TRICK OR TREAT? THE SUPREME COURT'S REFUSAL OF PERMISSION TO APPEAL IN *HUZAR* AND *DAWSON*

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On 31 October 2014, the Supreme Court published its decision to refuse permission to appeal in *Huzar v Jet2.com Limited*[1] and *Dawson v Thomson Airways Limited*[2] following months of apprehension.

The Supreme Court's decision means that technical faults will now rarely constitute 'extraordinary circumstances' under EC Regulation 261/2004 (the Regulation) and the national limitation period will continue to apply to Regulation claims. The ruling in *Huzar* in particular represents a serious blow to the ability of airlines to defend such claims.

Whilst on its surface, the decision may appear to symbolise a welcome victory for passengers, the financial repercussions for the airline industry are likely to permeate the entire European aviation market.

Background

Since the judgment of the Court of Justice of the European Union in the conjoined cases of *Nelson and Others v Deutsche Lufthansa AG* and *TUI Travel plc and Others v Civil Aviation Authority*[3] in October 2012, airlines generally accept that they will be liable to pay fixed levels of compensation to passengers in the event of both flight cancellation and certain cases of delay.

The exception to this general rule, pursuant to Article 5(3) of the Regulation, is where airlines can prove 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.' The term 'extraordinary circumstances' is undefined in the Regulation, and has been subject to considerable judicial interpretation.

In *Huzar*, the English Courts explored a question of law shrouded in uncertainty since the very inception of the Regulation in 2005, namely: is compensation awardable for cancellation or delay caused by technical aircraft faults or are such circumstances 'extraordinary'?

The notion of 'extraordinary circumstances' is not the only area to cause uncertainty under the Regulation. Whilst the Regulation itself does not stipulate an applicable limitation period, the Montreal Convention 1999 (the Convention), provides that the limitation period for bring-

1. [2014] EWCA Civ 791
2. [2014] EWCA Civ 845
3. C-581/10 brought simultaneously and joined to C-629/10

ing a claim is two years, following which the right to damages is 'extinguished'.[4] In *Sidhu v British Airways Plc*,[5] Lord Hope confirmed that where applicable, the Convention is exclusive in respect of passenger claims brought against the carrier arising out of international carriage by air.

In *Moré v KLM*[6] the CJEU held that the time limit for bringing a claim under the Regulation was a matter for national law because the compensation provisions in the Regulation fall outside the scope of the Convention, are independent from the Convention and operate at an earlier stage.

It is curious, therefore, that there is a disconnect between the two year limitation period stipulated in the Convention on the one hand, and the application of domestic limitation to Regulation claims. This was the central issue explored in *Dawson*.

Huzar: a ruling out of the ordinary

It is regrettable that both the Court of Appeal and Supreme Court missed an opportunity to bring much-needed clarity to the meaning of 'extraordinary circumstances' in relation to claims for compensation for flight delays and cancellations arising out of technical faults.

Huzar concerned a Jet2.com operated flight from Malaga to Manchester in October 2011. The aircraft due to operate the flight developed an unexpected technical fault in the wiring of a fuel valve circuit during its inbound flight to Malaga. Efforts to repair the fault in Malaga proved unsuccessful, and subsequent investigations meant it would be necessary to dispatch a specialist engineer and parts from the UK. Given the time this was likely to take, Jet2.com sourced another aircraft from Glasgow to operate the flight, meaning the flight incurred a delay to arrival into Manchester of 27 hours. The Claimant, Mr Huzar, subsequently brought a claim for compensation pursuant to the Regulation.

At first instance, DJ Dignan at the County Court at Stockport held that the nature of the fault in question was beyond the control of Jet2.com, who had taken 'all reasonable measures' in the routine servicing of its aircraft and following discovery of the fault. He dismissed the claim on the basis that such a fault constituted an 'extraordinary circumstance' within the meaning of the Regulation.

Upon appeal, HHJ Platts at the County Court at Manchester reversed the first instance decision. He held that the true cause of delay was, 'the need to resolve the technical problem which had been identified' as opposed to the technical problem itself and explained that, 'once a technical problem is identified it is inherent in the normal activity of the air carrier to have to resolve that technical problem'. As such, HHJ Platts did not regard the technical issue to be an 'extraordinary circumstance'.

