Neutral Citation Number: [2015] EWHC 3071 (Ch)

Case No: HC-2014-000482

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2015

Before :

MRS JUSTICE ROSE

- -

Between :

BAO XIANG INTERNATIONAL GARMENT CENTRE and Others	**Claimants and Respondents**
- and -	
BRITISH AIRWAYS PLC	**Defendant and Applicant**
QANTAS AIRWAYS LTD **SINGAPORE AIRLINES CARGO PTE LTD** **SINGAPORE AIRLINES LTD** **CATHAY PACIFIC AIRWAYS LTD** **CARGOLUX AIRLINES INTERNATIONAL SA**	**Applicants**

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Adrian Hughes QC and Ben Olbourne (instructed by Hausfeld & Co LLP) for the Claimants/Respondents

Kenneth MacLean QC and Gideon Cohen (instructed by Slaughter and May) for the Defendant/Applicant, British Airways Plc

Daniel Beard QC and Thomas Sebastian (instructed by King & Wood Mallesons LLP and others) on behalf of the other Applicants

Hearing date: 15 October 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE ROSE

Mrs Justice Rose:

1. On 8 May 2014 the Claimants issued a claim form in this Court in the name of Bao Xiang International Garment Center of Beijing, PRC and 64,696 other claimants, all based in China. The claim form states that this is a claim for damages arising from an unlawful price-fixing cartel in relation to air freight services supplied by the Defendant ('British Airways') and other airlines to the Claimants between 1999 and 2007. The claim form asserts that the price fixing cartel was, amongst other things, a breach of Article 101 TFEU and that:

> "The Claimants purchased air freight services to transport their goods worldwide. As a result of the collusion to fix prices, the Claimants paid inflated prices for those air freight services. The Claimants also lost profits and faced increased borrowing costs as a result and suffered other damage."

2. The claim form was signed by Boris Bronfentrinker a former partner in the law firm Hausfeld & Co LLP ('Hausfeld'). He signed under a statement of truth. The significance of a statement of truth is explained in the Practice Direction supplementing the requirement in CPR r 22 for a statement of truth verifying a statement of case, including a claim form:

> "3.7 Where a party is legally represented, the legal representative may sign the statement of truth on his behalf. The statement signed by the legal representative will refer to the client's belief, not his own. In signing he must state the capacity in which he signs and the name of his firm where appropriate.
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> 3.8 Where a legal representative has signed a statement of truth, his signature will be taken by the court as his statement —
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> (1) that the client on whose behalf he has signed had authorised him to do so,
>
> (2) that before signing he had explained to the client that in signing the statement of truth he would be confirming the client's belief that the facts stated in the document were true, and
>
> (3) that before signing he had informed the client of the possible consequences to the client if it should subsequently appear that the client did not have an honest belief in the truth of those facts (see rule 32.14)."

3. On 8 September 2014 the Claimants served Particulars of Claim running to 81 pages and as many pages again in appendices. The Particulars of Claim in these proceedings were also signed under a statement of truth by Mr Bronfentrinker asserting that the Claimants believe that the facts stated in the Particulars of Claim are true. The Particulars aver in paragraphs 1 and 10 that the Claimants were at various

dates between at least 1999 and 2007 purchasers in China of air freight services for cargo. In paragraph 11 it is averred that the Claimants transported items on routes from and to one or more starting or final destinations within the EU or EEA and on routes from and/or to starting and final destinations both of which are outside the EU and EEA. In paragraphs 154 onwards of the pleading, the Claimants set out their case on the loss they have suffered. They state that they do not have full records of their purchases of air cargo services but they are able to provide in Annex L particulars relating to purchases on routes between China and the EU. Annex L comprised a table:

"**COMBINED VALUE OF COMMERCE FOR ALL CLAIMANTS**"

Year	Value of Commerce (£)
1999	53,544,263*
2000	781,867,431
2001	743,135,104
2002	826,256,867
2003	920,765,761
2004	1,153,755,104
2005	1,552,419,531
2006	1,926,782,411
Total	**7,958,526,473†**

* The value of commerce figure for 1999 only represents estimated air freight spend incurred between 1 December and 31 December 1999.

† The value of commerce figures for the years 1999 to 2006 have been estimated by the Claimants from available air freight spend records."

4. The allegations of wrongdoing set out in the Particulars of Claim follow closely the particulars served in two other sets of proceedings brought against British Airways by shippers of air freight seeking damages for loss allegedly suffered as a result of paying inflated cargo prices. I will refer to those other sets of proceedings as 'the *Emerald* proceedings'. British Airways is the sole Defendant in the *Emerald* proceedings but it has brought a Part 20 Claim against 23 other airlines. It is expected that if the present claim proceeds, British Airways will also bring Part 20 proceedings against those same airlines in this claim.

