# STUCK IN MOLASSES: THE HIGH COURT'S RESPONSE TO THE DELAYS IN PUBLISHING THE AIR CARGO DECISION

## *Emerald Supplies v British Airways [2014] EWHC 3513 (Ch)*

**George Peretz, Monckton Chambers**

What is a national court to do in follow-on litigation when, in Peter Smith J's words, EU procedures on which that litigation depends adopt a *"one speed molasses approach"*?

### *The Commission's decision*

On 9 November 2010, the Commission took a decision imposing fines amounting to €799 million on 11 well-known airlines, including British Airways ("BA") ("the fined firms"). Its press release (IP/10/1487) described a practice over many years in fixing various surcharges on cargo rates.

The Commission also noted in its press release that it had dropped allegations made in its Statement of Objections against 12 other firms (including a consultancy firm) for lack of sufficient evidence ("the dropped firms").

The press release finally noted that any person or firm affected by the anti-competitive behaviour it had found could bring an action before national courts.

### *Subsequent litigation*

Emerald Supplies ("Emerald") (along with 564 others) had in fact anticipated that invitation by issuing a claim in the English court some two years earlier. It originally claimed only breach of statutory duty (the breach of Article 101(1) TFEU and the cognate provision in the EEA Agreement) but later added interference in its business by unlawful means and involvement in a conspiracy to injure it by unlawful means. Various breaches of foreign competition laws were alleged. Although it identified 31 airlines that had taken place in the cartel, it pursued BA alone on the basis that BA had joint and several liability for the acts of all the others. Unsurprisingly, BA sought a contribution from those other airlines (both fined and dropped firms), 23 of which were joined as Part 20 defendants.

Meanwhile, in early 2011, appeals against the decision were brought in the General Court by all the fined airlines. Pleas raised included matters going to liability (such as the application of the principle of single and continuous infringement and complaints that the Commission had erred by regarding evidence against them as

sufficient to found an infringement but not allegedly similar evidence against the dropped firms). The backlog before the General Court being what it is, no date has yet been fixed for the hearing of those appeals. Any trial of the Emerald action is likely to be delayed until the General Court's judgment (and any appeal to the Court of Justice).

### *Emerald's problem*

In the meantime, Emerald could be forgiven for trying to make such progress as it could before the domestic courts. However, it faced one frustrating difficulty. Right up to the present day, four years after the decision, anyone looking for it on DG Comp's website will find the following note: -

> *As DG Competition and the companies involved are in the process of establishing a version of the decision that does not contain any business secrets or other confidential information, no public version of this text is available for the time being. DG Competition is trying to settle this issue as soon as possible with a view to a quick publication. You are therefore invited to check the present section of DG Competition's website regularly in order to remain aware of any further developments.*

Emerald therefore had no copy of the decision on which it was trying to rely. Nor did the dropped firms that were brought into the action by BA. On the other hand, BA and the fined firms all had their own copies of the decision.

### *Emerald's attempt to resolve the problem*

In 2012 Emerald asked BA for a redacted copy of the decision but was refused. Emerald then wrote to the Commission, which indicated that it hoped shortly to be able to publish a meaningful version of the decision.

In February 2014, Emerald decided that it had finally had enough of regularly checking DG Comp's website in the hope of further developments. It applied for an order that it be allowed to inspect BA's copy of the decision. On 28 March, Peter Smith J ordered that BA disclose a copy of the decision to the court and that a process be set up under which those with copies of the decision would attempt to come up with a redacted version that could be disclosed to Emerald. However, in the words of Peter Smith J, *"the document that was produced pursuant to that exercise was and is completely useless because so much has been redacted … it looks like the kind of redactions seen in some FOI cases".*

Meanwhile, the Commission wrote to the court explaining its difficulties, referring in particular to a paragraph of the Judge's order of 28 March dealing with the position of the dropped firms: -

*The Commission understands the Court's concern at the delay in publishing a non-confidential version of the Decision. Under the present state of European Union law however, it is not possible for the Commission, within a reasonable timeframe, to override the numerous confidentiality claims made by [the fined firms], which prevent publication of a meaningful non-confidential version of the Decision. In this respect, I would refer you to an interim order made by the General Court in Case T-462/12 R, Pilkington Group Ltd v Commission and, on appeal, by the Court of Justice in Case C-278/13 p(R), Commission v Pilkington Group Ltd. The Court of Justice upheld an order made at first instance by the General Court restraining the Commission from publishing a non-confidential version of another cartel decision, the European Courts accepting the applicant's argument that the publication of material over which confidentiality was claimed could cause irreparable harm to the applicant. The determination of whether the material in question is indeed deserving of protection as confidential is a matter that will only be decided in the final judgment. In the light of the position taken by the Court in Pilkington, the Commission finds it is unable to publish a non-confidential version of the Decision, given the widespread objections to publication on grounds of confidentiality: the [fined firms] would be able to rely on Pilkington to obtain interim measures from the European Courts preventing publication of a non-confidential version of the Decision. The further implication of the Commission's inability to override the [fined firms'] confidentiality claims is that the Commission is unable to explain to the [dropped firms] the exact context in which they are mentioned in the Decision. The Commission is therefore not in a position to provide the [dropped firms] with the information necessary for them to make a substantiated application to your Court of the sort that appears to be contemplated by paragraph 8(2)(i) of your Order. The Commission has only been able to confirm, either in writing or orally and without any reference to any paragraphs of the Decision, that the [dropped firms] are mentioned in the factual part of the Decision. The Commission hopes therefore that you will understand that any applications made pursuant to paragraph 8(2)(i) of your Order by [the dropped firms] cannot be substantiated further than a request that any reference to the [dropped firm] making the application be removed from the Redacted Decision to be prepared pursuant to paragraph 10 of your Order.*

