October 3, 2024

# *Smyth* v *British Airways* – A crash investigation

By Robert Blackett

> *Greek myths are heroic, noble and tragic; but the American Dream is heroic, comical, and uplifting. … The Wright Brothers did not have their wings melt when they flew too high.*
>
> John C. Wright in an interview with sfsite.com

Claire Smyth was a yoga instructor employed by a Monaco-based Australian businessman called John Armour, who latterly employed her to run a family office for him in London.

In 2022 Ms Smyth's British Airways ("**BA**") flight from London to Nice was cancelled a few days before departure. EU Regulation 261/2004 (retained post-Brexit) gives passengers a right to £220 compensation in these circumstances, though many never claim it. Rather than claim her compensation via the portal on BA's website, Ms Smyth decided to aim much higher, and launched a claim against BA and EasyJet, purporting to claim compensation as a "*representative*" under CPR 19.8 on behalf of all passengers who had been entitled to claim such compensation - but didn't - in respect of all flights to or from UK airports between 1 December 2016 to 31 August 2022 which were cancelled or delayed by three hours or more. There were alleged to have been 116,000 such flights. Estimates of the unclaimed compensation vary, but EasyJet's counsel suggested assuming 200 passengers per flight, that 25% of the flights met the conditions for compensation and that 25% of passengers had not been compensated, meaning that the claim would have been seeking around £319 million.

Ms Smyth cast herself as a consumer champion, acting "*from a strong desire to stand up for the wronged consumer let down by large corporations*". It gradually emerged that Ms Smyth's representative claim was financed by Mr Armour, who had agreed to indemnify her in respect of any adverse costs and had paid £800,000 into court as security for the same. Ms Smyth had agreed that 24% of any amount she recovered was to be paid to Mr Armour and her legal representatives so they stood to receive around £70 million if she had been successful (the split was undisclosed, and her personal share in it unclear). From the facts, it would be difficult to call Mr Armour a champion of the consumer. His past activities included having made mass-mailed unsolicited offers to consumers in New Zealand seeking to buy securities they owned at prices below their market value, leading the New Zealand Financial Markets Authority to observe that "*less experienced investors, in particular those who received shares through demutualisations and privatisations, often accepted these offers without understanding that they were receiving considerably less than they could have obtained if they sold through a broker*".

Ms Smyth's claim came crashing down on 2 September 2024, in *Smyth* v *British Airways Plc & Anor* [2024] EWHC 2173 (KB) when Master Davidson struck it out, and this article seeks to investigate why that was. The decision offers some insight into the present viability of such ambitious 'class action' type litigation in England, compared to the United States.

## The economics of very small claims

Most people will agree that some actions – stealing, murdering – are undesirable in principle. Lawmakers prohibit them and provide sanctions for these actions. Insofar as the state succeeds in detecting and punishing them, the threat of punishment serves to discourage transgressions and satisfies the public's desire for retributive justice.

Unlike stealing and murdering, most activities (e.g. operating passenger airlines) present a more complex mix of potential harms and benefits. Lawmakers will be concerned not to prevent the activity outright on principle, but to maximise the benefit, minimise the harm and ensure the former outweighs the latter. Rather than outlawing a given activity, lawmakers thus commonly enact laws which give people harmed by it a right to compensation and impose on D, the person who controls the activity and is best placed to control and prevent the harm, an obligation to pay for it. By pooling the costs and benefits of the activity in the same person, D is incentivised to minimise the harm, and to cease activities whose costs outweigh their benefits while ensuring that activities which do deliver a net benefit continue. In this way, the costs and risks of enforcing the law are outsourced, as enforcement depends on the willingness of those entitled to compensation to claim it.

Such mechanism is liable to be ineffective, though, when the cost or harm is substantial, but very thinly distributed, so that a very large number of people each suffer a very small amount of harm and each has a correspondingly small claim to compensation. Very small claims present a very big problem for any legal system because there is always some fixed component in the cost of litigation. Below a certain value, the cost of enforcing one's right to compensation exceeds the compensation and the law goes unenforced. If the tens of thousands of people harmed each fail to pursue the small amount of compensation to which they are entitled, D has no incentive to avoid inflicting the associated harm. The law imposing a civil liability for the harm in question is rendered ineffective to serve the lawmaker's underlying policy goal of eliminating or minimising the harm.

Such a problem will be overcome where the fixed costs of litigation can be spread over multiple claims. Sometimes such aggregation of claims happens organically in the market, without any special procedure being required. A low value clothing item proves to contain a manufacturing defect, and consumers who bought it complain to the retailer. No individual customer has enough at stake to justify suing, but the retailer refunds or replaces the items anyway, for goodwill, and – with hundreds or thousands of claims now effectively pooled in the retailer – the retailer can present a credible threat to sue the manufacturer.

**Class actions in the United States**

To overcome the 'many small claims' problem, some legal systems provide mechanisms whereby multiple claims which involve some common issue can be aggregated. The epitome is the class action lawsuit in the United States' legal system, and most readers outside of the US will have at least some sense of this mechanic, because it so often features in legal drama (e.g. *Class Action*, *Michael Clayton*, *A Civil Action*, *Erin Brockovich*, *North Country*, *Better Call Saul* …).

Class actions in the federal courts are governed by Rule 23 of the Federal Rules of Civil Procedure, and most states have class action procedures based on the same rule. A claimant, or claimants, file a claim, proposing to represent a defined class of claimants. To be maintained as a class action, it is necessary: (i) that the class be so **numerous** that joinder of all members is impractical, (ii) there be questions of law or fact **common** to the class; (iii) those acting as representatives have claims or defences **typical** of the claims or defences of the class; and (iv) that those acting as representative will fairly and **adequately** protect the interests of the class. In most cases, it is also necessary that the common questions **predominate** over questions that affect individual class members and that class treatment be **superior** to other available methods for adjudicating the dispute.

