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The Reform of Class and Representative Actions in European Legal Systems

A New Framework for Collective Redress in Europe

Christopher Hodges

Case Study: Shell Hydrocarbon Reserves[92]

On 9 January 2004, following an internal review, Shell (Royal Dutch and Shell Transport, the two former parent companies of the 'Shell Group') announced that it would re-categorise approximately 3.9 billion barrels of oil equivalent ('boe') out of its reported proved reserves. The re-categorisations were based on a determination that the reserves did not strictly comply with the definition of 'proved' reserves established[93] by the US Securities and Exchange Commission ('the SEC').[94] On 24 August 2004, the UK Financial Services Authority and the SEC announced final settlements of their investigations with respect to Shell. As a result of the settlement, Shell, without admitting or denying the SEC's findings or conclusions, entered into a consent agreement with the SEC and paid a civil penalty of $120 million.

A number of putative class actions were filed in the United States against Shell in relation to the re-categorisation. One class action was commenced in the US District Court for the District of New Jersey. A non-US shareholder, Mr Peter M Wood, was recruited into that action through an appeal on the website (<http://www.royaldutchshellplc.com> accessed 10 June 2008). The US District Court for New Jersey initially ruled that Mr Wood could represent all non-US shareholders, but a new judge reversed the ruling on the issue of 'subject matter jurisdiction'.

After the announcement of the re-categorisations, the price of Shell's shares fell. Shell made an offer to compensate certain non-US shareholders for losses alleged as a result of the price fall, without any admission of wrongdoing, illegal conduct or causation of loss. Shell entered into an agreement with a foundation (the Shell Reserves Compensation Foundation) and various associations that represent the interests of retail shareholders and the institutional investors, including the Dutch Equity Holders' Association and others, under which non-US Shell shareholders would receive $352 million. The agreement called on the SEC to distribute $96 million of the $120 million fine to the non-US investors, an amount that corresponded to their share of investor base.[95] The non-US arrangement would benefit both the shareholders who were parties to the agreement and other shareholders who fell within the definition of participating shareholders. That agreement was contingent on the US District Court of New Jersey declining jurisdiction over the non-US

(*continued*)

[92] See Undated Note by the Ministry of Justice.
[93] Rule 10-4 of Regulation S-X and interpretations of the definition published by the SEC.
[94] See <http://www.shellvergoeding.nl> accessed 10 June 2008.
[95] See <http://www.shellsettlement.com> accessed 10 June 2008 .

investors, which it did on 13 November 2007, and on approval by the Amsterdam Court of Appeal, which is expected to rule in early 2009. An agreement approved in this way would be expected to be enforceable throughout the EU.

In March 2008, Shell announced settlement in principle of the US shareholder class action claims for an additional $79.9 million plus $2.95 million, being proportional to the amounts payable under the proposed Dutch settlement, plus legal costs, subject to approval by the US Court.[96] If the Dutch and US settlements are achieved, the combined cost would be around $600 million, including the $90 million paid in 2005 to the US employee shareholders. The US legal fees would be approved by the court as a percentage of the total recovery paid.[97]

In practice, it should be understood that the Netherlands has two systems for collective claims. In addition to the Settlement Law discussed above, the litigation system permits a foundation or association to bring a collective claim without an individual lead plaintiff. Under that mechanism, there is no court supervision over appointment of lead counsel and it is only possible to bundle claims if there are no individual issues. No damages are claimable, but it has instead been the practice to request a declaration that there has been a breach.[98] *Res judicata* only applies between the parties, and this is problematic for defendants, who want to avoid more cases.

GERMANY

The traditional prevailing view amongst German lawyers was that there was no need for a class action mechanism, and that all claims could be resolved individually.[99] Indeed, even assignment of consumer claims so as to enable a representative action to be brought was held to be permissible in exceptional cases only.[100] However, the traditional approach was seriously

[96] Rivalry between competing US claimant law firms has been cited as playing a significant part in the structuring of the deal so as to split the European and US shareholders: see RA Nagareda, 'Aggregate Litigation across the Atlantic and the Future of American Exceptionalism', Vanderbilt University Law School Working Paper No 08-05, accessible at <http://ssrn.com/abstract=1114858> accessed 10 June 2008.

[97] A request for fees of $47 million has been reported: J Jones, 'Bad Blood over Royal Dutch Fees' *Am. Lawyer*, June 2007 58.

[98] An example of such a case involved people who visited a fair and caught Legionnaires Disease from sprayed jacuzzi water: mentioned by D Lunsingh Scheurleer at the European Commission conference at Lisbon on 9 and 10 November 2007.

[99] H-W Micklitz, 'Collective private enforcement of consumer Law: the key questions' in W van Boom and M Loos (eds), *Collective Enforcement of Consumer Law* (Europa, 2007).

[100] OLD Düsseldorf, 17 October 2003, case no 16 U 197/02.

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