Peter Smith J was not impressed by that letter: -

*Although the letter was sent in the "spirit of co-operation" between the national courts and the EC there does not with respect to the Commission seem to be much co-operation from it. Despite the fact that it must be self-evident that 4 years even just to consider working out the non confidential part of the Decision is completely unacceptable no steps are being made to speed up that process and no indication is given as to when the whole*

*process will be finalised.*

Given the unsatisfactory outcome of the 28 March order, Emerald had another shot. This time, it proposed that the Judge himself consider the decision and decide what redactions should be made. Recognising the burden this would place on the Judge, it suggested that a named individual with considerable experience in the area be appointed to help. The Judge regarded that proposal as well intentioned and held that objections to it *"bordered on the ludicrous to the insulting"*. However, he decided that, nonetheless, the task would be an impossible one for him to undertake.

What, then, should be done?

### *What an English court would do, absent EU authority*

Peter Smith J started his analysis with the pointed observation that *"Without the assistance of any European authority this would not pose a problem."*

The concern in the present case was: -

> *that the Decision might reveal alleged wrongdoing against people who have not participated in that exercise or there might be observations or findings within that decision which the Part 20 Defendants in particular had not had an opportunity to deal with. The other concern is the potential damage caused by the material going in to the public domain. Finally there is the possibility that the Decision might identify other people against whom claims could be brought.*

The English approach to that problem, he held, would be to disclose into a tightly drawn confidentiality ring, combined with an order that the claimants should be prevented from using the decision to commence any proceedings against anyone else.

### *EU authority*

Peter Smith J then dealt with the two EU law-based objections raised against this approach.

(i) Sincere Cooperation

Air Canada argued that the duty of sincere cooperation precluded the Court from resolving the question of redactions, which was before the Commission and could well be appealed to the General Court.

The Judge rejected that submission. He noted that: (1) the Commission was unable to decide on the question of redactions, 4 years after the process was started; (2) the Commission would not expedite that procedure to assist the Court, and was therefore not itself displaying sincere cooperation; and (3) it had accepted that it was for the Court, balancing the rights of the claimants as victims with the rights of the defendants and the Part 20 defendants, to carry out the exercise of protecting the parties' respective rights.

(ii) *Pergan*

The second objection was that, in Case T-427/04 *Pergan* [2007] ECR II-4225, the General Court had held that a party in the position of the dropped firms (i.e. a party whose offending conduct was referred to in the recitals to a decision but which was not then named in the operative part) was entitled to have the description of its offending conduct treated as covered by the obligation of professional secrecy.

The Judge rejected that objection. In his view, the proposed confidentiality ring would protect the dropped firms' rights. The Commission's approach of negotiated redactions demonstrably led only to delay. It was clear from the Commission's letter, and from Case C-360/09 *Pfleiderer* [2011] ECR I-5161, that the job of balancing the dropped firms' rights as against the claimants' rights to an effective remedy.

### *Ruling on summary judgment/strike out applications*

In a further judgment in the case issued on the same day [2014] EWHC 3514 (Ch), Peter Smith J decided to adjourn applications for summary determination of three issues: (1) whether Emerald had adequately pleaded, for the purpose of the conspiracy/unlawful means claims, the necessary intention by BA to injure it; (2) whether means unlawful in a foreign jurisdiction counted for the purposes of those claims; and (3) if the answer to (2) was "yes" whether Emerald was entitled to claim damages in relation to loss suffered outside that foreign jurisdiction. The Judge declined to decide any of those issues, reserving them to trial. Question (1) would be best decided against a full factual background, and the other two questions were not suitable for summary determination.

### *Analysis*

The absence of any published decision in this important cartel case, so long after it was taken, is plainly unsatisfactory.

The Judge was unsparing in his criticism of the Commission. However, the underlying problem is the unacceptable backlog before the General Court: not

only does that backlog mean that the substantive appeals in this matter will not be resolved until many years after the decision, but it also places a very powerful weapon in the hand of any party seeking to object to publication of the decision: as long as it can show an arguable case, the fact that publication is irreversible once it has happens means that it is likely to get interim relief against any decision to publish and will therefore succeed in postponing publication for the many years until the General Court is able to give final judgment. The Commission is therefore in a much weaker position to take a firm line with confidentiality objections than is, say, the Competition and Markets Authority (where an equivalent challenge would be resolved in, at most, a few months).

Whatever the technical merits of the Judge's robust approach to EU case-law, it is a serious attempt to find a practical way of dealing with the unacceptable results of this delay. It may be hoped that it encourages those negotiating redactions in Commission decisions not to seek to drag the matter out unreasonably: if they do, they may find that national courts begin to lose patience.

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**Jon Turner QC & Michael Armitage** (instructed by Slaughter & May) acted for British Airways PLC

**Daniel Beard QC & Thomas Sebastian** (instructed by Hogan Lovells International LLP, Squire Patton Boggs (UK) LLP and Latham & Watkins LLP) acted for the Third Parties (Air Canada, Cathay Pacific Airways Ltd and Singapore Airlines Ltd/Singapore Airlines Cargo PTE Ltd)

**Kassie Smith QC** (instructed by Shearman & Sterling (London) LLP) acted for the Third Parties (Cargolux Airlines International SA)

**George Peretz & Josh Holmes** are acting for the Commission in the fined airlines' appeals to the General Court.

*The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.*

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