The court must decide at the outset whether conditions for the claim to be maintained as a class action are met, in which case the class is said to be 'certified'. Once this crucial initial hurdle has been overcome, the representative claimant must seek to give the members of the class notice of the claim being brought on their behalf, and of their right to 'opt out', and bring their own claim rather than have the claim brought on their behalf. Those who do not opt out will be bound by the court's decision, or any settlement. To receive their share of any

pay-out, they will need to file a claim form. People often fail to learn of the case, or simply do not bother filling in either an opt-out or a claim form, so that they remain part of the class and bound by any settlement or judgment, but receive no personal benefit.

Settlements require to be approved by the court as fair and adequate, and class members have the right to make representations to the court about the fairness and adequacy of proposed settlements.

**Financing class actions in the United States**

How do the lawyers get paid? Many claims in the United States are financed by way of contingent fees. A lawyer agrees to represent a claimant and receive a percentage of any recovery. To negotiate this kind of contingent fee arrangement with the prospective class members is impractical – at the start of the claim the class members have no contract with the lawyers seeking to bring the claim on their behalf, and may be entirely unaware of their doing so. Essentially the same result is achieved, however, by way of the judge-made 'common fund doctrine' (*Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1982)). If a person through his efforts creates a recovery that benefits people, it is considered fair that the beneficiaries share in the cost of achieving that, with this being paid out of the common fund resulting from any judgment or settlement in the litigation. Any fee award requires to be approved by the court, but adjustments to proposed fees are rare, and rarely significant – defendants will not contest them, and class members rarely seek to make representations, because small changes in the percentage fee make only a small difference to each individual claimant's small potential recovery. Fee awards of 25% to 30% are common.

The pursuit of class actions is made hugely easier by the fact that in US litigation each side will generally bear their own costs. The representative claimants (or, rather, their lawyers and financial backers) thus do not need to take on the financial risk of paying for the defendant's costs if they lose, or providing security for the same. If it were otherwise, the average return which could be earned from pursuing such litigation would be greatly reduced – the prospective recovery in each case remains the same, but the loss for each case you lose is greatly increased, being both your own sunk cost and whatever the other side has spent.

As an exception to this general rule, and to further encourage the enforcement of legislation by way of class actions, legislation will sometimes provide that a successful claimant is entitled to recover their reasonable legal costs from the unsuccessful party. This 'one way cost shifting' is commonly found in civil rights, environmental or consumer protection legislation.

Elsewhere in North America, Canada has a public fund to which those wishing to pursue class action type claims can apply for funding, with a percentage of any recovery being repaid to the fund.

**Settlements and distributions**

The mechanics of settlements and their distribution are interesting. Sometimes a settlement is a cash lump sum, but it is also common for settlements to include a non-monetary element. Defendants may for example agree to change their business practices in future. In consumer cases, Defendants commonly agree to make what are termed 'coupon settlements', where a defendant agrees that each of the class members will be entitled to a coupon entitling them to a discount on future purchases, and pays a cash sum to the lawyers to represent a percentage of the value of that coupon settlement. These kinds of settlements create obvious opportunities for collusion, because by exaggerating the value of the coupon settlement (i.e. how many people will actually redeem their coupons) the lawyers may secure a greater fee, to the detriment of the class. Also of interest is so-called 'fluid recovery'. The costs of trying to locate all the people who suffered harm and post them a cheque for their share of the settlement may be so great that all of the monies recovered would be squandered on postage and

advertising, with the class receiving little or nothing. In such cases, courts have occasionally permitted or ordered so-called 'fluid recoveries', where the sums recovered are not paid to the past-victims, but are passed on to future consumers in some way (e.g. by reducing the price of the goods or services in question for a period) despite their not actually having been injured by the defendant's actions.

**Problems with class actions as an enforcement mechanism**

Critics of class action as an enforcement mechanism complain of its leading to lawyer-driven litigation, for the benefit of lawyers rather than the people who have been harmed by the conduct that was the subject of the legislation.

On analysis, such criticisms often seem driven more by sentiment than by reason – an instinctive distaste for opportunistic lawyers making a quick buck and consumers receiving a lesser share of the compensation than the law entitled them to on its face.

If the purpose of the legislation were to secure that a particular amount of compensation be paid to each person harmed by an activity, then the fact that the injured parties do not receive that compensation is to be deprecated. But a class action will rarely operate to deprive class members of a benefit they would otherwise have received. Rather they receive some part of their legal entitlement, where they would otherwise have received nothing. And, if the principal purpose of the legislation is not to compensate loss but instead to modify or prevent the offending behaviour by imposing the cost on the defendant, then what matters is that the cost be imposed. What matters is who suffers, not who benefits by that transaction. The money functions not as compensation for a wrong but as a bounty or reward, incentivising enterprising lawyers and litigation funders to detect non-compliance, enforce the law and secure future compliance, effectively outsourcing these functions to the private sector. Such incentive mechanisms bear comparison with the explicit rewards offered to the public, for providing information leading to the apprehension of criminal suspects, or the very substantial rewards payable to whistleblowers in the US for reporting violations of securities law, tax fraud or similar. Other jurisdictions (Canada, Australia, South Korea) have similar whistleblower reward schemes, but most European governments do not follow this explicitly mercenary approach.

The problem to which class actions purport to present a solution is that of very small claims which are uneconomic to enforce individually, such that absent some aggregation mechanism they will not be pursued, and the lawmaker's aim will be frustrated because the law in question is never enforced and the costs are never imposed on the intended defendant. Yet the US model of class actions is far from a perfect means of achieving this end. With no 'real' client, the lawyers representing the class have little incentive to pursue the litigation to a successful conclusion and indeed, for reasons of cash flow, it will often be more attractive to recoup a lesser amount early, and move on to a new case before too much has been invested, rather than holding out for the possibility of a bigger payout for the benefit of the class. While courts must approve settlements, the lawyers control the court's access to information about the likely recovery, size of the class, likely uptake of any coupons, the amount of work done and similar. Lawyers thus face a constant temptation to offer a settlement resulting in a smaller payout to the class and a larger legal fee, to the detriment of the class, knowing that such offers are attractive so long as the total of the two figures is less than the defendant's expected net loss at trial. The fact that vanishingly few class actions ever get to trial supports this conjecture (the majority either fail at certification, or settle).

