Neutral Citation Number: [2024] EWHC 2173 (KB)

Case No: KB-2023-000089

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/09/2024

Before :

MASTER DAVISON

- -

Between :

CLAIRE SMYTH

Claimant

and

(1) BRITISH AIRWAYS PLC
(2) EASYJET AIRLINE COMPANY LIMITED

Defendants

and

JOHN ARMOUR

Interested Party
(for the purposes of costs only)

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Hugh Preston KC and **Conor Dufficy** (instructed via **Direct Access**) for the **Claimant**
Brian Kennelly KC, **Tom Coates** and **Aislinn Kelly-Lyth** (instructed by **Linklaters**) for the **First Defendant**
Charles Béar KC and **Giles Robertson** (instructed by **Norton Rose Fulbright**) for the **Second Defendant**

Hearing dates: 10 & 11 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Master Davison:

Introduction

1. This claim raises some novel and interesting points about the permissible scope of a representative action under CPR rule 19.8. It arises in the following way. The claimant, Ms Claire Smyth, was booked on a British Airways flight scheduled to fly from London Gatwick to Nice at 1740 on 18 June 2022. On 14 June (less than 7 days before departure) the flight was cancelled. The cancellation gave rise to a right on the part of the claimant to claim compensation under Article 7(1) of EU Regulation 261/2004. This Regulation (which was retained post-Brexit) establishes, under specified conditions, minimum rights for passengers when: (a) they are denied boarding against their will; (b) their flight is cancelled; or (c) their flight is delayed. For short-haul flights of less than 1,500 kms (such as the one the claimant was booked on) the level of compensation was €250 and, post-Brexit, is now £220.

2. The defendants to the claim, British Airways and easyJet, both maintain portals through which passengers may claim the compensation, free of charge. Ms Smyth did not utilise that method. Instead, on 2 August 2022, direct access counsel, Mr Hugh Preston KC (who has acted for the claimant throughout) wrote a letter before action on behalf of a very large class whose members were, in summary, those who had booked a flight with BA or easyJet scheduled to depart from, or arrive at, an airport in the UK during the period from 1 December 2016 to 31 August 2022 and whose flight was then either cancelled or delayed by three hours or more. (I will have to return to the precise delineation of the class as it was first framed in this letter. For present purposes, suffice it to say that it was intended to include, and only include, those passengers who had an indisputable right to compensation.) For reasons that are not clear to me, the letter did not identify Ms Smyth as the representative. She was not identified until 5 months later. The letter of 2 August 2022 referred to a schedule of flights believed to fall within the relevant criteria, which would be served in due course and which would be adjusted as necessary in order to eliminate cases in which there was, or there came to be recognised, an arguable defence. The stated purpose of the claim was to recover compensation where that was legally due but had not been paid, "for example because the customers have not been made aware of their right to claim compensation". An important element of the claimant's case is that there is low awareness of the passenger rights conferred by the Regulation and that airlines, including BA and easyJet, do the bare minimum to inform passengers of their rights and to allow those rights to be satisfied. The claimant's position is that this claim will, effectively, force BA and easyJet to take a proactive stance and to pay the compensation in all cases where it is indisputably due.

3. The schedule was served with the Part 8 Claim Form, which was issued on 10 January 2023. The schedule contained approximately 116,000 flights. Various estimates can be made as to the scale of the claim. For the purposes of the hearing, the rough and ready estimate offered by Mr Béar KC for easyJet was as follows. Assuming approximately 200 passengers per flight (i.e. 23.2 million passengers) and on the further assumptions that 25% of the flights were indisputably compensable and that 25% of passengers had not already been compensated, then the claim would be worth £319 million. The assumptions might prove to be inaccurate one way or another. But on any view, the claim, if properly constituted as a representative action, will be a very large one.

4. A feature of the claim is that it is funded by a Mr John Armour, an Australian citizen who is a resident of Monaco and who is Ms Smyth's employer. The exact funding arrangements have not been disclosed and this is a topic that I will have to return to. But 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. The proportions in and/or the contingencies upon which the percentage is to be split are unknown. But 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" – again, a topic to which I will have to return.

5. The defendants strongly oppose the constitution of the claim as a representative action and seek an order striking it out and/or an order under CPR rule 19.8(2) directing that the claimant "may not act as a representative".

