

obtain. Expansive constructions of the requirements of s 34A do not sit well with the legislative policy of the section.

Second, and in that context, the legislature has again left open the content of the obligation to give reasons in s 31(3). The High Court's decision in *Westport* that the content of the obligation to give reasons is to be tailored to the circumstances of the particular arbitration would be of continued significance. One outcome of this is that the availability of a 'reasoning' ground of appeal is very much at large (subject to the requirements of s 34A(3), which base the entitlement to leave on the decision being 'obviously wrong' or 'open to serious doubt' as opposed to containing errors). Whether these descriptions encompass inadequacy of reasons may be arguable.

Third, the High Court's construction of 'manifest error' in s 38(5)(b)(i) may or may not survive its replacement in s 34A(3)(c)(i) with 'obviously wrong'. On the one hand, the notion of obviousness incorporates the notion adopted by the majority that the error must be apparent to the reader of the award. On the other, 'obvious' does appear to comprehend some qualitative notion that excludes arguable doubt about the correctness of the award.

This approach serves to defeat one mischief that may arise from the construction adopted by the High Court. Identification of an 'apparent' error may, in complex or uncertain cases, invite a detailed examination of the reasons to identify whether the award is wrong in the sense complained of, with the result that the appeal is effectively determined at the leave stage. This attracts the consequences Allsop P identified in observing that leave applications should not be heard together with the appeal.

Finally, it appears from the structure of s 34A of the new Act that a respondent to an appeal application would be entitled to raise points of contention, but that the court should exercise caution in accepting them. This option may be material to the decision of a respondent to agree to an appeal for the purposes of s 34A(1)(a), if it has not done so in advance of the arbitration.

By Catherine Gleeson

Commonality requirements in US class actions

Wal-Mart Stores, Inc. v Dukes et al, Supreme Court of the United States, 20 June 2011.

Introduction

Rule 23(a)(2) of the United States Federal Rules of Civil Procedure provides that a plaintiff seeking orders permitting an action to proceed as a class action (known as class certification) must prove that there are questions of law or fact that are common to the class the plaintiff is seeking to represent. That obligation is known as the 'commonality' requirement of any class action proceeding in the federal courts. It was central to the Supreme Court's June 2011 decision in *Wal-Mart Stores, Inc. v Dukes et al*, No., 10-277, in which the court had to decide whether one of the largest class action proceedings ever brought in the United States was entitled to class certification.

The Plaintiffs' Case

The named plaintiffs (respondents in the Supreme Court proceedings) were three current or former Wal-Mart employees purporting to represent some 1.5 million current or former female employees of Wal-Mart. Led by employee Betty Dukes, they sought on behalf of themselves and the class, declaratory and injunctive relief, punitive damages and back pay as compensation for Wal-Mart's alleged violation of Title VII of the Civil Rights Act of 1964, which prohibits discrimination among employees based on gender.

The plaintiffs alleged that Wal-Mart, the nation's largest employer, discriminated against female employees with respect to pay and promotions. They alleged that local managers exercised their discretion over pay and



promotions disproportionately in favour of men, leading to an unlawful disparate impact on female employees. They claimed that the discrimination they had suffered was common to all female employees of Wal-Mart and sought to litigate the Title VII claims of all female employees at Wal-Mart's stores in a nationwide class action. More specifically, they sought certification of a class consisting of '[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices'.

Rule 23(a)

Rule 23(a) imposes three further requirements for class certification in addition to commonality, namely that the class is so numerous that joinder of all members is impracticable ('numerosity'), the claims or defences of the representative parties are typical of the claims and defences of the class ('typicality') and the representative parties will fairly and adequately protect the interests of the class ('adequacy').

The Supreme Court's decision

Justice Scalia delivered the opinion of the court, in which the chief justice and Justices Kennedy, Thomas and Alito joined, with Justices Ginsburg, Breyer and Sotomayor joining in part. The court reversed the decision of the Court of Appeals for the Ninth Circuit and set aside the orders certifying the class.

Justice Scalia noted the following general principles that govern the determination of commonality:

- class members must have suffered the same injury – it is not enough to allege that they have all suffered a violation of the same provision of law (Slip. Opinion. p.9);

- the 'common contention' which is said to establish commonality must be capable of class-wide resolution, meaning that the 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 (*Id*);
- Rule 23 is not a mere pleading standard – plaintiffs seeking certification must actually demonstrate compliance with the Rule, i.e., to prove that there are in fact sufficiently common questions of law or fact (*Id* at 10); and
- the 'rigorous analysis' required of the evidence provided in support of certification will involve consideration of factual and legal issues that underlie the plaintiff's claim (*Id* at 10).