The result of such undervalued settlements is that, while some of the costs of the defendant's conduct are indeed imposed on the defendant as intended, and the lawmaker's objective is thereby advanced, not all of the cost is and, to that extent, the lawmaker's objective is not met. In theory a sophisticated lawmaker might seek to factor this into their law, and deliberately legislate at the outset for a level of compensation which exceeds each individual

claimant's real loss, balancing out the facts that not everyone will claim, and any settlement will tend to understate what would have been the real entitlement. There is, however, considerable scope for error in such an exercise, with a potential for either conferring windfalls on lawyers and penalising or discouraging beneficial activity on the part of the defendant, or else failing to impose the real externality on the defendant so that the harmful activity continues without taking proper account of the externality. In some cases, simple regulation - prohibiting the activity in question and enforcing the prohibition – may be more reliable than imposing civil liabilities and trusting to the market. Prohibiting useful but harmful ingredients in consumables is a good example (like prohibiting the use of lead as an anti-knock agent in petrol). Inevitably, though, and as discussed further below, there will be many instances where an otherwise useful or beneficial activity, which cannot be prohibited outright, causes many small harms and some form of class action is the best enforcement mechanism.

**Differences between the US and English position**

There are three reasons why England presents a less fertile jurisdiction than the United States in which to seek to bring class action lawsuits:

**Lower rewards**. The potential recoveries from any given class action lawsuits in England would always tend to be lower than in the US. England simply has a smaller population and economy, so the number of prospective claimants affected by any given breach will tend to be correspondingly smaller too. Add to this that damages awards are: (i) determined by judges, not juries; and (ii) are limited to compensating claimants for their actual loss, with no scope for exemplary or punitive damages.

**Higher risks**. England is often thought of as having a "*loser pays*" system, where a successful party will generally recover its costs from the unsuccessful party. Such a system might be thought to remove the need for class actions as a means to ensuring meritorious claims are vindicated, because no matter how small the claim, the individual claimant would not be deterred from pursuing it because he can be sure of recovering his costs if he wins. The truth, however, is that for claims under £10,000 legal costs are almost never recoverable, and so, just as in the US, it is rarely economic for individuals to bring a claim for very small sums. If these smaller claims were aggregated into larger claims, seeking in excess of £10,000, the successful representative claimant could be expected to be awarded their costs. One can only ever recover one's legal costs, however, insofar as a judge considers them to have been "*reasonable and proportionate*". And, remarkably, almost everyone whoever succeeds in bringing a claim or defending one turns out to have spent 30% to 40% more in doing so than a judge thinks it would have been reasonable to spend. This exerts a chilling effect on potential class actions in two ways. The shortfall in recoverable costs serves to reduce further the rewards for succeeding. And the prospect of also being ordered to pay 60%-70% of the defendant's costs if unsuccessful increases the risks.

**Lack of procedural machinery**. Besides these structural factors discouraging class actions, the English procedural rules make it much more difficult to bring class actions, as the *Smyth* v *BA* case discussed below illustrates.

**Policy goals of Regulation 261/2004**

Operating a passenger airline brings benefits to many people. Employment for the airlines' staff, returns for its shareholders, tax for the exchequer, utility for its customers. Operating a passenger airline also imposes some externalities. The most obvious are noise and air pollution and the risk of accidents, and one can obviously debate how effective our systems of regulation and taxation are at imposing these externalities on airlines. But another externality of air travel is the trouble and inconvenience which passengers experience when flights are cancelled or delayed. If one is going to have air travel, then some minimum level of cancellations and delays is going to be

unavoidable due to outside causes – e.g. due to bad weather or acts of war. But there will also be cancellations and delays which are the preventable result of actions which created some saving for the airline at the expense of this harm to the passenger. For example, where flights are delayed or cancelled due to failures to maintain aircraft, or employ sufficient personnel, or through deliberate overbooking, or underbooking, to suit the convenience of the business.

Lawmakers could, of course, have just left this to the market and trusted that people who were concerned to minimise delays and cancellations would pay a premium for a carrier which offered that, while those who were prepared to tolerate delays and cancellations in exchange for a lower price would gravitate to carriers who took that approach. Such mechanism might not be that efficient, because most people fly infrequently, so have limited opportunity for comparison, and it is hard for consumers to compare performance from published statistics. Operating airlines is also a field with high barriers to entry and big economies of scale, leading to relatively few, big carriers operating any given route, so that consumer choice is limited.

The lawmakers' policy goals underlying the compensation provisions in Regulation 261/2004 were set out explicitly in its recitals: "*(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers*" "*(9) The number of passengers denied boarding against their will should be reduced … by fully compensating those finally denied boarding*" "*(14) … obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier*."

**Regulation 261/2004**

In the event of the cancellation of a flight by a UK or Community air carrier to or from a destination in the UK or a Member State, Article 5(1)(c) of the Regulation provides passengers a right to compensation in certain circumstances unless:

- they are informed of the cancellation at least two weeks before the scheduled time of departure; or
- they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or
- they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

It is established law that a delay of more than three hours amounts to a cancellation so attracts the same right to compensation. There are various pre-conditions or exceptions to the right to compensation. These include:

- The rights arise only where the delay or cancellation was not caused by "*extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*".