4. See: Montreal Convention 1999, Article 35 which has force of law in the EU through EC Regulation 2027/97

5. [1997] A.C 430

6. Full case name: *Cuadrench Moré v Koninklijke Luchtvaart Maatchappij N.V.* (C-139/11), [2013] All E.R. (Comm) 1152. See further DLA Piper article 'EC Regulation 261/2004 and Limitation' available at: www.dlapiper.com/~/media/Files/Insights/Publications/2012/12/EU%20regulation%202612004%20and%20limitation%20%20Judgment%20o__/Files/Aviation_Legal_Update_December_2012/FileAttachment/Aviation_Legal_Update_December_2012.pdf

Jet2.com appealed to the Court of Appeal. Whilst the Court of Appeal held that HHJ Platts had erred in finding the cause of delay to be the resolution of a technical fault rather than the fault itself, it nevertheless dismissed Jet2.com's appeal on a different basis.

Accepting that Jet2.com took 'all reasonable measures' in the circumstances, the Court considered the relevant test in defining the concept of 'extraordinary circumstances.' The Court turned to guidance provided by the then European Court of Justice (ECJ) in *Wallentin-Hermann v Alitalia*,[7] namely the fact that such circumstances must 'stem from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.' In doing so, Elias LJ identified that the *Wallentin* test has 'two limbs' but with 'no explanation as to how the two limbs interrelate.'

His Lordship expressed the view that:

> *"... difficult technical problems arise as a matter of course in the ordinary operation of the carrier's activity ... all are, in my view, properly described as inherent in the normal exercise of the carrier's activity."*

He therefore concluded that such technical problems must be 'internal' to a carrier's operations and, as such, are within the carrier's control. He stated that characterising technical faults as extraordinary 'makes an event extraordinary which in common sense terms is perfectly ordinary.'

Jet2.com submitted that the policy behind the Regulation was to provide a clear deterrent to carriers by preventing them from resorting to taking harmful steps against passengers. In the absence of any 'control over events', the deterrent effect was simply not required. Elias LJ dismissed this notion, finding that:

> *"[t]he wider purpose is to compensate passengers for inconvenience, as the recitals make clear, and it is far from self-evident that this requires compensation to be limited to cases of fault."*

His Lordship added that an attempt to classify a technical fault as anything other than being within the carrier's control would:

> *"... 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."*

The question in point would then be whether the airline was at fault by failing to discover the problem which, His Lordship held, did not sit comfortably with the language and ambit of Article 5(3) of the Regulation.

In dismissing the appeal, Elias LJ was unable to accept Jet2.com's submissions that carriers should be able to rely on the defence of 'extraordinary circumstances' where an aircraft experiences an unforeseeable technical fault. He remarked:

7. Full case name: *Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA* (C-549/07)

> *"... it would open up endless debate about whether a particular technical problem should have been foreseen or not. This could become a critical question in many compensation claims and would potentially involve lengthy litigation with, no doubt, expert witnesses being called on each side ... I doubt whether the draftsman would have intended the exception to have that effect."*

Such concerns seem somewhat removed from the remit of small claims track litigation in which expert evidence is generally not permitted. In addition, they seem to prioritise the 'inconvenience' of the passenger over the fundamental reasoning behind the majority of technical cancellation or delay cases, which is valid safety concerns. Indeed, the very word 'safety' gets little more than a scant mention in the Court of Appeal judgment in *Huzar* indicating its remoteness from the commercial reality of running an airline. The Court did not specifically consider 'unexpected flight safety shortcomings' referred to in Recital 14 of the Regulation and further to the judgment, this notion appears to have become obsolete.

Elias LJ acknowledged that the 'extraordinary circumstances' issue 'is not without some difficulty.' However, perhaps surprisingly, his judgment culminated in the conclusion that:

> *"... even if ... it can properly be said that the technical problem here was beyond the carrier's actual control, that will not relieve the carrier from the obligation to pay compensation."*

This appears somewhat at odds with the two-limb test applied in *Wallentin* in that, as his Lordship acknowledged, 'it can be said to render the second limb redundant.' This conclusion alone seemed to pave the way for the Supreme Court to grant permission to appeal. Accordingly, Jet2.com sought such permission from the Supreme Court and/or a preliminary ruling from the CJEU.

Dawson: lessons on the interplay between the Regulation and the Convention relearnt

On 9 September 2014, the Supreme Court announced that it had linked Jet2.com's permission to appeal application in *Huzar* to a separate application in the case of *Dawson*.

Dawson concerned a claim brought against Thomson Airways for delay to a flight from London Gatwick to the Dominican Republic in December 2006. The timing of Mr Dawson's claim is apt as he issued proceedings just prior to expiry of the six-year limitation period applicable in England and Wales.[8]

The County Court held that Mr Dawson was entitled to bring his claim because the six-year limitation period provided by domestic law had not yet expired. Thomson Airways appealed to the Court of Appeal on the basis that the two-year limitation period provided by the Convention was, in fact, the correct limitation period, which had expired nearly four years previously.

