SLAUGHTER AND MAY

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Emerald Supplies v British Airways plc: Court of Appeal strikes out economic tort claims

1. INTRODUCTION

1.1 On 14 October 2015, the Court of Appeal overturned a decision of Mr Justice Peter Smith to refuse British Airways' request to strike out or summarily dismiss economic tort claims brought by 565 claimants in the *Emerald Supplies* case.[1]

1.2 These claims formed part of the ongoing cartel damages litigation brought against British Airways (and 23 other airlines as Part 20 defendants) following the European Commission's finding in 2010 that certain airlines had participated in a cartel to inflate prices for air freight services by fixing fuel and security surcharges in relation to intra-EU/EEA flight routes and routes between EU/EEA airports and non-EU/EEA airports.

1.3 The Court of Appeal judgment has resulted in a significant portion of the claimants' claims being struck out. However, the judgment also has significant wider implications for the scope (and thus value) of other cartel damages claims that are brought in the English courts.

2. THE IMPORTANCE OF THE ECONOMIC TORT CLAIMS

2.1 The claimants had originally brought a claim for breach of statutory duties owed under Article 101 of the Treaty on the Functioning of the European Union and/or Article 53 of the Agreement on the European Economic Area based on the European Commission's 2010 infringement decision.

2.2 In 2013, the claimants sought to expand the scope of their claim by arguing that British Airways had also committed the torts of: (i) unlawful interference with the claimants' businesses by unlawful means; and (ii) conspiracy to injure the claimants by unlawful means, together referred to as the "economic tort claims". Both torts rely on there being an intention to injure the claimants. If the claimants had been successful with these economic tort claims, they would have been able to recover damages in relation to flight paths between non-EU/EEA countries, significantly expanding the scope of any potential damages award against the defendants.

3. BRITISH AIRWAYS' STRIKE OUT APPLICATION AND MR JUSTICE SMITH'S DECISION

3.1 On 31 December 2013, British Airways applied to strike out the economic tort claims on the basis that they were legally unsustainable, because the claimants had no realistic prospect of establishing that British Airways intended to injure the claimants, given that British Airways could not have known that the claimants would necessarily suffer loss due to the possibility of any alleged overcharges being passed on to others.

[1] *Emerald Supplies Ltd and others v British Airways plc* [2015] EWCA Civ 1024.

3.2 In the High Court, Mr Justice Peter Smith delivered his decision on 28 October 2014, declining to rule on the application in advance of disclosure and ordering British Airways to pay indemnity costs. Mr Justice Smith concluded that the issue as to whether British Airways intended to injure the claimants was a question of fact and that, as such, he could not strike out the claims before disclosure had taken place.

4. THE COURT OF APPEAL'S JUDGMENT

4.1 British Airways subsequently appealed Mr Justice Smith's ruling. On 14 October 2015, the Court of Appeal delivered its judgment, overturning Mr Justice Smith's decision to refuse to strike out the economic tort claims. In overturning the decision, the Court of Appeal unanimously held that it was bound by its own previous decision in *Newson Holding Ltd v IMI plc.*[2]

4.2 The Court of Appeal accepted Mr Justice Smith's reasoning insofar as that it would be premature to resolve the issue of intention if it involved consideration of the subjective intent of the defendant, since – in those circumstances – the disclosure of further documents might be necessary to determine the requisite intention. However, the Court of Appeal held that in the present case, there was sufficient material before the court to determine the issue, and that it was "*entirely fanciful*" to suggest that British Airways and its alleged co-conspirators had the requisite intention to injure the very customers on whom they rely for their business.

5. AN INTENTION TO INJURE?

5.1 The case involves a lengthy supply chain: the claimants are air freight shipping companies which purchase air cargo services through freight forwarders and then sell those services on to their customers (e.g., manufacturers, wholesalers or distributors). Those customers then sell services to their own customers (e.g., retailers), which in turn make sales to end consumers.

5.2 At the heart of the Court of Appeal's judgment was the fact that any potential loss caused through increased prices could have been passed on directly or indirectly to either the freight forwarders, or alternatively, the shippers or customers. The Court of Appeal further noted that the claimants had not put forward any evidence to support the absence of any passing-on.

5.3 In cases where there is a supply chain constituting various parties, a claimant or class of claimants must be able to point to an intention to injure a *specific level* of the supply chain. Following *Meretz Investments NV v ACP Ltd*[3], the Court of Appeal decided that the necessary intention to injure in respect of both the tort of unlawfully interfering with business by unlawful means and the tort of conspiracy to injure using unlawful means was the same.

5.4 The Court of Appeal concluded that if an intent to injure a particular claimant must be the cause of the defendant's conduct then "*[a]n intention to harm the claimant cannot properly or sensibly be described as a cause of the defendant's conduct if the defendant is not even sure that the claimant will suffer loss at all*". The Court of Appeal took the view that to infer intention from the actions of the defendants would, in the words of Elias LJ, "*dilute the concept of intention and bring it unacceptably and perilously close to a concept of foreseeability*". Thus, the Court of Appeal held that intention is exactly that; it is not foreseeability.

[2] [2013] EWCA 1377.

[3] [2006] EWHC 74 (Ch).

Moreover, neither indifference as to where the loss falls, nor knowledge that an element of the supply chain would typically absorb the cost, is enough to evidence intention.

5.5 As a result, the Court of Appeal concluded that British Airways (and the other airlines) had no intention of harming any specific class within the supply chain.

5.6 Finally, the Court of Appeal also decided that it was in the interests of the expeditious handling of the litigation to determine this issue at an earlier stage. The Court of Appeal noted the "*enormous*" number of claims waiting in the wings and the advantages of focusing the case on claims which may be sustainable in law as soon as possible and eliminating the ones which should be struck out.

6. WHERE DOES THIS LEAVE CLAIMANTS SEEKING REDRESS FOR NON-EU/EEA LOSSES?

6.1 The Court of Appeal's decision has important implications for the potential scope (and thus value) of cartel damages claims that can be brought in the English courts: its approach to intention appears to curtail significantly a claimant's ability to obtain wider recovery of cartel-related losses – i.e., beyond those recoverable under a breach of statutory duty claim – through the use of economic tort claims, given that there is likely to be a lack of intention in any cartel in relation to causing a loss to a specific element of the supply chain, and passing-on is likely to be a possibility in most cartel cases.

6.2 What other options may be available for claimants seeking to recover losses for non-EU/EEA losses then? Another possible way of claiming losses suffered as a result of anti-competitive behaviour which falls outside the jurisdictional scope of EU competition rules may be to bring a claim for "umbrella damages". This type of claim is brought on the basis of damages allegedly suffered as a result of the surcharge applied by non-cartelists who independently raised their own prices in order to adapt to price increases resulting from a cartel. Alternatively, as alluded to in the Court of Appeal judgment, claimants could potentially seek to rely directly on breaches of foreign competition laws.

6.3 It remains to be seen, however, whether such alternative routes will provide an effective means of redress for parties who have suffered cartel-related losses outside, as well as inside, the EU/EEA.

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