Travel Law Group

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TRAVEL LAW

Travel Law Case Update

Introduction

In the last month the Court of Appeal has handed down judgments in two cases that will have a considerable effect on the airline industry and the rights of passengers to claim compensation for delayed and cancelled flights.

In this Travel Law Case Update, **Ian Denham** (2003 call) considers the cases of *Huzar v Jet2.com* and *Dawson v Thomson Airways*.

Amy Rollings (2012 call) reviews the judgment of the Privy Council in *Shtern v Cummings*, a case which concerned the claim of a tourist injured whilst on holiday in Jamaica.

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Ronald Huzar v Jet2.com Limited

This was an appeal to the Court of Appeal which considered the definition of "extraordinary circumstances" in the context of delayed air travel.

Facts

Mr Huzar booked a flight from Malaga to Manchester with Jet2 that was delayed due to a technical issue with the aircraft.

The Claim

Mr Huzar sought compensation pursuant to an EU regulation, Regulation (EC) No. 261/2004.

It was not disputed that *prima facie* he was entitled to compensation from the airline carrier but it was disputed whether an exception applied, where the operating airline can prove that the delay was caused by "*extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken*".

Jet2 alleged that the delay was as a result of a wiring defect in the fuel valve circuit which could not have been prevented by prior maintenance of prior visual inspection. It was therefore argued it was both unexpected, unforeseen and unforeseeable, and as such amounted to an "extraordinary circumstance".

Trial Judgment

The matter came before District Judge Dignan, sitting in the Stockport County Court. He accepted Jet2's characterisation of the nature of the fault and held that in the circumstances the exception applied and there was no right to compensation.

The First Appeal

On appeal there was no challenge to the factual finding that the fault was unforeseen and unforeseeable.

Nonetheless HHJ Platts, sitting in Manchester County Court, held that the exception did not apply and awarded compensation.

Jet2 appealed the judgment to the Court of Appeal.

The Legal Framework

The stated intention of Regulation 261/2004 is to "*establish common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights…*"

Article 6 concerns the delay of aircraft and provides:

> 1. *When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:*
>
> *(a) for two hours or more in the case of flights of 1500 kilometres or less; or*
>
> *(b) for three hours or more in the case of all intra-Community flights of more than 1500 kilometres and of all other flights between 1500 and 3500 kilometres; or*
>
> *(c) for four hours or more in the case of all flights not falling under (a) or (b), passengers shall be offered by the operating air carrier:*
>
> *(i) the assistance specified in Article 9(1)(a) and 9(2); and*
>
> *(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and*
>
> *(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).*
>
> 2. *In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.*

There is an exception to provide compensation that is conferred by Art 5(3), which provides:

> 3. *An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.*

There were two elements to the exception and the burden was on the carrier to show that each was satisfied and these were:

1. the cancellation or delay must be caused by extraordinary circumstances; and

2. the carrier must have been unable to avoid the cancellation or delay, even by taking all reasonable measures.

The second limb was not in issue as the District Judge's finding was not appealed.

The Court of Appeal

Lord Justice Elias gave the leading judgment, with which Lord Justices Laws and Gloster agreed. In his judgment Elias LJ gave careful consideration to the meaning of "extraordinary circumstances".

Unfortunately the Regulations did not provide a clear definition of "extraordinary circumstances". However, some light is shed on the issue by recitals 14 and 15, which state:

> *(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.*
>
> *(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.*

However, the definition of "extraordinary circumstances" was considered by the Court of Justice of the European Union (CJEU) in the case of *Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA* (Case C-597/07).

The Court in Luxembourg defined the concept of "extraordinary" circumstances by reference to two limbs, those being:

1. the nature or origin of the event or events which cause the technical problem must not be inherent in the normal exercise of the activity of the carrier; and

2. that it should be beyond its actual control.