The Regulation

6. Article 5(1)(c) of the Regulation provides for a right to compensation in the event of the cancellation of a flight which falls within its scope. It is established law that a delay of more than three hours amounts to a cancellation for the purposes of the Regulation and so attracts the same rights to compensation. There are various pre-conditions or exceptions to the right to compensation, which affect both individual flights and individual passengers. These include (but are not limited to) the following:

   i) 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" (Articles 5(3) and 6(4)). The meaning of "extraordinary circumstances" is not defined in the Regulation and has been the subject of significant jurisprudence at UK and EU levels.

   ii) 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)).

   iii) 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)).

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

7. Article 7(1) provides for varying compensation levels (€250, €400 or €600, or roughly equivalent GBP sums under the post-Brexit retained version of the Regulation) which are *prima facie* payable to passengers whose flights are relevantly delayed or cancelled.

The sums at Article 7(1) vary according to the distance of the flight. However, those sums represent only a starting point. The Regulation further provides that passengers may receive reduced or no compensation depending on the circumstances of their case. In particular:

i) In respect of cancellations, Article 5(1)(c)(iii) of the Regulation provides that passengers are not eligible for compensation where they are offered an alternative flight which allows 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.

ii) In respect of cancellations, Article 7(2) of the Regulation provides that passengers may be entitled to a reduced amount of compensation (i.e. 50%) depending on the length of their journey and the final arrival time of their alternative flight.

8. Operating carriers are not required to compensate passengers automatically under the Regulation. The Regulation adopts a framework under which passengers are provided with information about their entitlement to claim compensation, thereafter leaving the onus on them to make a claim if they wish to. Pursuant to Article 14, 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 and assistance in line with the Regulation.

The airlines' direct claims procedures ("DCPs")

9. British Airways and easyJet, in common with other airlines, maintain their own direct claims procedures. These are accessed via an online portal. In the case of easyJet (whose example I will take) the evidence is that claims submitted are usually assessed within 28 days. If a passenger's claim is rejected, they are given an email explaining why. EasyJet has signed up to Aviation ADR, an official alternative dispute resolution scheme approved by the Civil Aviation Authority. (BA uses the Centre for Effective Dispute Resolution ("CEDR"), a similar type of scheme.) The scheme is free for passengers to use, and adjudicates claims within 90 days. It is binding on the airline. Passengers remain free (even if they take their case to Aviation ADR without success) to take their claim to court if they disagree with the adjudication. There is a substantial volume of such claims, which are managed by the County Court at Luton, which conducts "blitz hearings" dealing at one instance with several different claims. (BA claims are dealt with at Uxbridge.) There are also no-win no-fee solicitors prepared to pursue these claims for passengers, charging up to 50% of the compensation awarded. Given that passengers can pursue their claims for free, the value these solicitors add is open to question and both the CAA and the European Commission recommend that passengers contact airlines directly. Airlines have added clauses to their conditions of carriage requiring customers to submit claims directly to them; easyJet has included such a clause since 20 May 2019, BA since 18 April 2019.

10. There was disagreement about how easy these portals were to use. Mr Kennelly KC took me (on paper) through the steps required by the BA portal. My impression was that it was reasonably straightforward, though requiring quite a few 'clicks' to get through the process from beginning to end.

11. There was also disagreement about the take-up and enforcement of the rights conferred by the Regulation. The claimant referred to her own ignorance of her rights and her surprise at discovering the true position. She provided statements from two witnesses, who spoke to this topic. The first was from Mr Keith Richards OBE, formerly chair of the Civil Aviation Consumer Panel and currently chair of the National Centre for Accessible Transport and also of the Heathrow Access Advisory Group. (He is also a member of the claimant's consultative panel, as to which see further below.) The second was Ms Susan Davies, the Head of Consumer Rights Policy of the Consumers' Association. Mr Richards' evidence was that there was "ample evidence of the lack of consumer awareness of their rights". The airlines did not proactively inform consumers of their rights nor did they pay the fixed compensation automatically. He was clear that the best outcome for consumers would be an automatic distribution of compensation to which they were entitled "when there is essentially no defence". He said that "this action should achieve that." Ms Davies gave evidence of various Which? surveys, investigations and publications the general tenor of which was that there was low awareness amongst consumers of their rights, that it was unclear (because there were no publicly available data) to what extent consumers were successful in making claims, that airlines did not meet and/or by various expedients tried to avoid meeting the legal requirements of the Regulation, that the CAA did not police the Regulation effectively and that "an effective collective redress regime for passenger rights" (such as already existed for competition cases) would be beneficial. In the view of the Consumers' Association there was "significant unremediated consumer detriment arising from the gap between those consumers who are by right entitled to EC261 compensation and those that receive it".

