HENDERSON CHAMBERS

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Group Litigation (representative actions)

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Smyth v British Airways & Easyjet [2024] EWHC 2173 (KB): Flight delay representative action fails to take off

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The High Court has struck out a representative action claiming statutory damages for delayed and cancelled flights. Master Davison found that the claimants did not all have the same interest. On the contrary, it would only have been possible to identify the claimants at the end of case.

In any event, the Master would have refused to allow the representative action to continue because it was clear that it was being pursued for the benefit of the funder and where claims could be submitted directly to the airlines (and to ADR) for free. The Master went further and made an order debarring the claimant from acting as a representative claimant, in part due to his concerns about her relationship with the funder.

The judgment (which is available here) emphasises the need to consider carefully whether the class of represented claimants can properly be defined at the outset, and stresses that is not permissible to commence a representative action with the intention of whittling down the class of claimants later on. Further, the case makes clear that representative actions cannot be pursued for the benefit of their funders and may not be appropriate where cheaper alternatives or ADR schemes exist.

INTRODUCTION

1. Where a flight is cancelled, or delayed by three hours, airline passengers are entitled to compensation under Regulation 261/2004 EC (retained post-Brexit). The Regulation sets out a tariff of awards based on the length of flight and of the delay. It also provides a defence to claims where the delay or cancellation is caused by "*extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*".

2. The Regulation does not require airlines to pay compensation automatically, but instead places the onus on passengers to submit claims. As is common across the industry, both British Airways and Easyjet operate "*reasonably straightforward*" online portals by which affected passengers may submit claims free of charge. In the event of dispute, they may then submit complaints – again free of charge and without risk as to costs – to an adjudicator and then arbitrator, both of whom have the power to bind the airline. The passenger – who is not bound by an adverse ruling of the adjudicator or arbitrator – may ultimately issue proceedings [9].

3. The claimant in the present case – Ms Claire Smyth – was booked to fly with BA from London to Nice in 2022. Her flight was cancelled. Under the Regulation, she was entitled to claim a fixed sum of £220. However, she did not submit a claim via BA's portal, but issued a representative action, purporting to claim damages on behalf of all passengers entitled to compensation following delays or cancellations to 116,000 BA and Easyjet flights. It was estimated that the quantum of all such claims would be in the region of £319m [§3]. Ms Smyth's claim was funded by a foreign domiciled individual who, along with her legal team, sought to retain 24% of all damages obtained (and therefore, potentially, £70m).

4. Master Davison identified that the case raised *"some novel and interesting points about the permissible scope of a representative action under CPR rule 19.8"* and went on to consider whether the *"same interest"* test was satisfied and whether, as a matter of discretion, the claim should be permitted to continue.

NO SAME INTEREST

5. It is a necessary precondition of a representative action that the claimants must all share the "*same interest*" (see CPR r19.8(1)). This is a 'non-bendable' statutory requirement which cannot be abrogated, albeit that the Courts will nonetheless adopt a pragmatic approach. The same interest test is assessed by considering whether there are common issues which are shared by all claimants[1]. Critically, the assessment takes place at the outset of the claim as "*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.*"[2]

6. The claimant contended that the same interest test was satisfied by virtue of the manner in which she had defined the class of represented persons. In her pre-action protocol letter, she proposed bringing the claim on behalf of all "*passengers on flights where the cancellation or delay was not by reason of extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*" [§13]. It is therefore noteworthy that, on one view, Ms Smyth proposed representing only those claimants whose claims would ultimately succeed, either because the airlines would not raise a defence of extraordinary circumstance, or because, having done so, that

[1] *Jalla v Shell* [2021] EWCA (Civ) 1389, and *Lloyd v Google* [2021] UKSC 50 (discussed at [§§20-22])
[2] *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284

defence would be dismissed. However, whether or not a claim would ultimately succeed could not be known at the outset.