5. British Airways and four other airlines have applied to strike out the claim on the grounds that the claim has been issued without Hausfeld having the necessary authority of any of the 64,697 Claimants to bring the proceedings. This ground was argued before me primarily by Mr MacLean QC for British Airways. The airlines argue in the alternative that the claim should be struck out as an abuse of the process of the court. This part of the application was argued primarily by Mr Beard QC on behalf of the four other airlines.

6. By the time of the hearing before me, Hausfeld accepted that the claims could not continue for the vast majority of the current Claimants because only 5,277 of the Claimants could show that they had shipped cargo by air during the relevant period. It was also conceded that none of the Claimants had authorised Hausfeld to bring proceedings in its name at the time the claim form was issued. However Mr Hughes QC appearing for the Claimants argued that 362 Claimants have recently expressly ratified the commencement of the proceedings on their behalf. He asks for an extra period until 31 December 2015 in which to gather more ratifications from Claimants and for the proceedings then to continue as a claim by however many Claimants have ratified by that point.

The background to the claim

7. The way in which the claim came to be issued is described in the evidence of Anthony Maton, another partner in Hausfeld, and of Mr Zhang Shun who was formerly the Director of the Legal Counsel Office of a Chinese social organisation based in Beijing called the China Chamber of International Commerce ('CCOIC'). Mr Zhang says that the CCOIC has about 200,000 members divided into two forms of membership. About 400 members are large businesses and other organisations that play an active role in CCOIC's activities and management. The other members are entities that have registered to use CCOIC's on-line services - in order to access those services, entities must become members. CCOIC is responsible for the issue of Certificates of Origin ('COO') which are required for the export of all Chinese manufactured goods. Any Chinese company wishing to export goods must apply to the CCOIC for a COO and about 95 per cent of COOs are issued following an on-line application.

8. In late 2011 CCOIC was contacted by Hausfeld. Mr Zhang attended a meeting in Beijing where representatives of Hausfeld explained to him about the infringement decisions taken by the European Commission and other competition regulators around the world in respect of air freight price fixing. Mr Zhang says that Hausfeld explained that the actions of the airlines had artificially inflated the prices paid for air freight services and that it was likely that Chinese exporters had suffered harm as a result of the cartel. CCOIC and Hausfeld discussed how CCOIC could assist its members in bringing proceedings against the airlines to recover those losses. Mr Zhang describes the efforts that CCOIC made, assisted by Hausfeld, to identify CCOIC members who may have a claim. CCOIC communicated with its members by notices published on its website, branch meetings, regional sub-council meetings, telephone calls and letters to individual members. In May 2012 about 60 representatives of CCOIC regional branches attended a meeting at CCOIC's Beijing offices where they were told about the cartel and were given written instructions as to how to identify potential claimants. Between June 2012 and May 2013 approximately 70 seminars were held around China with at least one in every province with significant export activity.

9. A number of the larger CCOIC members became claimants in the *Emerald* proceedings in about May 2013. No complaint is made in those proceedings about those claimants.

10. Mr Zhang says that in early 2014 he became aware that unless the CCOIC members commenced action promptly, there was a possibility that any claims they might have would be time-barred as a matter of Chinese law. They therefore prepared a list of CCOIC members that he believed 'were likely to have suffered harm as a result of the

airlines' cartel activities'. CCOIC retained Hausfeld and instructed Hausfeld on behalf of the Claimants to file proceedings in England. He describes the process of choosing the claimants:

> "In the end, we had to act very quickly. We reviewed our database of companies that had applied on-line for COOs and had applied to become members of CCOIC and provided a list of 64,697 of those members to Hausfeld. ... The 64,697 entities are all international trading companies. On this basis and on the basis of our understanding from our visits to the regions in which they are based that they were importing, exporting or temporarily exporting to participate in trade shows; we estimated that all of those companies were likely to have shipped via air.
>
> Through our on-site visits and investigation, the 64,697 Chinese enterprises on the list who conduct international trade may all utilize the air freight method to import, export and participate in exhibitions overseas on a provisional basis. However, since we are still not able to access accurate data about the other shipment methods, other than the export enterprise information from the applications of certificates of origin, we only relied on the COO export database for more accurate data as to the identity of Claimants who have made relevant air freight purchases."