- The Regulation applies only to those passengers with a confirmed reservation on the flight concerned who have (except in the case of cancellations) duly presented themselves for check-in (Article 3(2)(a)).

- The Regulation does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public (Article 3(3)).

- The Regulation does not apply in cases where a package tour is cancelled for reasons other than cancellation of the flight (Article 3(6)).

Article 7(1) provides for varying compensation levels depending on the distance of the flight (€250, €400 or €600, or roughly equivalent GBP sums under the post-Brexit retained version of the Regulation). Article 7(2) of the Regulation provides that where passengers are offered re-routing, and the arrival time does not exceed the scheduled arrival time by 2, 3 or 4 hours (depending on the distance of the flight), the compensation is reduced by 50%.

Operating carriers are not required to compensate passengers automatically. The Regulation requires passengers be provided with information about their entitlement to claim compensation, placing the onus on them to make a claim if they wish. Operating carriers are required to: (i) ensure that at check-in a clearly legible notice containing the following text is displayed in a manner clearly visible to passengers: "*If you are denied boarding or if your flight is cancelled or delayed for at least two hours, ask at the check-in counter or boarding gate for the text stating your rights, particularly with regard to compensation and assistance*"; and (ii) provide each passenger affected by a cancellation with a written notice setting out the rules for compensation.

**How was *Smyth* v *BA* to be financed**?

Ms Smyth's claim was drafted by Hugh Preston KC, and she was represented at the hearing before Master Davidson by Mr Preston and Conor Dufficy, barristers acting on a direct access basis (i.e. instructed directly by Ms Smyth, rather than solicitors).

As noted in the introduction, Mr Armour appears to have agreed to fund the claim and, in that regard, to indemnify Ms Smyth in respect of any adverse costs award, and also paid £800,000 into court as security for the defendants' costs. The precise funding arrangement is unclear, but Ms Smyth had obtained an order from Master Pester in the Chancery division, without a hearing, declaring 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*". The order was apparently based upon trust law principles permitting remuneration out of trust assets for work done in relation to those assets. The material upon which the 24% was approved was not disclosed but, on the face of the order, appeared to comprise two elements: (1) a funder's fee payable to Mr Armour and (2) fees payable to her legal representatives. The proportions and/or the contingencies upon which the percentage was to be split were not stated. But, as the judge put it: "*simple arithmetic, based upon the estimates set out above, suggests that there would be a sum in excess of £70 million available for payment to what might loosely be called the claimant's "team"*". It was unclear to what stake Ms Smyth herself had in the outcome, beyond the £220 she could have obtained for free through BA's website. The judge remarked on the: "*careful wording … of her second witness statement (her position is "reserved" but "as matters presently stand I have no commercial interest")*".

It would be interesting to understand more about the reasoning, and why the court considered Ms Smyth to be acting as a trustee of the assets (the passengers' claims and the proceeds of those claims) in circumstances where the beneficial owners – the passengers - had done nothing to convey legal title to her. How do you obtain a money judgment on a claim that does not belong to you? How does your entitlement to pay your lawyers out of

the proceeds arise? Such order did not, in any case, approve the funding arrangements as such, nor sanction Ms Smyth as an appropriate person to act in a representative capacity. The lack of clarity around these issues in England can be contrasted with the long-established common fund doctrine which applies in the United States.

**The proposed claim in *Smyth* v *BA***

The class Ms Smyth sought to represent was revised several times, but at the time of the hearing the essential definition was:

> "*… each person who had duly presented themselves for check-in for any of the British Airways flights listed in the schedule referred to in the attached witness statement and identified therein as having been delayed, or who had a confirmed reservation to fly on any of the British Airways flights listed in the said schedule and identified therein as having been cancelled (save for any such flights in respect of which that person's presentation for check in or confirmed reservation was for an Excluded Journey as defined below) …*
>
> *The Excluded Journeys referred to above are those journeys in respect of which:*
>
> *(a) on behalf of the person who had presented themselves for check in or who had a confirmed reservation for the said journey, on or before the date of issue of these proceedings, proceedings had been issued or an agreement with the applicable Defendant had been reached in full and final settlement of any claim, for a payment to be made to or on behalf of that person under Article 7(1) of the Regulation;*
>
> *(b) the person who had presented themselves for check in or who had a confirmed reservation for the said journey as aforesaid, was travelling free of charge or at a reduced fare not available to the public;*
>
> *(c) the booking made by or on behalf of the person who had presented themselves for check in as aforesaid was for two or more connecting flights including a flight identified on the said schedule as having been delayed;*
>
> *(d) the booking made by or on behalf of the person who had presented themselves for check in or who had a confirmed reservation for the said journey as aforesaid was for two or more connecting flights including a flight listed on the schedule and at least one additional flight operated by an air carrier who was not either a Community carrier or a UK air carrier as defined in Article 1 of the Regulation.*"

The Judge observed, however, that, "… *she does not intend that the claim should proceed on behalf of all the individuals who fall within the above definition. What she intends is a series of steps whereby, rather like a game of Russian dolls, the class is progressively reduced by removing those claims which do not in fact qualify for compensation or which are or may be met with an arguable defence*". It was proposed that the defendants would identify which of the 116,000 flights were, in fact, delayed, and which they intended to raise certain defences (e.g. the "*extraordinary circumstances*" defence). Importantly, in their skeleton argument, Ms Smyth's counsel team said:

> "*If statutory defences are raised in respect of represented parties' ("RP's") claims, it will in general not be practicable … for the Court to determine the merits of those defences. The rule 19.8 question will therefore need to be revisited once those defences have been identified, and the class size*

> *reduced by amendment to ensure the continuing viability of the action; (an alternative structure would have been to exclude those claims from the class definition from the outset).*
>
> *However, if issues can be identified (in respect of which the defendants' position is considered to lack merit) that can be determined in a practicable and proportionate manner taking into account the number of RPs affected; this would be desirable (but not essential).*"

In essence, the intended class was to consist of claims which had not been paid and to which there was no defence and was to be identifiable only at the culmination of a process, after the airlines had undertaken (no doubt at considerable expense) an analysis of 116,000 flights and ca. 23.2 million passengers going back 6 years, to identify any of those in respect of which the airlines wished to raise defences, at which point those claims would be abandoned. Once the airlines had done all the work required to identify for Ms Smyth, Mr Armour and their lawyers a kernel of indisputable claims, the airlines were to pay compensation for these. After skimming off their 24% fee, the remaining compensation would be: "*distributed to the class members utilising the services of Epiq Systems Inc, a commercial organisation with expertise in the administration of class actions*".