Elias LJ considered the above and held:

> *"35. In my view, the difference between the two arguments can, without undue distortion, be encapsulated in this way. The appellant is in effect construing the test as follows: "events by their nature or origin are not inherent in the normal exercise of the activity of the air carrier because they are beyond its actual control." The key concept, on this test, is actual control; if the event is beyond control it is necessarily not inherent in the normal exercise of the activity. By contrast, the respondent is saying; "events by their nature or origin are not inherent in the normal exercise of the activity of the air carrier and therefore are beyond its actual control." The defining concept on this test is the notion of what is inherent in the normal exercise of the carrier's activities; if it is not inherent, it is beyond control and vice versa.*
>
> *36.* ***In my judgment, a proper understanding of the inter-relationship between the two limbs should focus on the concept of "extraordinary circumstances" itself, the language used in Article 5(3). This requires that the circumstances must be out of the ordinary****, as the Court noted in Sturgeon. As the CJEU recognised in paragraph 24 of Wallentin-Hermann,* ***difficult technical problems arise as a matter of course in the ordinary operation of the carrier's activity. Some may be foreseeable and some not but all are, in my view, properly described as inherent in the normal exercise of the carrier's activity. They have their nature and origin in that activity; they are part of the wear and tear****. In my judgment, the appellant's submissions fail to give proper effect to the language of the exception. It distorts the meaning of limb 1 in defining it by reference to limb 2, and thereby renders it superfluous. It makes an event extraordinary which in common sense terms is perfectly ordinary.*

> 37. *There is a further fundamental problem in the analysis. If Mr Lawson [for Jet2] were right, the effect would be to shift the focus away from the source or origin of the technical problem and asks instead whether it ought to have been picked up in the course of maintenance. But that in my view – although Mr Lawson baulked at this – is effectively asking whether the airline was at fault in not identifying the problem in advance. There are two difficulties with accepting fault as the test. First, the ability or otherwise to anticipate and deal with the technical problem does not alter its source or origin, and that is the material test. Second, if the intention had been to relieve the carrier of the obligation to pay compensation when it is not at fault, it would have been an easy principle to define in simple language, as Mr Lawson conceded. The language of Article 5(3) is in my view wholly inappropriate to capture that principle."*
>
> *(Emphasis added)*

Accordingly the appeal was dismissed on the grounds that the first limb was not satisfied.

Comment

The delay in this case was caused by usual 'wear and tear' and it seems inevitable that this judgment will increase the number of claims brought as a result of delayed and cancelled flights.

In summary the Court of Appeal held that technical problems that caused delay to air passengers were inherent in the normal exercise of a carrier's activity, even if they were not foreseeable. Therefore they did not amount to extraordinary circumstances, and the carrier could not rely on the exception in Regulation article 5(3) to avoid its obligation to pay compensation for the delay.

A technical problem may constitute an extraordinary circumstance provided it stemmed from an event which was not inherent in the normal exercise of the activity of the air carrier and was outside the carrier's control

Accordingly, in assessing a technical problem it was necessary to consider the cause of the technical problem. If the cause of the technical problem is one which is 'inherent in the normal exercise of the activity of the air carrier concerned' then it necessarily follows that it is also within the control of the carrier and therefore not extraordinary.

Ian Denham

James Dawson v Thomson Airways Limited

This was an appeal to the Court of Appeal which considered the appropriate limitation period for a claim arising from a delayed flight.

Facts

The claim arose from a delayed flight from London Gatwick to the Dominican Republic in December 2006.

Mr Dawson sought compensation pursuant to Regulation 261/2004.

His claim was issued in in December 2012, just before the expiration of the six year limitation period under section 9 of the Limitation Act 1980.

Thomson accepted that it would have been liable to make the payment if proceedings had been brought in time, but argued that the claim was out of time and had been discharged by virtue of the two year limitation period contained in Article 35 of the Montreal Convention, which governs the liability of carrier by air.

Trial Judgment

The matter came before HHJ Yelton, sitting in the Cambridge County Court. He held that by virtue of section 3 of the European Communities Act 1972 the claim fell out of the Montreal Convention and the six year limitation period applied. The Claim succeeded.

Thomson appealed.

The Court of Appeal

The leading judgement was given by Lord Justice Moore-Bick, which whom Lord Justices Kitchin and Fulford agreed.