11. Following the service of the Particulars of Claim in September 2014, Slaughter and May, solicitors for British Airways, and solicitors acting for various other airlines wrote a series of letters to Hausfeld seeking information about the nature of the relationship between Hausfeld and the 64,697 Claimants and about the basis for asserting that those Claimants might have a claim for losses arising from the cartel. From Hausfeld's reply by letter of 4 September 2014 it became apparent that Hausfeld was not instructed directly by any of the Claimants. Hausfeld's position, as they put it in their later letter of 13 March 2015, was that the firm was 'retained by CCOIC on behalf of the Claimants in order to pursue the Claim'. Accordingly 'Hausfeld represents each of the Claimants'. In answer to the questions about authority to act for the Claimants, Hausfeld wrote:

> "The Claimants are not obliged to disclose the nature or terms of any arrangement between Hausfeld and CCOIC in relation to the Claim, either in whole or specifically in respect of its jurisdiction and choice of law provisions, such arrangements being both privileged and confidential."

12. In response to the question of CCOIC's authority to act on behalf of the Claimants, and/or the Claimants' indication of consent to be parties to the Claim, Hausfeld said that this raised matters of evidence which would be served in accordance with the agreed timetable. They then, however, went on to describe the communications that had taken place between the CCOIC and its members.

13. On 19 December 2014 British Airways issued an application to strike out the claim pursuant to CPR 3.4(2) and/or the Court's inherent jurisdiction on the basis that Hausfeld had brought the claim without authority. Following a CMC before Mr Justice Peter Smith in December 2014 the other airlines who are likely to be brought into this claim as Part 20 Defendants were ordered to bring any strike out application in support of British Airways' application by 14 days after 19 December 2014. In the event four supporting applications were lodged: by Qantas Airways Ltd on 30 December 2014; by Singapore Airlines Cargo PTE Ltd and Singapore Airlines Ltd on 2 January 2015; by Cathay Pacific Airways Limited in 2 January 2015 and by Cargolux Airlines International SA on 30 January 2015. Those four additional applications raised several objections to the proceedings in addition to the lack of authority ground. I do not need to consider those additional grounds.

14. In January 2015, Slaughter and May raised another issue with Hausfeld. They had noted that a large number of the purported Claimants appeared to operate in industries which made it unlikely that they had ever shipped goods by air. Some of them operated for example in investment and banking, advertising and entertainment and others appeared to be holding companies. In March 2015 Hausfeld replied that they were carrying out urgent investigations as to which of the Claimants had purchased air freight services. Mr Zhang says, in his witness statement made on 8 May 2015 (over a year after the claim was issued):

> "We have recently conducted further searches of our database records in order to identify all of the Claimants that applied for a COO for the export of Chinese goods by air.
>
> Following further interrogation of the records in our database, our further more detailed searches of the COO records revealed that only approximately 5,000 of the Claimants had applied for COOs during the period from January 2000 to February 2007 for the export of Chinese goods by air.[2] ... Once we have completed searches of our COO records for Claimants who applied for COOs during the period from March 2007 to December 2008, the claims of any Claimant who has not exported goods by air during the relevant period will be withdrawn.
>
> [2] Unfortunately, our database only includes the certificates of origin application records dating back to January, 2000. Before that, we did not have electronic records. We are no longer in possession of any copies of the data from that period, including application forms."

15. Mr Maton of Hausfeld says in his witness statement that he confirms that Mr Zhang's account is consistent with what he has been told by his colleagues. His own description of how the 64,697 claimants were selected was as follows:

> "11. In April 2014, Hausfeld became aware that there was a possibility that any further claims by Chinese businesses might become time-barred, on the assumption, which is not accepted, but which was a possible risk, that Chinese law applied to the

> claim, if proceedings in England were not commenced promptly.
>
> 12. CCOIC provided us with the details of 64,697 companies which it had identified on the basis of the information available to it at that time as having been potentially affected by the cartel and the present claim was subsequently issued in May 2014, on the instruction of CCOIC, on behalf of each of those companies in order to best protect their interests."

16. For several months, the main issue in the strike out applications was whether, as a matter of Chinese law, CCOIC was authorised to instruct Hausfeld to launch these claims in the names of its members. A number of expert opinions in Chinese law considered CCOIC's articles of association, other provisions of the Chinese Legal Code and the Chinese law of agency. However, on 21 September 2015 Hausfeld wrote to Slaughter and May to say that those claimants who had not already provided – or who did not provide by 31 December 2015 – an express or positive ratification of CCOIC's authority to bring legal proceedings on their behalf would be withdrawing their claims against British Airways. Accordingly, their clients would no longer be pursuing arguments in support of the authority of CCOIC to act on their behalf other than on the basis of such express ratification. They contended that they would continue proceedings on behalf of clients who have, by the end of the year, provided express ratification of CCOIC's authority to bring legal proceedings on their behalf as it is their clients' position that as a matter of Chinese law, the CCOIC has authority to bring legal proceedings where the member has expressly ratified that authority. Since that concession, Hausfeld asserts that 362 claimants have provided the necessary express ratification of the proceedings and that they expect more to do so between now and 31 December 2015. The ratification is in the form of a letter sent by CCOIC to each claimant which the claimant has signed and returned to CCOIC ('the returned forms'). I shall consider the terms of those letters below.