**The Civil Procedure Rules**

CPR 3.4(2) says:

> "*(2) The court may strike out a statement of case if it appears to the court – … (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or court order.*"

CPR 19.8 says:

> *"(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.*
>
> *(5) This rule does not apply to a claim to which rule 19.9 applies*."

The requirement in CPR 19.8(1) that the representative have "*the **same** interest*" can be contrasted with the US provision requiring only that there be questions of law or fact **common** to the class and that those acting as representatives have claims **typical** of the claims of the class.

BA and EasyJet sought an order striking out the claim under CPR 3.4(2)(a) or (b), or an order under CPR 19.8(2) that Ms Smyth may not act as a representative.

**Previous case law on representative claims – *Jalla* v *Shell***

*Jalla* v *Shell International Trading and Shipping C Ltd* [2021] EWCA (Civ) 1389 concerned an oil spill off the coast of Nigeria. The representative action was on behalf of over 27,500 people and 457 villages and communities for environmental damage and remediation costs. A representative action was judged to be unsuitable for these claims, principally because issues of limitation, causation and damages would have to be determined on a claimant-by-claimant basis.

> "*60. These points came into sharp focus when Mr Dunning* [counsel for the claimants] *was asked what would happen if the court determined that the claims brought by the two appellants were statute-barred or otherwise failed. In a representative action, because the represented parties' claims stand or fall on the determination of the claims of the representatives, the dismissal of the representatives' claims would bring about the end of all the claims. But Mr Dunning submitted that, here, if one or both of the two appellants' claims failed, say, on grounds of limitation, new representatives would then be put forward from the 28,000 plus represented parties, and that those new representatives would then represent those whose claims were not (or which they said were not) statute-barred[5]. There are at least two fundamental objections to any such course.*
>
> *61. First, it would involve a form of "rolling" representative action, where (at least potentially) no represented party was bound by the court's determination of anyone else's claim. It would require the respondents to defeat the claim of the two appellants, and then wait for the next two representatives to be chosen and to go on and endeavour to defeat those claims too. And so on. I venture to suggest that no representative action has ever been conducted in such a way. The reason? Because the existence of the manifestly different interests of the represented parties mean that it is not a representative action in the first place.*
>
> *62. Putting the point another way, there could be no benefit to all even if, say, Mr Jalla's claim was upheld. The represented parties would not benefit from a finding that Mr Jalla had suffered a compensatable injury; the only thing that would matter to any of the represented parties was whether or not that represented party had themselves suffered a compensatable injury. If there is no benefit to all, there is not the same interest in the claim.*"

Coulson LJ's summary of the principles (with authorities omitted for brevity) included:

> "*(a) A representative action is a particular form of multi-party proceeding with very specific features. One such feature concerns the congruity of interest between representative and represented. Another is the need for certainty at the outset about the membership of the represented class.*
>
> *(b) The starting point (or threshold) for any representative action is that the representing parties must have "the same interest in a claim" as the parties that they represent.*

(c) *"The same interest" is a statutory requirement which cannot be abrogated or modified ...*

(d) *The reason why the represented parties need to have the same interest in a claim as the representative claimant is because the represented parties are bound by the result of the representative action …*

(e) *The court will adopt a common sense approach to this issue. It must be the same interest "for all practical purposes" … or it must be "in effect the same cause of action or liability" …*

(i) *The analysis of "the same interest" is undertaken by the court at the time of the application under r.19.8. The court has to consider what the issues are likely to be by reference to all the information then available …*

(j) *It is necessary to consider the likely defences as part of the analysis. …*

(l) *As to the equally fundamental requirement that membership of the represented class must be capable of being ascertained at the outset of the proceedings …* "*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.*"

**Previous case law on representative claims – *Lloyds* v *Google***

*Lloyds* v *Google LLC* [2021] UKSC 50 was a claim brought by a former director of the UK Consumers' Association on behalf of more than four million UK resident iPhone users alleging that their internet activity had been secretly tracked by Google for commercial purposes. The cause of action arose under the Data Protection Act 1998, which provides a right of compensation where an individual "*suffers damage by reason of any contravention by a data controller of any of the requirements of this Act*". In an effort to meet the "*same interest*" requirement, Mr Lloyd argued that damages did not need individual assessment but could be awarded on a "*tariff*" basis. The court ruled that because the damages were not uniform across the class but required individual assessment rather than "*tariff*" awards, the claim could only proceed as a representative claim on a "*bifurcated*" basis, with a determination on liability in the representative claim followed by damages claims each brought individually. But this was not what was being proposed by the claimant (because it would have made the representative proceedings uneconomic). So the claim failed.