12. The evidence from BA and easyJet about the take-up of rights was unspecific. A government assessment in 2021 assumed a 65% claim rate; easyJet said that take-up tended to be very route dependent – for some routes it was near 100%, for others "substantially less".

The class which the claimant wishes to represent

13. As originally proposed in Mr Preston KC's pre-action protocol letter, the class comprised passengers on flights where the cancellation or delay was <u>not</u> by reason of extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken (the Article 5(3) defence). But by the time the claim form was issued, the accompanying schedule contained all disrupted flights, i.e. it included those where an extraordinary circumstances defence might indeed arise. The claim form was then amended (though, as yet, without permission) so as to exclude from the class four categories of passenger who, by reason of either having already made a claim which had been satisfied or of being in an excepted category, had no *prima facie* claim. A further proposed amendment was to add a second claimant, Ms Stella English. This was done in order to address an objection (one of many) made by easyJet that Ms Smyth, whose flight was a BA flight, could not represent passengers on easyJet flights. Ms English had taken an easyJet flight. As set out in the Amended Claim Form, the class was this:

> "The First Claimant claims in her capacity as representative under CPR 19.8 (1) of 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), and who was not on the date of issue of these proceedings a Master or a Judge of the King's Bench Division of the High Court of England and Wales or a Judge of the Court of Appeal, or a Justice of the Supreme Court.
>
> The Second Claimant claims [wording as above *mutatis mutandis* for easyJet flights].
>
> Fixed compensation is claimed by the First and Second Claimants respectively on behalf of each such person in the fixed sum specified in the said schedule in respect of each such flight together with interest thereon pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period as the court thinks fit.
>
> 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."

14. There is an important qualification to be added to the claimant's definition of the class, which is 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. The steps are set out at section 5 of Ms Smyth's second witness statement. They can be summarised as follows:

i) At Step 1, each defendant would first be required to review the schedule appended to the claim form and identify (i) whether the allegedly delayed flights were in fact delayed; and (ii) whether it intends to raise certain defences in relation to each alleged cancellation or delay (with further details to be provided, if so) – in particular the "extraordinary circumstances" defence or the defences based on prior notification of the cancellation or re-routing. The defendant would therefore have to identify what (if any) defence it would raise in respect of each claim by each passenger on approximately 116,000 flights. At Step 1, those passengers falling into the Excluded Journeys category (see above) would be removed.

ii) At Step 2, the defendants' responses would then be used to divide the class into cohorts depending on the kind of defences raised. The claimant envisages that the defendants should serve counter-schedules and witness statements to set out the defences they raise and that, subject to the range and complexity of the defences relied upon, further information may be sought by the claimant and supplied by the defendants. This stage and the following one would operate as a kind of sift. Flights where there was uncontroversially a defence, e.g. where the passengers were given more than 7 days' notice of cancellation, would be removed from the schedule. In respect of others, the aim would be to fashion court directions that enabled the claimant's advisers to identify "issues of law".

iii) At Step 3, Ms Smyth's legal representatives would carry out an assessment, the purpose of which is described in Mr Preston KC's skeleton as follows:

> "If statutory defences are raised in respect of represented parties' ("RP's") claims, it will in general not be practicable or proportionate within the context of the overriding objective or a CPR rule 19.8 action 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)."

At paragraph 77 of Ms Smyth's second witness statement, she explains that the determination of these issues "would not involve any disputed issues of fact". They would be "issues of law, namely whether the defence relied upon is valid as a matter of law and would be determined on the basis of facts assumed in the defendants' favour for these purposes". The claimant anticipates that at the end of Step 3 the class size will have been reduced by the processes described above, which consist partly of an evaluation by her legal representatives and partly judicial determinations.

iv) At Step 4, having narrowed the class down to only those represented parties who have a claim in respect of which the defendants have no defence, "an order can then be made for the defendants to pay the applicable compensation" to the claimant, (subject to the 24% deduction already described representing the funder's fee and the legal fees). The net compensation would then be distributed to the class members utilising the services of Epiq Systems Inc, a commercial organisation with expertise in the administration of class actions.