Is the efficacy of the ratification governed by Chinese or English law?

17. British Airways submits that the question of whether the returned forms are effective to ratify the issue of this claim is a matter which is governed by English, not Chinese law. They rely on the decision of the Court of Appeal in *Presentaciones Musicales S.A. v Secunda and another* [1994] Ch 271 ('*Secunda*'). That case concerned a writ issued in April 1988 by English solicitors Goodman Derrick & Co in the name of a company PMSA registered in Panama. The solicitors had thought that they had been given authority to issue the claim by Mr Van Walsum who did not, it turned out, have actual authority to give those instructions on the company's behalf. The solicitors learned in March 1991 that PMSA had been dissolved under Panamanian Corporations Laws on 17 June 1987. The defendant in the action applied to strike out the writ as an abuse of process but the solicitors and the company argued that the company through its liquidators had expressly ratified the commencement and conduct of the action. The Court of Appeal upheld Mervyn Davies J's finding that under Panamanian law, the company had not ceased to exist as a result of the appointment of liquidators. Dillon LJ (with whose judgment Nolan LJ agreed) went on to say (emphasis added):

> "It is well recognised law that where a solicitor starts proceedings in the name of a plaintiff - be it a company or an individual - without authority, the plaintiff may ratify the act of the solicitor and adopt the proceedings. In that event, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification the defect in the proceedings as originally constituted is cured: ... The reason is that by English law ratification relates back to the unauthorised act of the agent which is ratified; if the proceedings are English proceedings, the ratification which cures the original defect, which was a defect under English law, **must be a ratification which is valid by English law.**"

18. Roch LJ in *Secunda* considered in more detail the issue raised here, namely whether the validity of the ratification of the unauthorised act of commencing proceedings was governed by English law or Panamanian law. Counsel for PMSA had submitted that the question of Mr Van Walsum's authority was governed by Panamanian law and under that law the acts of the liquidators in May 1991 had put the company and Mr Van Walsum in the position they would have been in had Mr Van Walsum had actual authority to commence proceedings in 1988. Roch LJ rejected that submission:

> "I do not doubt that if the issue had been whether Mr. Van Walsum had actual authority to instruct Goodman Derrick & Co. to issue proceedings in April 1988, that question could only have been resolved by the court examining the law relating to corporate bodies in the Republic of Panama and, probably, the constitution of the plaintiff company. In the present case there is no dispute, for the purposes of resolving the preliminary issue, that Mr. Van Walsum did not have actual authority in April 1988.
>
> What has to be considered, in my view, is first the effect of the contract apparently entered into between the plaintiff company and Goodman Derrick and of the act of Goodman Derrick in issuing proceedings against the defendants. The law which should apply to that contract and to that act, in my opinion, is the law which has the closest connection with that contract and with that act, namely English law. *Dicey & Morris, The Conflict of Laws,* 12th ed. (1993), p. 1459, under the heading "English Conflicts Rules" says:
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> "Where the agent lacks actual authority from the principal, it seems right in principle, that the law applicable to the contract between the agent and a third party, should determine whether the principal is bound or entitled. In effect in this situation one is asking whether the agent had apparent or ostensible authority to bind the principal. . . . As between the principal and the agent, the scope of the agent's authority to bind the principal and to confer rights upon him is necessarily determined by the law which governs their relationship, but third parties must be able to assume, at least where the agent has no actual authority

> from the principal, that the agents' authority covers everything which would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and the third party."
>
> The correct analysis of the facts of this case, in my judgment, is that the agents whose authority really has to be considered are Goodman Derrick and the act, the validity of which has to be considered is their act of commencing proceedings. Goodman Derrick are English solicitors retained, ostensibly on behalf of a Panamanian company, to perform legal services for that company in England. On that analysis the validating of the act of commencing proceedings by later ratification by those who clearly have authority under Panamanian law to do so on behalf of the plaintiffs must be a matter for English law.
>
> … Once it is shown by the law of Panama that neither Mr. Van Walsum nor Goodman Derrick were authorised to act, the consequences of that lack of authority are matters for the law of the place where the unauthorised act was performed. Thus … I conclude that the issue of ratification is governed by English law."