In *Lloyds* v *Google*, however, the Supreme Court appears to have relaxed somewhat the "*same interest*" requirement. Lord Leggatt said at [71]-[72]:

> *"71. The phrase "the same interest", as it is used in the representative rule, needs to be interpreted purposively in light of the overriding objective of the civil procedure rules and the rationale for the representative procedure. The premise for a representative action is that claims are capable of being brought by (or against) a number of people which raise a common issue (or issues): hence the potential and motivation for a judgment which binds them all. The purpose of requiring the representative to have "the same interest" in the claim as the persons represented is to ensure that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class. That plainly is not possible where there is a conflict of interest between class members, in that an argument which would advance the cause of some would prejudice the position of others.*

72. *As Professor Adrian Zuckerman has observed in his valuable book on civil procedure, however, a distinction needs to be drawn between cases where there are conflicting interests between class members and cases where there are merely divergent interests, in that an issue arises or may well arise in relation to the claims of (or against) some class members but not others. So long as advancing the case of class members affected by the issue would not prejudice the position of others, there is no reason in principle why all should not be represented by the same person: … As Professor Zuckerman also points out, concerns which may once have existed about whether the representative party could be relied on to pursue vigorously lines of argument not directly applicable to their individual case are misplaced in the modern context, where the reality is that proceedings brought to seek collective redress are not normally conducted and controlled by the nominated representative, but rather are typically driven and funded by lawyers or commercial litigation funders with the representative party merely acting as a figurehead. In these circumstances, there is no reason why a representative party cannot properly represent the interests of all members of the class, provided there is no true conflict of interest between them. …*

75. *Where the same interest requirement is satisfied, the court has a discretion whether to allow a claim to proceed as a representative action. As with any power given to it by the Civil Procedure Rules, the court must in exercising its discretion seek to give effect to the overriding objective of dealing with cases justly and at proportionate cost: see CPR r 1.2(a). Many of the considerations specifically included in that objective (see CPR r 1.1(2) ) — such as ensuring that the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate to the amount of money involved, ensuring that the case is dealt with expeditiously and fairly, and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases — are likely to militate in favour of allowing a claim, where practicable, to be continued as a representative action rather than leaving members of the class to pursue claims individually.*"

**The decision in *Smyth* v *BA***

Master Davidson found Ms Smyth and the represented parties did not share "*the same interest*".

"*28. As Coulson LJ said in Jalla the starting point (or threshold) for any representative action is that the representing party must have "the same interest in a claim" as the parties that they represent. The reason for this is twofold. First, the represented parties are bound by the result of the representative action brought by the claimant. Second, having the same interest goes to ensure that the representative can be relied upon to conduct the litigation in a way which will effectively promote and protect the interests of all the member of the represented class. The analysis of the "same interest" is made at the outset of the claim and it takes into account "likely defences". At the outset of this claim (i.e. now) it is clear that there are multiple different claims, all raising their own issues and requiring "individualised assessments". To take one category, the "extraordinary circumstances" defence is fact-specific and the subject of many different authorities - not always easy to reconcile with each other. Each flight so affected would require its own detailed evidence and inquiry. It is true that Lord Leggatt in Lloyd v Google distinguished "conflicting interests" from interests which were "merely divergent". But whether claims can be categorised as merely divergent is a question of fact and degree. To put that differently, there is a point at which interests diverge so widely that the class members cannot be said to have the "same interest". This case trespasses a long way beyond that point*

*and this was expressly or implicitly acknowledged by Mr Preston KC's proposal periodically to trim or re-visit the class by amendment so as to maintain compliance with the rule. …*

30. *Whether represented parties share the same interest is tested by asking whether there is a "common issue" (or more than one), the resolution of which would benefit all the represented parties. … Mr Preston KC's formulation sets out no common issue. It is, rather, a high-level description of the represented parties' cause of action. Beneath that high-level description (or "label" as I might call it), 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.*

31. *It is not permissible to address this problem by successive amendments to the class. … 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.*

32. *… What the claimant proposes would, in truth, be an entirely new remedy lying somewhere on the margins between a representative action, a mandatory injunction to the airlines to pay undisputed claims, and early (or even pre-action) disclosure. That goes well beyond a flexible, purposive interpretation of rule 19.8. Mr Preston KC was, in effect, inviting me to re-write the rule.*"

The Judge later observed that the: "*final class would also be objectionable on the ground that it disclosed no common issue in which the represented parties could meaningfully be said to share the "same interest". It would be just a collection of represented parties with undisputed or indisputable claims. It would be a class that was empty of actual issues*".

The claim thus failed at the first, jurisdictional, hurdle – Ms Smyth and the class described did not have "*the same interest in a claim*" and so she could not act as their representative.

The Judge also held that, even if the "*same interest*" test had been satisfied, he would exercise his discretion to prevent Ms Smyth acting as representative. This effectively appeal-proofs the judgment, if the analysis above were incorrect as a matter of law, because exercises of judicial discretion are so difficult to challenge. See e.g. Jackson LJ's *Review of Civil Litigation Costs* at Ch.39 paragraph 6.5, citing *Royal & Sun Alliance Insurance Plc* v *T & N Ltd* [2002] EWCA Civ 1964 at [38] and *Walbrook Trustee (Jersey) Ltd* v *Fattal* [2008] EWCA Civ 427 at [33]: "*It is a well-established principle that the Court of Appeal will be reluctant to interfere with case management*

*decisions made by a first instance judge who has applied the correct principles, unless the decision is 'so plainly wrong that it must be regarded as outside the generous ambit of discretion entrusted to the judge*". As for Master Davidson's reasons for exercising his discretion in this way:

> "*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. … 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.*"

> *"39. The discretion whether to allow the claim to proceed as a representative action is exercised in accordance with the Overriding Objective to deal with cases justly and at proportionate cost. One consideration is whether allowing a representative action to go forward would promote access to justice. It is hard to see how these aims would be served by this action when the represented parties have an alternative remedy which is easily accessed at no cost at all. The contrast is between, on the one hand, a representative action imposing very significant burdens of cost on both the defendants and the represented parties and, on the other, individual claims imposing modest costs on the airlines and no cost at all on the represented parties. It seems obvious that the latter is the better option and it is telling that there is no case in this or, so far as I am aware, any jurisdiction where, faced with such a choice, a court has sanctioned a representative action. One further and related aspect is that where a passenger brings an individual claim under a direct claims procedure or ADR process or Small Claim it will give rise to a definite outcome, i.e. it will be resolved. The claimant's proposed representative action will resolve few, if any, disputed claims. These will simply be jettisoned. That seems to me a melancholy and unfavourable aspect of the comparison.*"

**Unresolved matters**

The airlines raised further issues which were not resolved in the judgment, but are worth noting because they foreshadow problems liable to arise in any future case where the threshold 'same interest' test is satisfied and the representatives are considered proper persons, acting from the right motives.