8. See section 9 of the Limitation Act 1980

Lord Justice Moore-Bick gave the leading Court of Appeal judgment and explored the interplay between the Convention and the Regulation. He cited *International Air Transport Association (IATA) v Department for Transport*,[9] in which the then ECJ attempted to differentiate between the types of award available under the Convention and the Regulation. Whist the Convention is concerned with claims for loss and damage of a specific and individual nature, the Regulation governs the type of loss and damage common to all passengers who suffer delay, being standardised measures for inconvenience.

In *Nelson*,[10] the CJEU further held that the loss of time inherent in a flight delay constituted an inconvenience within the meaning of the Regulation and could not be categorised as 'damage occasioned by delay' within the meaning of Article 19 of the Convention.

Whilst Thomson Airways accepted that limitation would be determined in accordance with national law, it submitted that the application of English law leads one back to the Convention's two-year limitation period. In other words, the English Courts are bound to accept the decision in *Moré* which upheld the applicability of national limitation in respect of Regulation claims, but as a matter of national law, they must follow the reasoning applied in *Sidhu* which upheld the exclusivity of the Convention where the Convention applies. In support of this submission, Thomson Airways submitted that there was an irreconcilable conflict between English law as expounded in *Sidhu* and the CJEU's rulings in the line of cases culminating in *Moré*.

His Lordship accepted that *Sidhu* remained authoritative on the English law interpretation of the Convention but held that the Court was bound to follow and apply the CJEU's decisions to determine the compatibility of the Regulation with the Convention. In this regard, the Court contrasted the case with *Stott v Thomas Cook Tour Operators Ltd*[11] decided earlier this year by the Supreme Court. Whereas Mr Stott's claim was found to hinge solely on an interpretation of the scope of the Convention, His Lordship held that the issue of whether compensation provided for by the Regulation was subject to Article 35 of the Convention was fundamentally a question of compatibility.

Accordingly, His Lordship concluded that he was bound to follow and apply the decisions of the CJEU in resolving the tension between the Convention and the Regulation. He endorsed the CJEU's judgment in *Moré* in finding that the obligation to pay compensation for claims brought by reference to the Regulation is subject to the domestic limitation period, rather than the two year period stipulated in the Convention.

Despite the established grounds on which the Court of Appeal based its judgment, Thomson Airways sought permission to appeal to the Supreme Court.

9. Case C-344/04 [2006] 2 C.M.L.R. 20

10. *Supra* note 3

11. [2014] UKSC 15, [2014] 2 W.L.R. 521. See further: DLA Piper article 'The Montreal Convention 1999: the rock on which a claim for injury to feelings foundered' available at: www.dlapiper.com/~/media/Files/Insights/Publications/2014/03/AviationMontrealConvention.pdf

Supreme Court decision

The Supreme Court rejected permission to appeal in both *Huzar* and *Dawson* and refused to make a reference to the CJEU for a preliminary ruling in *Huzar*. This means that the Court of Appeal's rulings against the airlines in both cases stand as binding law in England and Wales.

The Supreme Court's order in *Dawson* stated that: 'permission to appeal be refused in [Dawson] because the application does not raise an arguable point of law ...' The rationale behind this decision arguably merits support by passengers and the airline industry alike. It is certainly difficult to challenge as it preserves the exclusivity of the Convention in respect of cases to which it applies, whilst confirming that the rights conferred by the Regulation are not to be confused with those available under the Convention. Indeed, it only seems logical that as the Regulation provides a different type of fixed compensation to passengers compared with the individualised damages due under the Convention, the two types of measure should not be confused. To do so would be to contradict an entire body of precedent including *Sidhu*, *IATA* and *Nelson*.

The Supreme Court's decision in *Dawson*, in as far as it endorses previous European and world-wide case law, will not come as a surprise to airlines but the decision in *Huzar* is significantly more troubling than *Dawson*. In refusing permission to appeal, the Supreme Court ruled that:

> *"... the application does not raise a point of law of general public importance and, in relation to the point of European Union law said to be raised by or in response to the application, it is not necessary to request the Court of Justice to give any ruling, because the Court's existing jurisprudence already provides sufficient answer."*

It is incomprehensible that the Supreme Court dismissed the public importance of the *Huzar* decision outright given its impact on both the travelling public and the airline industry. The County Courts stayed numerous small claims pending final determination of *Huzar*, and it is likely that passengers will issue many more claims against carriers now that the Supreme Court has upheld the Court of Appeal's decision. The sheer volume of flight delay and cancellation claims issued prior to *Huzar* forced the County Court to take the unusual step of assigning all cases to the County Court at Liverpool for allocation. This shows that the issue has proven to be a hefty burden on our Courts in addition to just our airlines.