The Court held that:

- Section 3 of the European Communities Act 1972 provided that any question about the meaning or effect of any EU instrument should be determined in accordance with the principles laid down by any relevant decision of the European Court of Justice ('ECJ').

- The English Courts were therefore bound to follow and apply the decisions of the ECJ in relation to the nature of the claim for compensation under Article 7 of the Regulation and its compatibility with the Convention. As such, that included the ECJ's ruling that the obligation in question lay outside the scope of the Convention.

- On that basis the Montreal Convention had no relevance to the applicable limitation period and thus the six year limitation period applied.

Comment

The Court of Appeal made clear, though exhaustive consideration of both domestic and European law, that a six year limitation period applies to claims arising from Regulation 261/2004.

The airlines are now likely to face an influx of claims that were previously considered to be statute barred.

Ian Denham

Adele Shtern v Monica Cummings

This was an appeal to the Judicial Committee of the Privy Council from a decision of the Court of Appeal of Jamaica.

Facts

The appellant is a citizen of the USA. She was, at all material times a guest at the Villa Mora Hotel at Norman Manley Boulevard, Negril, Westmoreland, Jamaica ('the hotel'). She alleged that she sustained injury when she opened the door of a refrigerator in the office of the hotel and received an electric shock. (The particulars of special damages amounted to nearly USD 1.4 million at the date of the trial.)

Brief History of the Claim

The appellant issued proceedings against three Defendants:

1. A private company called Villa Mora Cottages Limited ('the Company'), who ran the hotel.

2. The Respondent, Monica Cummings who owned the land on which the hotel stands and is the controlling director and shareholder of the Company.

3. Mr. K Black, an employee of the Company as a manager of the hotel at the time of the Appellant's accident. By the time the action came to trial he was no longer a party and had died.

The Appellant claimed that this accident was caused by the negligence of the first Defendant, as the operator of the hotel, and/or the respondent, as the owner of the premises upon which it was situated. She also placed reliance on the common duty of care under the provisions of the Occupiers' Liability Act 1957 ('the 1957 Act').

Trial Judgment

Lawrence-Beswick J found, on the balance of probabilities that the appellant sustained an electric shock from the refrigerator. However, after a detailed review of the expert evidence he considered that the relevant evidence as to what occurred at the precise time of the incident was 'minimal' and it was insufficient to allow a determination of the shock suffered by the appellant. Accordingly, the

Judge was unable to make a finding of negligence on the part of the Defendants. That conclusion also sufficed to dispose of the claim under the Act.

The Court of Appeal of Jamaica ('The Court of Appeal')

The Court of Appeal reversed the trial judge's dismissal of the Appellant's claim against the company but upheld the dismissal of her claim against the Respondent. It was held that the judge's conclusion that the Appellant suffered an electric shock raised a prima facie inference that the accident was caused by the negligence of the company as the occupier of the hotel either under the general law or under the 1957 Act.

The company did not appeal the Court of Appeal's decision.

Issues before the Judicial Committee of the Privy Council

The question raised at appeal was whether the Court was right to hold that the Respondent owed the Appellant no relevant duty of care.[1] It was determined that the Court of Appeal was correct to draw the distinction between the company, which carried on the business of running the hotel and the Respondent. The fact that the respondent was the owner of the site and had powers as a director did not make her operationally responsible for running the hotel business. Further, the mere fact that she was the owner of the refrigerator did not give rise to any duty of care on her part as an occupier towards the Appellant.

It was held that the Court of Appeal was correct to find that the Respondent owed no duty of care to the Appellant. The Board advised that the appeal should be dismissed.

Comment

This appeal raises interesting points with regards to the liability of hotel owners in international personal injury matters when they have no responsibility in the day-to-day running of their business but do have powers as a director. As explained by Lord Denning in the leading case of *Wheat v E Lacon & Co Limited* [1966] AC 552, 577, whilst a Respondent may have sufficient occupational control to owe a duty of care to see that the structure is reasonably safe, the duty lies with the party who has the operational control of the hotel in the day-to-day running of the business.

Amy Rollings

1 The first question for the Court to decide was a procedural question regarding the pleadings. This is beyond the scope of the case summary.

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