> "*45. The defendants took a variety of other points with respect to both jurisdiction and discretion. In no particular order, these included specific conflicts within the class, the problem of the claimant's lack of authority both to receive others' money and to waive elements of others' claims, the 'residue' / unclaimed balance problem and data protection issues. Some of these had a slightly confected flavour. Some or all might be overcome were this a properly constituted representative action, (which it is not). The most problematic of them, as it seems to me, is the issue of the claimant's authority to receive money which is not hers and to make deductions from that money. As Nugee LJ observed in "Commission Recovery" "it is not immediately obvious how [the class representative] can obtain a money judgment on claims that do not belong to it". The money claims belonged to "each member of the class and it is not suggested that they have been assigned to [the class representative]"; (see at paragraph 33). Mr Preston KC said that this problem, if it were a problem, could be dealt with by a direction that the defendants make the payments to the represented parties. He added that*

> *each such payment "would need to be the balance after the costs and expenses are deducted". It is obvious that such an arrangement would place a very considerable administrative burden on the airlines and would put them in a commercially invidious position with their customers. I very much doubt that it is a solution that would commend itself to a court. As to deductions, given that these have been at least provisionally approved by Master Pester, I will simply observe that the jurisdiction under which he gave his approval (the principle in In Re Berkeley Applegate Ltd [1989] 1 Ch 198) is one of uncertain breadth and reach and it is not obvious that it can be applied to the present situation. Nor is it obvious that to remove this, and only this, aspect of the case to the Chancery Division was correct. It could equally well (and perhaps better) have been heard in the King's Bench Division where it could have been considered in the broader context of the applications before me.*
>
> *46. These are issues that are better addressed in a case where they matter, i.e. a case where the anterior and fatal objections to the representative action which I have identified do not arise.*"

*In Re Berkeley Applegate* Ltd [1989] 1 Ch 198 concerned Berkeley Applegate which made loans to small businesses to buy or finance property. Individual investors would deposit monies with Berkeley Applegate and their funds would be pooled and used to finance loans, usually secured by way of second mortgage. Each investor would receive interest on their deposit as the borrowers repaid the corresponding loan. In the face of rising interest rates many borrowers began to default, and the security proved insufficient. Berkeley Applegate sought to conceal this from the investors, borrowing funds from some client accounts to continue making interest payments on others. Eventually this scheme unravelled and liquidators were appointed. Berkeley Applegate held the monies in the client accounts as trustee for the investors, so they did not belong to Berkeley Applegate and could not be used to pay a dividend to Berkeley Applegate's creditors. The liquidators, standing in Berkeley Applegate's trustee shoes, could administer these accounts, reconcile them and trace and return whatever remained of each investor's money. But the liquidators would only be entitled to be paid for any work they did out of the company's assets, and could not recover for this work out of the client account funds. The liquidators sought an order permitting them to do the required work and take their fees out of the investor's funds. The court ordered that the liquidators could take their fees for the work needed to reconcile the accounts and pay the investors out of the investors' funds. Per Edward Nugee QC at 51:

> "*The authorities establish, in my judgment, a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest … or by a receiver appointed by the court whose fees would have been borne by the trust property … and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity ... In my judgment this is a case in which the jurisdiction can properly be exercised*."

It is unclear whether the passengers who had not claimed their compensation could be said to have "*an equitable interest in"* any particular *"property*". BA and EasyJet do not hold any particular funds on trust for these people (there is no "*trust property*") and their claims do not arise in equity. Rather they are (at most) owed an unpaid debt or (perhaps) have a claim to damages for breach of a statutory duty. Even then, it is unclear that any breach

is committed or any legal obligation on the part of the airline to pay actually arises until the passenger has first made a claim. Until that point, no money is due.

**Discussion**

Ms Smyth, Mr Armour (arguably not a champion of the embattled consumer) and their legal team sought to bring an audacious, opportunistic claim, aimed at forcing the airlines to, in effect, operate at the airlines expense a scheme whereby the airlines would automatically identify all those entitled to unclaimed compensation and then **systematically underpay** them, paying the passengers 76% of the compensation to which they were entitled while skimming off 24% for Mr Armour and Ms Smyth's lawyers. Some people's instinctive reaction to seeing the hubristic lawyers and financiers fail in such a scheme will, no doubt, be satisfied *schadenfreude*.

It is useful to read *Smyth* v *BA* mindful, however, of our potential biases, and whether our attitudes to such class action litigation are founded in reason or sentiment. It is a cliché, but one with some truth in it, that taboos around discussing money, and acknowledging oneself to be motivated by it, are stronger in Europe than in the United States and that successful entrepreneurship enjoys a special status in the American psyche. Allied, no doubt, to this, England has long cultivated an ideal of the English lawyer as disinterested, objective professional, and motivated by professional pride and duty, not by anything so mundane as personal enrichment. US-style class actions jar with this ideal, because they exhibit – indeed, depend explicitly upon – mercantilism and speculation by lawyers. Far from being 'a bad thing', the financial motives of the lawyers are deployed to achieve the lawmaker's goal.