Indeed, one claims handler estimates that the *Huzar* decision is likely to cost the airline industry £876 million per year.[12] Whilst this figure may be inflated, there is no underestimating the fact that the cost will be significant. Further, the decision paves the way for forum shopping by passengers based outside England or Wales who are able to establish jurisdiction in our County Courts in order to benefit from a more favourable judicial view of the meaning of 'extraordinary circumstances.'

Questions naturally arise as to whether any other 'extraordinary circumstances' listed in Recital 14 of the Regulation might now be considered inherent in the normal exercise of the activity of the carrier. Elias LJ refers to 'wholly exceptional climate difficulties' and 'freak

12. See Bott and Co bulletin at: www.bottonline.co.uk/aviation-latest-news/landmark-day-for-millions-with-flight-delay-claim

weather conditions' as constituting 'extraordinary circumstances.' Such comments beg the question of whether conditions such as strong or high winds, fog, ice and snow are now too ordinary an occurrence to exempt carriers from paying out compensation. This is despite the fact that such factors are undoubtedly outside air carriers' control and to operate in such conditions would greatly compromise safety.

Given that *Huzar* concerned the issue of a technical fault only, Elias LJ's comments must be considered *obiter dicta*. It would seem something of a travesty to now penalise carriers for discharging their core responsibility to passengers – safety. Elias LJ's comments should not displace the understood phrase 'meteorological conditions incompatible with the operation of the flight concerned' used in Recital 14 of the Regulation. Further, Recital 15 of the Regulation states that extraordinary circumstances should be 'deemed' to exist where air traffic control (ATC) decisions lead to long delays. Such decisions should continue to be deemed 'extraordinary.'

Use of the 'inherency' test in *Huzar* makes sense in the context of technical issues only; it clarifies that Courts should not equate control with the fault of the airline or foreseeability of the relevant technical issue. Such a test is irrelevant as far as weather or ATC restrictions are concerned. In such cases, a simple test must continue to apply of whether the circumstances were out of the ordinary.

In the wake of *Huzar*, it is unsurprising that the question of whether technical defects may constitute 'extraordinary circumstances' is set to be considered once more by the CJEU in *C. van der Lans v KLM*[13] in the near future. Whether the CJEU will follow the judgment in *Huzar* remains to be seen.

Concluding thoughts

Whilst the opening of the floodgates may be considered a victory for the passenger, the practical reality for the vast majority of the travelling public is that the decision is likely to significantly increase the cost of air travel. In itself, this would appear to be an issue of considerable public importance seemingly overlooked by the Supreme Court. Standing back from the legal vacuum of the *Huzar* decision, it is curious to contemplate that this could have possibly been the intention of the drafters of the Regulation.

There remains only a chink of light for airlines in the form of the draft revised Regulation, likely to come into force in 2015, which clearly contemplates certain situations of cancellation or delay caused by technical issues such as hidden manufacturing faults as being 'extraordinary.' If implemented in its current form, this could potentially restore some much-needed sense to the current situation and not increase the cost of air travel going forward.

Equally, if the CJEU rules in favour of the airlines in *C. van der Lans* the goal posts may change once more. It is interesting to note that since the European Commission published its guidance on what it considers to constitute 'extraordinary circumstances' in April 2013, it has not omitted technical issues from its list even following amendment of the list by the Civil Aviation Authority in July 2014. Therefore, there remains the possibility that European thinking could be somewhat removed from that of the English Courts.

13. C-257/14

For now, the flow of the tide in favour of the passenger indicates that compensation culture is gathering momentum in the EU. With the cost of flights themselves irrelevant to the sum of compensation due, it seems inevitable that the financial struggles of airlines both large and small operating in an already tough economy will intensify in some cases and prove insurmountable in others. This is highly regrettable given that the growth of low cost air transport has been a European success story allowing the development of regional airports, increased access to air transport for passengers in lower income groups and facilitated free movement of persons across the European Community. As Martin Lewis, founder of moneysavingexpert.com rightly acknowledges, the question of compensation has become a moral choice as well as just a financial one.[14]

In all technical delay and cancellation cases, the Supreme Court has now passed the ethical baton to the consumer in deciding whether to seek compensation. The real question that follows is whether passengers will be long-sighted enough to predict that in the European Aviation industry, each man's gain could have the propensity to contribute to an entire market's fall.

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14. See commentary by Martin Lewis at: www.moneysavingexpert.com/travel/flight-delays