Justice Scalia observed that the plaintiffs were seeking to sue 'about literally millions of employment decisions at once' and that there needed to be 'some glue holding the alleged reasons for all those decisions together' (*Id*). The plaintiffs needed to show some 'significant proof' that Wal-Mart operated under a general policy of discrimination.

To demonstrate commonality, the plaintiffs relied on (a) statistical evidence about pay and promotion disparities between men and women at the company, (b) anecdotal reports of discrimination from approximately 120 employees, and (c) the evidence of a sociologist who had concluded that Wal-Mart was 'vulnerable' to gender discrimination. The District Court certified the class and a divided Ninth Circuit Court of Appeals affirmed the certification order.

The Supreme Court majority held that the plaintiffs had failed to provide significant evidence sufficient to demonstrate commonality. The court found that the statistical evidence failed to demonstrate a uniform national pattern of discrimination. The evidence of the plaintiffs' sociologist was unpersuasive because he had conceded at his deposition at the District Court stage of the proceedings that he could not determine whether 0.5 per cent or 95 per cent of the employment decisions at Wal-Mart might have been the product of discriminatory practices. The plaintiffs' anecdotal evidence of discrimination practices (120 affidavits in total, or one affidavit for every 12,500 class members) was likewise insufficient to raise any inference that all the individual, discretionary personnel decisions made

by Wal-Mart were discriminatory.

The court concluded that because the plaintiffs had provided 'no convincing proof' of a company wide discriminatory pay and promotion policy, they had not established the existence of any common question (*Id* at p.19). Adopting the language of Chief Judge Kozinski in his dissenting opinion in the Ninth Circuit, Justice Scalia, for the majority, held that the members of the class had 'little in common but their sex and this lawsuit' (*Id*).

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, disagreed. Her Honour held that the plaintiffs' evidence adequately demonstrated that resolving the plaintiffs' claims of discrimination would necessitate examination of particular policies and practices alleged to adversely affect women at Wal-Mart's stores nationwide (*Id* Slip. Op. Ginsburg J, p.8).

Analysis

The Supreme Court's decision highlights the significant differences between federal class action proceedings in the United States and representative proceedings in the Federal Court of Australia or the New South Wales Supreme Court. The approach in the United States entails a rigorous analysis of the proof that the plaintiff intends to rely upon to prove a claim on behalf of the class, in order to determine whether the plaintiffs' claims are capable of class-wide resolution. Expert evidence is almost always provided on behalf of the class and is tested through depositions, often followed by a class certification hearing involving a combination of witness testimony and legal argument as to whether or not the requirements of commonality have been met. This invariably entails, as Justice Scalia observed, an analysis of the plaintiffs' underlying claims at a very early stage of the proceedings.

The principal difference between the practice in United States federal courts and here is, of course, that the

existence of common questions of fact or law in a representative proceeding under Part IV of the *Federal Court of Australia Act 1976* (s 33C) or Part 10, Division 2 of the *Civil Procedure Act 2005* (s 157) is assessed by reference to the pleadings, without a substantive analysis of the evidence through which the plaintiff proposes to prove those contentions that are common to the class. There is no procedure to 'certify' a class, although something vaguely resembling the US approach could occur if a respondent to a representative proceeding brought an application pursuant to s 33N of the *Federal Court Act* or pursuant to s 166 of the *Civil Procedure Act* for an order that a proceeding no longer continue as a representative proceeding. That could occur, for example, if the evidence filed on behalf of the plaintiffs revealed the absence of questions of fact and law common to the class.

The US system is designed to provide a determination, at the outset of a case as to whether it can proceed as a class action. Where the purported class includes up to 1.5 million people, one could argue it is critical to have that determination made at a very early stage in the proceedings and one can see the justification for requiring the plaintiffs to demonstrate to a court how they propose to prove the common contentions advanced on behalf of the class. However, the determination of commonality in the US federal system can involve a preliminary trial of the merits of the plaintiffs' claims, which can take many months, or (as in the *Wal-Mart* case), years to resolve. That is somewhat at odds with objective of class action proceedings to provide an efficient means to resolve a large number of individual claims through a single proceeding.

By Christopher Withers