19. Mr Hughes did not, as I understood his submissions, seek to distinguish *Secunda* from the present case although he submitted that the question of ratification by the Claimants was a matter governed by Chinese law and that appeared to have been common ground between the experts until a short time before the hearing. In my judgment, the *Secunda* decision is binding authority in support of British Airways' submission that the right question here is whether the returned forms are an effective ratification by the 362 claimants of Hausfeld's conduct in commencing proceedings in their name in May 2014. The question is not the one which the Claimants posed, namely whether the returned forms are an effective ratification by the 362 claimants of CCOIC's purported instruction to Hausfeld to commence proceedings in their name. Further, the answer to the correct question must be ascertained by looking at English law and not Chinese law, for the reasons set out by Roch LJ in his judgment.

Are the English law requirements for ratification met by the returned forms?

20. Bowstead and Reynolds on Agency (20th edn) paragraphs 2-069 onwards set out the requirements for ratification by the principal of an unauthorised act of an agent. Ratification may be express or by conduct. An express ratification is a manifestation by one on whose behalf an unauthorised act has been done that he treats the act as authorised and becomes a party to the transaction in question. British Airways also relies on the statement at paragraph 2-069 of Bowstead that:

> "In order that a person may be held to have ratified an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify the act and take the risk whatever the circumstances may have been. … "

21. I was also referred to the judgment of Moore-Bick J (as he then was) in *Yona International Ltd and another v La Réunion Française Société Anonyme d'Assurances et de Réassurances* [1996] 2 Lloyd's 84, 103 to the same effect.

22. Hausfeld accept that express ratification stands or falls by the contents of the returned form; they do not attempt to rely on any other information given to the 362 claimants as providing them with the information necessary to support a valid ratification. They submit that the returned forms constitute an express ratification whether the question is governed by English of Chinese law. The returned forms contain text in Chinese and English. The English purports to be a translation of the Chinese but that translation is inaccurate and a better translation is provided by British Airways' expert Mr Edward Epstein attached to his second witness statement dated 5 October 2015. That translation is set out in full in the Annex to this judgment.

23. The submission that a signature in response to that text amounts to a ratification by these 362 claimants of Hausfeld's conduct in commencing these proceedings on their behalf must be rejected. The returned form does not tell the company that proceedings have in fact already been commenced in its name in England. It merely refers to overseas attorneys who have filed a claim on behalf of Chinese enterprises. Although the wording refers to the company being willing 'to continue' to participate in the proceedings, the returned form does not make clear that the actions already taken by the CCOIC for which retrospective approval is sought include instructing Hausfeld to bring proceedings in the company's name, rather than to bring a collective claim in CCOIC's name for the benefit, more broadly, of its members. Further, the description of what will be required from the company if it decides to ratify the claim and carry on as a named claimant is highly misleading. The statement that the company would not need to participate directly in the lawsuits in foreign courts is wrong. By becoming a claimant the company is participating directly in the proceedings. The claimants in the *Emerald* proceedings have already had to devote a huge amount of management time and resource in providing data to populate extensive Scott Schedules detailing each air freight shipment on which they rely for their individual claim. The claimants in these proceedings will have to do the same if they continue with their claims. The impression given to the company that sending back the form creates only the possibility of financial gain and no risk of expense ignores the realities of what may well be required of them in terms of provision of documents or making employees or senior executives available to give evidence. The assurance given to the companies that they will not in any circumstances be liable to pay legal fees for their own lawyers or for the legal costs of the Defendants if their claim is unsuccessful also appears to be entirely unsupported by fact. Not surprisingly British Airways and the other airlines had been raising issues of the Claimants' ability to meet adverse costs orders or to provide security for costs at this stage of the proceedings. No comfort has been forthcoming other than that inquiries are being made about taking out insurance to cover these costs. It is not at all clear therefore whether the assurance stressed in the returned forms is based on any arrangement in place at the time the returned form was signed.

24. In my judgment, none of the 64,697 claimants on whose behalf this claim was brought by Hausfeld has either authorised the bringing of the claim or ratified Hausfeld's actions in starting the claim on its behalf. I accept the submission of British Airways and the other airlines that in these circumstances, the only possible course for me to

take is to strike the whole of the claim out. In *Adams and others v Ford and others* [2012] EWCA Civ 544 ('*Adams*'), which I discuss in more detail later, Toulson LJ said (emphasis added):

> "32. The legal consequence of proceedings being issued without authority is also well established. The proceedings are defective and liable to be struck out on that account, but they are not devoid of legal effect until they are struck out. Moreover, the court is not bound to strike them out if **at the time of the strike out application the client on whose behalf the action was commenced wishes it to continue and to accept responsibility for it**."

25. The evidence before me does not establish that any of these Claimants on whose behalf the action was commenced by Hausfeld wishes it to continue and accepts responsibility for it. The claims must therefore be struck out on the basis of lack of authority.