7. However, the claim form as issued encompassed a much broader set of claimants, namely all passengers on 116,000 disrupted flights, and therefore some claimants who would face a (good) defence of extraordinary circumstances [§13]. As such, the class of represented claimants included – at least at the outset – claimants in very different circumstances: those where no exceptional circumstances defence would be raised at all; those where the defence would be raised but would fail; and those where it would succeed. The latter two scenario would entail significant factual and legal differences arising out the reasons for delays and cancellations, whether such reasons were exceptional, the steps taken by the airlines to avoid delay or cancellation, and whether such steps constituted all reasonable measures.

8. Further, the claimant's formulation of the class set out no common issues, but was instead a high-level description of the cause of action, beneath which "*the practical reality is that the opening class presents numerous, widely diverging interests requiring individualised determinations. It does not present the same interest, or anything close*" [§30].

9. The claimant's response to this criticism was to propose a multi-step process by which the cohort of represented claimants would be whittled down *"rather like a game of Russian dolls*" to reveal the final cohort of claimants [§14]. At Step 1, the airlines would be required to identify their defences by reference to each of the 116,000 flights. Under Step 2, claimants would be sifted into cohorts and further information would be sought from the airlines. Under Step 3, the claimant's legal team would carry out an assessment of the airlines' defences, seemingly with a view to conceding those claims in which a defence would be likely to succeed (or where no

proportionate means of trying it could be identified), or so as to identify short points of law by which those defences could be tried. Under Step 4, the airlines would pay out compensation to the claimant in respect of all undisputed (or resolved) claims.

10. However, as Master Davison noted, it would only be at the end of Step 3 that the cohort of represented claimants would finally have crystallised [§15].

11. Ultimately, the Master held that an inability to identify a class at the outset could not be overcome by a series of amendments to an overinclusive class, each one stripping away subsets of claimants until a final core of claimants were left with the same interest. On the contrary, the fact that the claimants would have to be pared back later meant that, at the outset, they did not all have the same interest. Further, under the claimant's multistep process, by the time the class of claimants would finally emerge, there would be no common issues left to determine as, by definition, the claimants would be those, and only those, who had succeeded. The rump cohort would by that stage be "*just a collection of represented parties with undisputed or indisputable claims. It would be a class that was empty of actual issues.*" [§42]. As held:

> *"It is not permissible to address this problem by successive amendments to the class. The reasons, which overlap somewhat, can be expressed as follows. To accept that successive amendments to the class will be required is to admit that at the outset the claim is not properly constituted as a representative action. It is also to admit that the claimant does not and cannot "promote and protect the interests of all the members of the represented class" (see paragraph 71 of Lloyd v Google) and that there is no declaration or finding available that "would be equally beneficial to every member of the class" (see paragraph 51 of Nugee LJ's judgment in Commission Recovery). If these very fundamental difficulties could be addressed by amendment, that would render*

> *the "same interest" test nugatory and would amount to a variation on the type of "rolling representative action" which the Court of Appeal deprecated in Jalla (see paragraph 61). The reason that the Court of Appeal deprecated that approach was that "the existence of the manifestly different interests of the represented parties" meant that it was "not a representative action in the first place". To quote from paragraph (i) of Coulson LJ's summary in Jalla of the applicable principles (see above), "the analysis of the 'same interest' is undertaken by the court at the time of the application under r. 19.8". Other cases, e.g. Emerald Supplies have emphasised that the "same interest" test must be met "at all stages of the proceedings"; (my emphasis in all of the foregoing quotations). By contrast, no case says that it is sufficient if the "same interest" test is satisfied at the concluding stage of the proceedings." [§31]*

A MATTER OF DISCRETION

12. Given that the represented claimants did not all share the same interest, that was the end of the matter. However, Master Davison went on consider whether, as a matter of discretion, it would have been appropriate to permit the claim to proceed as a representative action. These factors included the following:

13. <u>First, the claimant and her funder:</u> Ms Smyth described herself as a consumer champion. However, she had no history of working in consumer rights. On the contrary, she was the employee and former yoga instructor of Mr John Armour [§§4, 16-17, 27, 34], an Australian citizen who had been the subject of regulatory action in New Zealand [§17] and was domiciled in Monaco. Mr Armour was funding the claim and had provided security for costs. Whilst the financial arrangements had not been disclosed, it was proposed that 24% of all damages secured would be retained for the benefit of Mr Armour as

funder and to pay for Ms Smyth's legal expenses[3]. This led Master Davison to conclude (at [§27]) that:

> *"the dominant motive for [the action lies in the financial interests of its backers, principally Mr Armour, and not the interests of consumers. That motive has translated into a proposed deduction from the compensation available to each represented party which is excessive and disproportionate both in its overall amount and in relation to the available alternative remedies, which would lead to no deduction at all."*

14. The Master commented further on the lack of transparency surrounding funding, Ms Smyth's motivation for pursuing the claim and her lack of independence from her funder. At [§36]:

> *"There has been and there continues to be a lack of transparency regarding Ms Smyth's motivation, funding and suitability. On the material before me, I do not accept that her motivation lies in a desire to secure redress for consumers. She has had no prior involvement in such activities. Her evidence suggests or is only really consistent with that interest having been sparked by the chance (though common enough) experience of her cancelled flight. But she has not explained how and by what process that led her to the very considerable undertaking of a representative action brought by her on behalf of many millions of others. The availability of funding from Mr Armour, her employer, strikes me as unlikely to have been fortuitous. She was not at all*

[3] See [§4]: "on 24 May 2024, Ms Smyth obtained an order from Master Pester in the Chancery Division of the High Court on a without notice basis whereby it was declared that she would be entitled to deduct "an aggregate sum equivalent to 24% of any compensation recovered by her on behalf of the Represented Persons" in this action. The order was based upon trust law principles permitting remuneration out of trust assets for work done in relation to those assets. It did not, as I understand it, approve the funding arrangements as such, nor did it sanction the claimant as an appropriate person to act in a representative capacity. The material upon which the 24% percentage was approved has not been disclosed. It appears from the face of the order that the percentage comprises two elements: (1) a funder's fee payable to Mr Armour and (2) fees payable to her legal representatives."

> *forthcoming about her links with Mr Armour and there is inconsistency between Mr Preston KC's letter of 21 February 2023 (claimant has no financial interest in the claim) and the somewhat careful wording of paragraph 117 of her second witness statement (her position is "reserved" but "as matters presently stand I have no commercial interest"). Neither she nor Mr Armour have given any context to or reassurance concerning the investigation by the NZFMA into Mr Armour's share-buying activities in 2010. Such activities seem to me to be thoroughly inimical to his taking a role in this litigation, in which role he would be in a position to influence Ms Smyth. That influence would be the more likely and the more powerful given that he is her employer. Mr Bear KC described him as dominus litis, i.e. the person who was really running the litigation and the description seems apt."*

15. Secondly, the burden on the defendants: The multi-step process proposed by the Claimant would have placed a significant burden on the airlines to identify, for 116,000 flights which took place over six years, whether a defence existed and, potentially, the details of that defence. Much of that work would be wasted [§44].

16. Thirdly, a failure to resolve cases: At Step 3 of the multi-step process, the representative claimant's legal team would likely jettison disputed claims unless they could be resolved by short points of law. As such, the action would not likely resolve many disputed claims.

17. Fourthly, an alternative redress scheme: Passengers had a relatively straightforward means of claiming compensation directly from the airlines (free of charge and without risk as to costs). Permitting a representative action to proceed would not promote access to justice in accordance with the overriding objective. It was no answer to say that some claimants were ignorant of their right to claim damage [§38]].

18. Finally, Parliamentary intention: Parliament had decided not to impose a statutory scheme requiring airlines to pay compensation *automatically*, but had placed the onus on passengers to decide whether to pursue a claim. A representative action would reverse that position, and would effectively create the very statutory scheme which Parliament had decided not to implement [§§38, 44].

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