The legislators' explicit goal in enacting the regulation was that "*The number of passengers denied boarding against their will should be reduced … by fully compensating those finally denied boarding".* The mere fact of passengers being "*compensated*" (say, out of some public fund) would do nothing to reduce the avoidable delays and cancellations which were the mischief the regulation was aimed at. What matters is that the compensation be paid *by the carrier*, thereby supplying the carrier with a motive to reduce such delays. It makes no difference whether the money is paid to the passengers, or 76% of the money is paid to the passengers and 24% to Mr Armour. The legislators' goal is achieved by depriving the airlines of the relevant money, not by its being paid to the customers. Master Davidson described the fact that the action would "*resolve few, if any, disputed claims*" as a "*melancholy and unfavourable aspect*", but those passengers whose claims are disputed are left **no worse off** than they were before. The representative action would resolve the undisputed claims, and that would be a good thing. That it would not also resolve the disputed claims does not detract from that good.

At any given time, there is always a pool of unclaimed money, which the lawmaker evidently desires the airlines to be deprived of, but which passengers will never claim. It is all very well to say that there is an online portal, and these people can easily claim if they want. But the reality is that they have not, despite their having been given the notices required by the Regulation. The ideal, of course, would be if 100% were paid to the passengers. But we live in the real world, where that will never happen, and the choice (it seems) is instead between: (i) the airlines retain 100% of this money and nothing is paid to the passengers, entirely frustrating the lawmaker's intent; or (ii) the airlines are deprived of this money and 76% of it is paid to the passengers. The latter would seem to serve the legislator's aim better than the former.

Is there any risk of unfairness in allowing a representative claim to be brought on behalf of the non-claimers? All the people who have not claimed have a right to bring a claim themselves (and get 100% of the money) any time within six years of their right arising. So it might be said that the representative claim would be depriving some small sub-group of people – who would have got round to claiming eventually within the six year period – of 24% of the compensation they would otherwise have received. No doubt this is a small group, though, and the benefit

to the majority, who would otherwise have received nothing, outweighs the harm. By the time the case got to trial, many of the claims would have become time-barred but for the claim, so one could be confident that those people would never have claimed their money, and everyone else who had not claimed up to that point would by then have had such a long time in which to do so such that even if limitation had not yet expired, one could conclude on the balance of probabilities, that they would never have done so.

None of this is to suggest that the decision in *Smyth* v *BA* is wrong as a matter of law, of course. The essential question was whether Ms Smyth had "*the same interest*" as the proposed represented parties, applying the purposive interpretation of that phrase in *Lloyd* v *Google*, that interests can be "*the same*" for these purposes if they are "*merely divergent*" so long as they do not conflict, so that "*advancing the case of class members affected by the issue would not prejudice the position of others*". Master Davidson took the view that the interests of the proposed represented parties were too divergent. One can readily see that there is no overarching common issue. If all the claims were pursued, one would have to consider each individual passenger's circumstances, whether they claimed, whether they were offered a substitute flight and the timing of that and so on. There is no conflict, because establishing one passenger's claim to compensation does not impinge another's. And there might be clusters of issues common to sub-groups – whether a particular plane was delayed by extraordinary circumstances, for example, which would be relevant for all the passengers booked on that plane. But the proposed claim was not even seeking to resolve any of those clusters of common issues. Rather the aim was to abandon any claims in respect of which BA might raise a credible defence, so that Smyth and her team would not then have to spend any money contesting them, to leave only those claims in which there was, in fact, no issue, let alone a common issue, to be resolved.

Even if the jurisdictional test had been met, whether to permit Ms Smyth to act as representative was a matter of discretion, to be exercised in accordance with the overriding objective of dealing with cases justly and at proportionate cost. Master Davidson considered that to permit Ms Smyth to act as a representative it would not have furthered that objective. Here, the Master's reasoning seems more open to question. The impression is of that decision having been driven by the court's sense that Ms Smyth (and, by extension, Armour) were not motivated by a selfless desire to aid consumers, but were seeking to act for their own profit. It is unclear why that should be a prerequisite for bringing a representative claim. If a representative claim serves the legislator's ends, enforces a law which would not otherwise be enforced and secures a benefit for people who would not otherwise receive it, the motives of the representative are irrelevant. The real problem is not so much Ms Smyth, Mr Armour and their lawyers' profit motive as the lack of well-established, familiar mechanisms in English law for supervising class actions to manage conflicts between those motives and the interests of the class sought to be represented – ensuring class members are notified of the claim, fixing the lawyers' remuneration, approving settlements and securing that monies recovered are dealt with appropriately.

**Lessons**

This case illustrates the relative difficulty of bringing representative actions under CPR 19.8 in respect of consumer rights such as those conferred by Regulation 261/2004 where statutory criteria confer a right to a small amount of individual compensation, contingent on criteria which cannot readily be reduced to a single common issue or small number of common issues. If one were of the view that something akin to a US style class action would serve a useful function in such instances, then the lesson is that CPR 19.8 does not presently permit that.

So far as prospective representative claimants are concerned, the case is at least useful in showing that representative claims do not work in such instances, so that they can save their money and refrain from trying to bring such claims.

The other lesson for people who aspire to bring such ambitious claims in future is that – if you can identify a claim which might pass the CPR 19.8 threshold – you still need to persuade the court to exercise its discretion to permit you to act as representative. And it seems that there is much value in transparency and having one's house very much in order. If Ms Smyth, her lawyers and financial backers had not pretended to be acting from some kind of public-spirited beneficence but had instead been entirely open about their motives from the outset, and presented a thoroughly worked out, transparent, fair scheme for how the claim would have been administered, and the safeguards they proposed to adopt, and given a reasoned, defensible account of how their level of remuneration had been arrived at, one cannot help but feel they might have enjoyed a more sympathetic reception. The lesson of Icarus is not to aim lower, but to make better wings.

Perhaps the most useful thing we can take from this case, though, is the reminder – if our flights are ever cancelled or delayed more than three hours – always to take the time to look into our right to compensation and claim it through the online portals which exist for that purpose.