Abuse of process

26. As the matter was fully argued before me, I will go on to consider the airlines' alternative submissions about abuse of process arising from Hausfeld's conduct. CPR r 3.4(2) provides:

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

27. In *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529, 536 Lord Diplock referred to the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.

28. The most pertinent case to which I was referred is the *Adams* case referred to earlier. In *Adams* a claim form was issued in the names of 273 claimants against 19 defendants. The claimants were members of the public who had subscribed to three technology-based investment schemes. The essence of the claim was that these were fraudulent schemes in their creation and in the way that the money paid over by the claimants was disbursed. A partner of the firm of solicitors which had issued the claim had signed a statement of truth that the claimants believed that the facts set out were true and that he was duly authorised by them to sign the statement. Prior to

service, the claim form was amended to reduce the number of claimants to 170 and the claim form was served shortly after. Two days before amending the claim form, the solicitors wrote to the solicitors for the defendants explaining the basis for the claim and indicating that the claim had been issued before they had heard back from all the subscribers to the schemes as to whether they wished to pursue a claim. In further correspondence it emerged that some of the original claimants wished to discontinue their claim and that seven of the original claimants had been approached by the solicitors but had not given the firm any clear instructions to act on their behalf. By the time of the hearing of the strike out application at first instance, David Steel J found that the firm had instructions to prosecute the action from 158 complainants.

29. Although David Steel J accepted that the statement of truth made by the solicitor on the claim form had been untrue in important respects, he declined to strike the claim out, holding that it would be wholly disproportionate to strike out the entire claim on the basis that some of the original claimants had not given the firm instructions. The Court of Appeal upheld the trial judge's decision. Toulson LJ, with whom Black and Arden LJJ agreed, rejected the submission that the claim was a nullity either entirely or in relation to the claimants who had only authorised the proceedings after the claim form had been issued. He applied the decision in *Secunda*, holding that the introduction of the procedural rule requiring a statement of truth since the *Secunda* decision did not distinguish that authority from the case before him. He went on to consider the defendants' submission that if the solicitors had acted with propriety, the original claim form would have been limited to those who had given authority to the firm to issue the proceedings in their name. He said:

> "It is unquestionably a sound general proposition that it is a misuse of the process of the court for a law firm to issue proceedings in the name of a person who has not given it authority to do so. There are public interest considerations. It is not in the public interest that a law firm should use the justice system to initiate litigation in a way which amounts to meddling in matters which are not its proper professional concern."

30. There were circumstances, Toulson LJ continued, where it would not be abusive to issue proceedings without formal instructions, for example where a limitation deadline loomed and the chairman of a company asked the solicitor to issue proceedings before the company's constitutional formalities had been completed. There was therefore no categorical rule that the issue of proceedings without valid authority from the claimant must necessarily amount to an abuse of process. Although those facts were far from the facts in *Adams*, it was necessary to look closely at the relevant facts in their context when considering a question of abuse of process. On the facts of *Adams* the Court of Appeal held that it would not be right to stigmatise the conduct of the solicitors as 'officious speculative intermeddlers in a matter in which they had no proper professional interest'.

31. An important element of the judgments in *Adams* concerns the emphasis that the Court placed on the need for transparency on the part of the solicitors issuing the proceedings disclosing to the defendants the problems existing with authorisation by the purported claimants. The Court found that in the light of the letter sent by the

claimants' solicitors before service of the claim form, there had been no attempt by the statement of truth to deceive the defendants into thinking that all the claimants had authorised the issue of proceedings. The Court stressed that the question of which clients had or had not instructed the solicitor to bring proceedings was not confidential – the defendants were entitled to know who had authorised the issue of the claim form and who had not. Toulson LJ set out the steps that the solicitors should have taken, making phased statements of truth in respect of claimants as and when they signed up. Arden LJ in *Adams* also stressed the need for transparency, summing up the judgments given in the case as holding that 'there are cases where it will be acceptable to start proceedings without authority provided that it is openly done'. There may be justification for issuing proceedings without authority and that must be judged in the light of the circumstances prevailing at the time of the issue of the proceedings.

32. If I were considering whether to exercise a discretion to strike out the present claim I would undoubtedly consider it was appropriate to strike it out as an abuse of process for the following reasons.