15. It is apparent that it is only at the end of Step 3 that the true and final class is identified. To quote from paragraph 44 of Mr Preston KC's skeleton, that class comprises claims "where the represented parties have not been paid and there is no defence".

The claimant as representative

16. This is addressed at section 6 of Ms Smyth's second witness statement. At paragraph 115 she has described her motivation which she says "stems from a strong desire to stand up for the wronged consumer let down by large corporations". She has expressed the hope that she will, by this claim, "bring to light passengers' rights but also encourage British Airways, easyJet and other airlines to adopt a more transparent and respectful approach to communicating with their passengers". She has described her relationship with Mr Armour, the funder of this claim, namely that she was employed by him to set up and run a small family office in London, carrying out personal administration and supporting him in various business activities. She has asserted her independence in the conduct of the litigation. Relevant to this is the consultative panel which she has assembled consisting of John Swift KC, a distinguished competition lawyer, and Keith Richards OBE, whose qualifications I have already recited. She has reserved her position on the issue of her personal remuneration.

17. As to the funding arrangements, Ms Smyth has confirmed that she is indemnified by Mr Armour in respect of adverse costs orders (and he has, indeed, provided security for the defendants' costs in the full sums demanded (over £800,000)). She has not disclosed details of the funding agreement. But the overall percentage deduction from the proceeds of the claim is now a matter of record. She has given no information as to what I might call the genesis of the claim. In particular, she has not described the process (and there must have been one) by which her cancelled flight and the personal motivation and ambition to promote consumer rights that this gave rise to was translated into action. Nor has she or Mr Armour himself answered the criticisms of the defendants about certain of Mr Armour's past activities. These relate to two Australian companies of which he was a director and shareholder and which engaged in the practice of mass-mailing unsolicited offers to consumers to buy securities at prices substantially below their market value. The New Zealand Financial Markets Authority described the vice of such offers as being 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". These activities led to intervention by the NZFMA and in October 2010 Mr Armour gave an enforceable undertaking to the effect that offer letters would include a warning which disclosed the actual market price for the securities.

The law

18. CPR rule 19.8 is in these terms:

> "(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."

19. I was supplied with and referred to many authorities. When I come to my reasoning and conclusions, I will have to refer to at least some of these. But for the purposes of an overview, I will restrict citation to the key cases set out in the following paragraphs.

20. The commentary in the White Book (2024, Vol. 1 at 19.8.9) commends the summary contained in paragraph 51 of the judgment of Coulson LJ in *Jalla v Shell International Trading and Shipping C Ltd* [2021] EWCA (Civ) 1389. Although (as the commentary points out) that summary now needs to be read in the light of later authorities, in particular the decision of the Supreme Court in *Lloyd v Google LLC* [2021] UKSC 50, it remains a detailed and illuminating review of relevant considerations. The context was a claim in respect of an oil spill off the coast of Nigeria. The representative action was on behalf of over 27,500 individuals 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. Coulson LJ's summary of the principles was as follows:

> 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 (see [74] of *Lloyd v Google* [2019] EWCA Civ 1599). It was described by Gloster LJ in *Re X and others* [2015] EWCA Civ 599, [2016] 1 WLR 227 as "a non-bendable rule".
>
> 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. That is what Mummery LJ in *Emerald Supplies*

Ltd v British Airways Plc [2010] EWCA Civ 1284 called "the binding effect of the proceedings".

e) The court will adopt a common sense approach to this issue. It must be the same interest "for all practical purposes" (the expression used by Staughton LJ in *Irish Shipping Limited v Commercial Union Assurance Co. PLC* [1991] 2 QB 206 at 227G); or it must be "in effect the same cause of action or liability" (the expression used by Akenhead J in *Millharbour Management Ltd v Weston Homes Ltd* [2011] EWHC 661 (TCC). This avoids the sort of rigidity deprecated by Megarry J in *John v Rees* [1970] 1 Ch 345.

