

Smyth v British Airways – A crash investigation

October 3, 2024 Robert Blackett

PRACTICES International Arbitration

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.

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