33. First, the evidence of Hausfeld's partners as to how the 64,697 claimants were chosen shows that they had no grounds for believing at the time they issued proceedings that any particular claimant had shipped air freight over the relevant period. They were given a list of 64,697 names by CCOIC. The most that Mr Maton is prepared to say in opposition to the strike out application is that the 64,697 names were those that CCOIC had identified on the information available to it at the time 'as having been potentially affected by the cartel'. This is a very different situation from that in *Adams* where all the claimants bringing proceedings had a valid claim but not all of them wished to pursue it. Hausfeld had been working with CCOIC to identify claimants for several years before proceedings were issued in March 2014. Yet when in January 2015 Slaughter and May queried whether the claimants had shipped any goods by air, CCOIC was able within four months to interrogate its database to discover that only 5,277 of the claimants had shipped freight by air. It was wholly irresponsible of Hausfeld to launch proceedings in the name of tens of thousands of additional claimants when there was no basis for signing a statement of truth in the claim form and in the Particulars of Claim asserting that those claimants had shipped goods by air. Further, this discovery leaves a substantial question mark over Annex L to the Particulars of Claim. The table set out there asserts that the total value of commerce has been estimated from 'available air freight spend records' as £7,958,526,473. That figure is not the figure for the loss claimed but purports to be part of the expenditure by the claimants on air freight - that part relating to shipment between China and the EU/EEA. But the figure is intended to send a clear message that the value of the claim is several billions of pounds, even if only a modest overcharge is eventually proven. It is difficult to imagine on what basis Hausfeld could have signed the statement of truth as regards this figure if in fact only 5,277 of the claimants shipped freight by air.

34. Secondly, Mr Maton's evidence as to the basis of Hausfeld's belief that CCOIC was able, as a matter of Chinese law, to authorise them to issue proceedings in the names of the CCOIC members was, in my judgment, wholly inadequate. He says: (emphasis added)

> "Following our initial meetings with CCOIC, we sought independent legal advice as to the authority of CCOIC to act on behalf of the Claimants as a matter of Chinese law. We were also provided with numerous documents including the Articles of Association of both CCOIC and CCPIT and a statement from the Fair Trade Division of the Ministry of Commerce of the PRC ('MOFCOM') dated 7 April 2013, all confirming CCOIC's authority **to represent its members in legal matters.**"

35. Following the service of that evidence, Shearman & Sterling (solicitors for Cargolux) wrote to Hausfeld asking for a copy of the 'independent legal advice' as to CCOIC's authority to act for its members. Hausfeld responded in a letter dated 5 June 2015 that the advice 'was provided orally and no such written advice was received at the time'.

36. The evidence relied on by Hausfeld before they abandoned their contention that CCOIC was actually authorised to instruct Hausfeld on behalf of its members was an expert opinion of Professor Donald Clarke of George Washington University Law School. The most pertinent parts of his evidence are that:

    i) A 'genuine although contestable argument exists' that CCOIC is authorised by statute to act on behalf of the claimants in the litigation by virtue of the Foreign Trade Law of the PRC;

    ii) It is possible for a valid agency relationship to be created by tacit consent under Chinese law; he has been unable to find an authoritative answer to the question as to what evidence is required to establish that tacit consent exists but the standard is likely to depend on the 'preponderance of the evidence'.

    iii) Similarly it is possible for an unauthorised act to be ratified by the principal but again, Prof Clarke is unable to find an authoritative answer as to what information must be communicated to the principal in order for the principal validly to consent to the agent acting on its behalf.

37. It is not clear by whom the oral advice to Hausfeld before the proceedings were launched was given. Even once the written opinion of Prof Clarke was received in April 2015, there was nothing in it that gave Hausfeld any assurance that the CCOIC was empowered to instruct the firm to lodge proceedings in a foreign jurisdiction in the names of many thousands of members who may only have signed up to membership of the organisation in order to apply on-line for a COO.

38. Thirdly, there was a complete lack of candour on the part of Hausfeld, despite the very clear guidance of the Court of Appeal in *Adams* as to the proper way for a solicitor to behave when faced with the dilemma Hausfeld thought they were facing. Far from alerting Slaughter and May when issuing or serving the claim form that there were serious difficulties with identifying claimants, Hausfeld served the claim form with no explanations and the false statement of truth was compounded when the Particulars of Claim, including Annex L, was served a few months later. The assertion in correspondence that it was not obliged to disclose details of who had authorised the proceedings is directly contrary to the decision of the Court of Appeal in *Adams*.

39. Fourthly, Hausfeld's attempt to salvage something from the claim by purporting to rely on the returned forms as express ratification of their unauthorised conduct is in my judgment unsuccessful. They must realise that the terms of the letters sent to the Claimants are highly misleading in their description of the nature of the claim and of what is required of claimants in proceedings in this court.