f) In this way, it is easy to see why all the stallholders in *Duke of Bedford v Ellis* [1901] AC 1, and all the shareholders in *Prudential Assurance Co Ltd v Newman Industries and others* [1981] 1 Ch 229 had the same interest in the injunction and the declarations sought. Similarly, in *Lloyd v Google*, the Chancellor said of the relationship between the representative and the represented parties that "the wrong is the same, the loss claimed is the same. The represented parties do, therefore, in the relevant sense have the same interests."

g) It may not affect the making of an order for a representative action if the represented parties also have their own separate claims for damages. In the copyright collection cases (such *Independiente Limited and Ors v Music Trading On-line (HK) Limited and Ors.* [2003] EWHC 470 (Ch)), where the emphasis was on the injunction for breach of copyright, the damages were of secondary importance: they simply paid the costs of the policing operation. Individual claims for damages, which were regarded as "subsidiary" in *Duke of Bedford v Ellis*, can be the subject of an inquiry or an account, or they can lead to subsequent individual claims (outside the representative action), which was the approach adopted in *Prudential Assurance*.

h) Thus, the existence of individual claims for damages is not necessarily a bar to their being dealt with in some way via a representative action. It will always depend on the factual circumstances.

i) The analysis of "the same interest" is undertaken by the court at the time of the application under r.19.6. The court has to consider what the issues are likely to be by reference to all the information then available (see Akenhead J at [22] of *Millharbour*). To the extent that Lord Macnaghten in *Duke of Bedford v Ellis* was suggesting that the exercise should be carried out solely by reference to the claimants' pleadings, that is emphatically no longer the practice, as demonstrated most recently by *Emerald Supplies*, *Millharbour* and *Lloyd v Google*.

j) These later authorities also show that it is necessary to consider the likely defences as part of the analysis. So in *Irish Shipping*, although potential defences were identified, at 227F Staughton LJ said that they were "unlikely to arise". The suggestion is that, if they had arisen, the case would have been decided differently. In *Emerald Supplies*, on the other hand, Mummery LJ said at [64] that "if there is liability to some customers and not to others they have different interests, and not the same interests, in the actions." In *Lloyd v Google*, the court expressly took into account the fact that it was "impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others."

> k) Likewise, depending on the circumstances, limitation defences may be a factor to be taken into account when assessing whether or not to make an order under r.19.6: see [22(7)] of the judgment in *Millharbour*.
>
> 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, I can do no better than repeat Mummery LJ's words in *Emerald Supplies* (see paragraph 46 above): "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."

21. *Lloyd v Google* 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 of the rule, Mr Lloyd argued that damages did not need individual assessment but could be awarded on a "tariff" basis. In the event, 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 proposed by the claimant (because it would have made the representative proceedings uneconomic). So the claim failed.

22. The importance of the case, for the purposes of this claim, is that the Supreme Court relaxed the "same interest" requirement. At paragraphs 71 & 72, Lord Leggatt said this:

> "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. *Markt* [1910] 2 KB 1021 and *Emerald Supplies* [2011] Ch 345 are both examples of cases where it was found that the proposed representative action, as formulated, could not be maintained for this reason.
>
> 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: see Zuckerman on *Civil Procedure: Principles of Practice*, 4th ed (2021), para 13.49. 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."

As to discretion, at paragraph 75 Lord Leggatt said this:

> "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 submissions of the parties

23. The parties each filed skeleton arguments and addressed oral submissions over the course of two days. (I can say with confidence that no point that could reasonably be taken was overlooked.) I will summarise the submissions as briefly as I can and only in broad outline – reserving more detailed discussion for the next section of this judgment.

24. The submissions sub-divided into those that went to the principle of whether the requirements of a representative action were made out and, if so, whether, in the exercise of a judicial discretion it was appropriate to let the claim go forward in that form. (Some of the submissions did double-service in that they went both to jurisdiction and discretion.)

25. For the airlines and in brief summary, the submissions were these:

    1) The "same interest in a claim" test was not met. There was no common issue in which the proposed class members had the same interest. Ms Smyth was seeking to aggregate millions of individual passenger claims raising many, discrete issues concerning the entitlement to compensation under the Regulation. She sought to meet that basic defect in her claim by progressively shedding class members until a true or final class was achieved where the claims were not contested or contestable

(and thus, by that stage, raised no common issue at all). This was an impermissible use of the CPR rule 19.8 procedure. The reality of the proposal was that it was intended to operate and would operate as a kind of mandatory compensation scheme, which was what Parliament had decided not to impose.

2) There were conflicts within the class, which rendered a representative action inappropriate (because the "same interest" test was, for this reason too, not met).

3) Ms Smyth's proposals for payment raised insuperable problems.

4) As a matter of discretion, the claim should not be allowed because:

   a. Passengers who qualified for payments under the Regulation had available to them a free, easy-to-use direct claims procedure, by which they could achieve full compensation without deductions. Individual claims rather than an automatic compensation scheme was the structure and intention of the Regulation (see above). A representative action was wasteful and unnecessary and would undermine the balance struck by the Regulation.

   b. The proposed representative action would impose an enormous burden of administration (and cost) on the airlines. That burden included difficult data protection issues.

   c. The real motive force behind the claim was Mr John Armour, who, together with the claimant's legal team, stood to recover almost a quarter of the eventual "pot" of compensation. Mr Armour was the antithesis of a consumer champion and, because Ms Smyth was his employee, there was an obvious danger that his influence would render her an inappropriate class representative.

26. For Ms Smyth and in brief summary, the submissions were these:

1) There was widespread lack of awareness of rights and a lack of transparency by the airlines in the provision of information.

2) The action was brought for the benefit of those unaware of their rights or for whom the process of claiming via the airlines' DCPs was too high or too complex.

3) The "same interest" test was met. The proper approach to the test was utilitarian and pragmatic. A representative action was suitable if it could be fairly and effectively run without the participation of the individuals concerned.

4) The members of the proposed class all shared the "same interest". There was no conflict of interest within the class – but merely divergent interests.

5) It was both permissible and appropriate to re-visit the CPR rule 19.8 question and amend and re-amend the class definition as necessary. The burden on the defendants of providing the information necessary to carry out this exercise was not excessive. Following class refinement, those represented parties who were as a result excluded would retain their substantive rights intact and could bring individual claims if they wished to.

6) The claimant was a suitable representative. There was no evidence of any inappropriate control by Mr Armour.

7) The claimant's funding arrangements were not disclosable. If the lawfulness of the funding arrangements fell to be examined, that would require a separate hearing at which the claimant and Mr Armour would be represented by separately instructed costs counsel. Deductions from the compensation reflecting those arrangements had been approved by Master Pester's order. It was open to the defendants to apply to be joined and to have that order set aside if they thought that there were grounds to do so.

Discussion and conclusions

27. I will first set out my two primary findings. I have reached the conclusion that the proposed representative action does not meet the jurisdictional requirements of the rule because the claimant and the represented parties do not share the same interest and that defect cannot be met by successive amendments to the class. Further, as a matter of discretion, I would not allow the claim to go forward as a representative action because the dominant motive for it 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.

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.

29. Mr Preston KC defended that proposal by saying that throughout the life of case the members of the class all had the same interest in the determination of compensation according to a formula based upon a common set of objective facts, which was that all were booked on a flight that was either delayed for more than 3 hours or cancelled. (This was a slight refinement of the class definition given in paragraph 16 of his skeleton argument. In that paragraph he said that the claimant had "the same interest

as the represented parties because she and they each share the same cause of action under the same Regulation for a fixed sum by reference to the same statutory formula".) Though no specifics were given, I presume that the anticipated amendments to the class would be by way of savings or exceptions or excluded categories. Mr Preston KC submitted that "same interest" as he formulated it met the requirement in *Millharbour* that the parties shared "in effect the same cause of action or liability". He referred also to the language used by Lord Macnaghten in *Duke of Bedford v Ellis* which was to refer to a "common grievance" for which "a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent". There was, he said, no need for a dispute, as such. The requirement for the same interest was satisfied by the looser concepts of a shared cause of action or shared grievance. Further, although he acknowledged that there was no precedent for his proposal to maintain the claim within the parameters of CPR rule 19.8 by successively trimming and amending the class, there could be no objection in principle and there was encouragement for that course in that (a) the authorities recognised that the class could fluctuate, (b) Robin Knowles J in *Commission Recovery Ltd v Marks & Clerk LLP* [2023] EWHC 398 (Comm) specifically contemplated that CPR rule 19.8 was not a "once and for all time provision" and might be re-visited or re-examined during the life of the claim (see paragraph 83) and that (c) we were in "the foothills of the modern, flexible use of CPR 19.8" (see paragraph 91 of *Commission Recovery*) which required the sort of innovative approach he (Mr Preston KC) commended.