40. Mr Hughes submitted that British Airways cannot fairly complain about the large number of claims it is facing. That is a result, he says, of the fact that they were involved in a price fixing cartel covering a large geographic area over many years in respect of a service that is supplied to thousands of customers. Mr Coulson's recent witness statement for Hausfeld stresses the difficulty of obtaining instructions from Chinese companies who are accustomed to personal contact in relation to their business affairs and may not respond to emails or telephone calls. Mr Hughes refers to paragraph 46 of *Adams* in which Toulson LJ set out the hurdles facing the solicitors in that case in forming 'a litigation group' as the only practical way in which the victims of the alleged fraud could hope to obtain redress. I do not regard the position here as analogous to the position in *Adams* for the reasons I have already set out. The collection of potential claimants in the present case was an exercise instigated by Hausfeld in late 2011, about a year after the EU Commission's Press Release announcing its finding of infringement by British Airways. They chose to participate in the very extensive programme that Mr Zhang describes aimed at identifying many thousands of claimants rather than focussing on gathering together a more modest litigation group of companies who Hausfeld could with confidence assert had a valid claim. Instead, after more than two years' work they have not in fact gathered a litigation group together at all for these proceedings. To allow this claim to proceed would, in my judgment, be manifestly unfair to the airlines and would bring the administration of justice into disrepute among right-thinking people. It is an abuse of the process and should be struck out for that reason.

ANNEX:

TRANSLATION OF LETTER SENT TO CLAIMANTS AND SO FAR RETURNED BY 362 CLAIMANTS

"Letter of Confirmation

International aviation anti-monopoly claim case, please reply in a timely manner

The China International Chamber of Commerce has notified your company to organize participation in hearings by courts in England and the Netherlands in the British Airways tort case. Previously, China International Chamber of Commerce has offered an extensive explanation to a vast number of enterprises in regard to the facts of the case and has cooperated with overseas attorneys, who have filed a claim on behalf of enterprises from our country.

The present lawsuits involve a conspiracy by many international airlines and cargo shipping companies to form a price-fixing cartel, which implemented a shipping price monopoly. These monopolistic actions have caused many enterprises from our country, including your company, to pay excessive air freight charges, resulting in huge losses.

The China International Chamber of Commerce believes that it is very important to help its members and client enterprises to file claims and recover losses with regard to the monopolistic actions of the airlines. Your company does not need to directly participate in the lawsuits in foreign courts or pay any legal fees in advance. The China International Chamber of Commerce has made proper arrangements for funding support of the cost of this litigation and has filed collective claims on behalf of your company and other enterprises. Due to the efforts made by China Chamber of Commerce in organizing the litigation and the funding support for the litigation, 40% of the total damages that are eventually received will be deducted to pay attorneys' fees, the cost of the litigation and other costs and expenses. Sixty percent of the total damages that are eventually received will be returned to the plaintiff enterprises, including your company, that have been affected by such a monopoly, according to the percentage of the cost incurred by these enterprises in acquiring air freight services. In the event that the present lawsuits are lost and no damages are recovered, all of the expenses related to the present lawsuits will be borne by the overseas partners through coordination of the China International Chamber of Commerce and your company will not be required to bear any expenses or legal liability.

Principal: .....

Signature: .....

Your company has the right to decide whether it is willing to continue to participate in such claims proceedings. If you agree to participate, please confirm the following items as soon as possible:

1. Your company authorizes China International Chamber of Commerce to represent your company and participate in the aforementioned lawsuits brought in the United Kingdom and the Netherlands.

2. This representation shall be valid until the final results of disposition are obtained in such lawsuits.

3. This representation includes assistance to your company in demanding damages and recovering losses from the airlines that participated in the international air freight monopoly. The China International Chamber of Commerce has the right to represent your company in taking any and all measures deemed necessary or feasible by China International Chamber of Commerce. Such measures shall include but are not limited to: designating attorneys; affirming or waiving rights; changing the relief demanded; participating in settlements; further prosecution of lawsuits and counter lawsuits; and filing appeals, etc.

4. By your company's approval herewith, the validity of the actions taken thus far by the China International Chamber of Commerce on behalf of your company with respect to such lawsuits shall be the same as if the China International Chamber of Commerce had received authorization from your company for the previous actions taken.

Upon confirmation that there are no errors, please also email or fax the document signed by your legal representative (legitimate principal) to China Council for the Promotion of International Trade/China International Chamber of Commerce legal counsel office or local chapter:
[Email addresses]

If your company's response not agreeing to be represented by our centre in the aforementioned litigation proceedings is not received by May 15, 2015, in accordance with the provisions of Article 66 of The General Provisions of Civil Law, the China International Chamber of Commerce will assume that your company has already agreed to give the aforementioned authorisation to represent your company to continue to participate in the litigation process.

We are happy to answer any questions related to the aforementioned matters and at the same time, are looking forward to a prompt reply from your company."