30. There are formidable objections to this approach. 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. That is clear from many cases, including *Duke of Bedford v Ellis*, *Lloyd v Google*, *Prismall v Google UK Ltd* [2023] EWHC 1169 (KB) and *Commission Recovery Ltd v Marks & Clerk LLP* [2024] EWCA Civ 9. 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. 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. I find that unsurprising since it would run directly contrary to the underlying rationale for the rule. These defendants would have a particular grievance if the rule were interpreted as Mr Preston KC proposed because they would be shouldering a heavy burden of costs during the preliminary stages (as to which, see further below). That would be manifestly unfair to them when it is at those very stages that the claim would not be properly constituted as a representative claim (if, indeed, it ever could be).

32. None of Mr Preston KC's arguments adequately answered these points. It is recognised that in some cases and for differing reasons the class of represented parties may fluctuate organically. But this provides no grounds or legal basis for successive redefinitions of the class as a strategy to overcome basic defects which are known or anticipated from the outset. The remarks of Robin Knowles J in *Commission Recovery* about revisiting CPR rule 19.8 during the course of the action reflect the wording of the rule itself and the court's general case management powers. (Though not referred to by Mr Preston KC, in the Australian case of *Carnie v Esanda Finance Corpn Ltd* 182 CLR 398, the High Court referred to the power under the equivalent Australian rule to "reshape proceedings at a later stage if they become impossibly complex or the defendant is prejudiced".) These *dicta* provide no support for this claimant's proposal which, I repeat, is for the court to sanction an *ab initio* strategy. As to flexibility and innovation, 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.

33. There are other objections to the constitution of the claim as a representative action. Before coming to those I will set out the reasoning for the second of my primary findings, which goes to discretion.

34. Ms Smyth's second witness statement describes her motivation for making the claim. I have already quoted from the relevant passage which casts her, if I can summarise, as a consumer champion. In her first witness statement made in November 2022 she described herself as an office manager. But she did not say whose office she managed. By letter dated 30 January 2023 and in response to enquiries from the defendants' solicitors, Mr Preston KC stated that the claimant "had secured the assistance of a third party litigation funder". By letter dated 21 February 2023, he disclosed that the funder was Mr John Armour and gave Mr Armour's address in Monaco. Investigation by British Airways of its booking records revealed a link between Ms Smyth and Mr Armour and in response to a direct enquiry by Linklaters (for BA) Mr Preston KC, on 2 June 2023, confirmed that Ms Smyth was "employed by Mr Armour under a contract for services". It was not until Ms Smyth's second witness statement, dated 13 March 2024, that further details of the link between her and Mr Armour were given, namely that she had been his yoga instructor and that she had then set up and was now running a family office for him in London.

35. That part of the defendants' evidence referring to Mr Armour's dealings with the New Zealand Financial Markets Authority has not been addressed at all.

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 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 Béar KC described him as *dominus litis*, i.e. the person who was really running the litigation and the description seems apt.

37. Ms Smyth's consultative panel's precise parameters and role have not been explained and it does not meet the difficulties I have described.

38. I can understand that the details of the deductions approved on a without notice basis by Master Pester may be sensitive and confidential and may contain material which is privileged. The arrangements may therefore be unsuitable for disclosure / full disclosure to the defendants. Given that they have not been disclosed, I am not in a position to make any findings as to whether the funding arrangements are lawful. But it is apparent that they have not been subject to any kind of market testing and my provisional view is that to take almost one quarter of the total amount of the compensation is disproportionate when, on the claimant's case, the work involved (a) arises in the preliminary stages of the claim and (b) falls overwhelmingly on the defendants and where (c) there is no sliding scale according to the amount recovered. More pertinently, this is a deduction which any given represented party would not suffer at all if they claimed their compensation via the defendants' DCPs or ADR schemes or via the Small Claims procedure in the County Court, which for a winning claimant who acts in person is cost-free. (A losing claimant would not have to pay the opposing airline's costs. So the Small Claims procedure is also effectively risk-free.) I do not accept Mr Preston KC's comparison, which he submitted was between this representative action and "nothing". He submitted that that was the relevant comparison because the members of the class he was concerned with would otherwise, through ignorance, make no claim. I do not think that that is valid. Parliament had the choice whether to implement a scheme of automated compensation, which was indeed at one stage proposed by the CAA Consumer Panel. The Department for Transport consulted about such a scheme in January 2022 and published its response in June 2023. The response was that more work was needed "to consider the merits and limitations of any changes in this area". The current scheme provides for passengers to be informed of their right to be compensated for cancellation etc but also that compensation is <u>not</u> automatic. The Regulation is policed by the CAA under powers conferred by Part 8 of

the Enterprise Act 2002, but passengers who wish to make a claim have to be proactive in doing so. Any change to that legislative scheme is a policy issue for Parliament. Mr Preston KC's comparison would only be valid from the starting point of an assumption that the proper or rightful scheme would be the automatic scheme not chosen by the legislature but favoured by the claimant (and which is, indeed, the avowed aim of her representative action). But that is the wrong assumption.

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.

40. Having set out the two primary grounds why I am not prepared to sanction this representative action, I can deal with the others very much more shortly. I do so bearing in mind the observations of the Court of Appeal in *Commissioner of Customs & Excise v A* [2002] EWCA Civ 1039 at paragraphs 80 – 84. Not every argument urged on me by the parties has been central to my decision. Not every argument has required from me the detailed analysis found in the skeleton arguments (in turn drawn from the 7 lever arch files of documents and the 6 lever arch files of authorities which this case generated for the hearing).

41. Two aspects of jurisdiction were mentioned in argument but were ultimately irrelevant.

42. The first is that Mr Preston KC said in his skeleton that an alternative structure to the proposed one of a gradually reducing class size "would have been to exclude those claims [i.e. the ones in which arguable statutory defences were raised] from the outset". This was, indeed, what the letter of claim envisaged. In his oral submissions, Mr Preston KC distanced himself from that alternative structure because it would fall foul of the rule that the class cannot be defined by or depend upon the outcome of the litigation; see *Emerald Supplies*. That was a proper concession. I would add that that 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.

43. The second is that the problem of conflicting and/or widely diverging interests can, in a proper case, be addressed by bifurcating a representative action, i.e. by splitting off claims that call for individual participation and assessment. (The classic example of that would be bifurcating the claims once the issue of liability had been decided so as

to address individual damages assessments. But other examples could be given.) The claimant did not seek any such remedy. She acknowledged that the sheer volume of numbers would impose an impossible case management burden on the court (though I suspect that a cost / benefit analysis from her and/or Mr Armour's perspective would also have entered the equation). Her preferred strategy was to shed those represented parties in respect of whom defences were raised unless those defences presented a simple issue of law requiring nothing more than a paper hearing. I have already touched on this subject. It seems to me to be an acknowledgement that the interests of those represented parties whose claims would be dropped would not be having their claims "protected and promoted" by the claimant. From the airlines' point of view, it also seems a poor return on the costs and effort which the claimant would be imposing on them.

44. The latter point is very relevant to discretion. The claimant's action would require the airlines to undertake an analysis of 116,000 flights going back 6 years – a task described by British Airways as "gargantuan" and by easyJet as "enormous". The airlines put in a good deal of evidence about this, which included a detailed critique of the claimant's proposed "4 Steps". They said that in reality there would be many more than 4 Steps. The claimant's evidence was to the effect that the process was, or could be, relatively straightforward and that in respect of many flights the groundwork would already have been done in response to one or more claims made in the conventional way. I do not propose to analyse these competing bodies of evidence. Suffice it to say that I am satisfied that there would indeed be a very significant burden on the airlines. At the risk of revisiting points I have already explained, in addition to scale, that burden would have two objectionable features. First, much of the work involved would be wasted. Second, the work would in practical terms be forcing the airlines to implement the automatic compensation scheme for which Parliament did not provide. I do not think that this would be just or proportionate.

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.

Disposal

47. Because the action is not properly constituted as a representative action, I will strike it out under CPR rule 3.4(2)(b) & (c). Under CPR rule 19.8(2), I will also direct that the claimant may not act as a representative. I make it clear that in my view both rules are wide enough to embrace not only the jurisdictional but also the discretionary factors to which I have referred.