In the County Court at Manchester

Case number M16X175

Parties

MARTIN WEARMOUTH CAROLE WEARMOUTH JORDAN WEATHMOUTH JOSHUA WEARMOUTH (by his Mother & Litigation Friend, Carole Wearmouth)	Claimants
and	
THOMAS COOK AIRLINE LIMITED	Defendants

Before His Honour Judge P.R. Main QC sitting at the Manchester Civil Justice Centre, 1 Bridge Street North, Manchester M60 9DJ on 11th November 2016[1].

Simon Murray, counsel for the Appellants (instructed by Bott & Co, Solicitors);

Arron Walthall, counsel for the Respondents (instructed by Thomas Cooke Airlines Ltd);

JUDGMENT

The facts

1. On 31st August 2014, the Wearmouth family sought to board their return flight from Cyprus to Glasgow, at Larnica airport. The Defendants were the flight carriers under flight number MT3035. Sadly, the flight could not leave at the scheduled time of departure, namely 23.20 hours but left instead the following day – in the event, a delay in arrival back in Glasgow for the family of 22 hours and 40 minutes.

2. It is common ground that the cause of the flight hiatus was due to the illness of the first officer. Rostered to undertake the flight home, the first officer had succumbed to what appears to have been a 'viral' illness that made him unfit medically to fly. In the event, the carrier, was not able to secure an alternative first officer until the following day. In fact, it is agreed that the first officer had gone down with his viral illness on the earlier flight out of Glasgow *en* route -

[1] Judgment handed down in draft on 21st November 2016 and formally handed down on 26th January 2017.

as was later recorded, he was noted to have a very high temperature, was dehydrated and almost continually vomiting. On arrival at Larnica, he was conveyed by paramedics to hospital.

3. As flight MT3035 was a flight operated by an EU air carrier (the Defendants) within the EU, Regulation (EC) 261/2004 (the "Regulation") was engaged. By claim form issued on 24th June 2015, the Wearmouth family claimed compensation under Article 7 of the Regulation. At the time of issue, applying the mechanism for assessing compensation as set out in the Regulation, a sum of £476.72 was claimed for each of the Claimants.

4. On 7th April 2016, district judge Matharu directed the claims should be heard on the small claims track and in due course, on 13th August 2016 deputy district judge Ackroyd[2] heard these claims. Having reserved his decision, judgment was handed down on 5th August 2016. He rejected the claims but granted the Claimants permission to appeal. In so rejecting the claims, the judge found that the employee's illness was an 'extraordinary' circumstance falling within the derogation provision contained under Article 5.3, on the footing the Defendants were able to prove, to the court's satisfaction:

> "*...that the cancellation[3] (was) caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken...*"

Specifically, the deputy judge found that the first officer having succumbed to an acute illness, as prevention and management of the same was not part of the ordinary or normal exercise of activities by the air carrier, the onset was an 'extraordinary' circumstance. He went on to find, accepting evidence from a representative of the Defendants, that it was patently impracticable and unreasonably costly, to maintain suitably qualified crew to abide such a rare event – accordingly, he found that the Defendants could not have avoided the event even if all reasonable measures had been taken. The deputy judge granted permission to appeal.

5. Before me, Mr Murray appeared for the claimants and Mr Walthall appeared for the defendants[4]. In fact, they have each previously appeared before me on a similar issue, in the case of *Lewis and others -v- Thomas Cooke Airline Ltd*[5]. I have been referred to my decision in that case, together with a number of other decisions, in the course of this appeal.

6. I am very grateful to both counsel for their detailed skeleton arguments which have been lodged with the court. Whilst it had been my hope to provide an *ex tempore* judgment, in the light of the matters raised and the technical nature of the arguments relied on, where there had been evident disagreements between district judges on the same or similar facts, I thought it more appropriate to

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[2] Formerly district judge Ackroyd.

[3] For cancellation – read 'delay' on the facts here, as a delay of more than 3 hours is equivalent to cancellation.

[4] I note there was different representation before the deputy judge.

[5] Judgment handed down on 10th May 2016, under appeal reference M16X002.

hand down a considered judgment. Can I apologise for any added delay which this action has caused.

7. The outcome of this appeal, as with many other like it, rests on the proper interpretation of the derogating provisions within the Regulation in the context of the guidance provided in both the European and English case law.

8. In considering the appeal, I remind myself that in hearing this appeal I am reviewing the decision of deputy Ackroyd. It is no part of my function to substitute my own judgment unless, I can first establish under Part 52 Rule 11(3)(a), that the judge was wrong - either in finding that he (i) erred in law or (ii) erred in fact or (iii) erred in the exercise of any discretion. In fact, the issues identified in this appeal are very narrow - if as seems to be the case (as I will come to) the judge set about initially identifying the correct legal test to apply - the question arises - did he see it through and apply the correct law. There appears to be little dispute as to the facts. It agreed by the parties, this was not a case where the judge was exercising any discretion.

The operation of the Regulation

9. The burden of proving that the '*extraordinary circumstances*' under article 5(3) arise, rests on the carrier.

10. As article 5(3) must be regarded as a derogating provision to the general right to consumer compensation in the event of delay, it must be interpreted strictly.

11. On the facts of this case, there has been a "long" delay and the provisions of article 6 were engaged. Accordingly, absent the application of the derogating provisions of article 5(3), article 7 compensation to each of the passengers affected by the same, will fall due.

12. As has been recognised in all of the courts, the primary aim of the Regulation is to raise the standard of protection available to the air passengers *qua* consumers - to strengthen their rights and ensure air carriers operate under harmonised conditions[6]. The Regulation was not implemented with a view to holding the air carriers liable to compensate when they were at fault. Indeed, the fault or otherwise of the carrier is entirely irrelevant. In construing the provisions so as to give effect to this aim, it was important not to import a restrictive construction, which facilitates an Article 5(3) derogation, unless either the wording is clear or there is good authority for so doing.

"Extraordinary Circumstances"

13. The term '*extraordinary circumstances*' is not defined in or by the Regulation but previous case law has determined that some assistance can be derived from the recitals to the Regulation, specifically recitals (14) and (15). So far as I can

[6] See recitals 1 and 2 of the Regulation.

tell, the facts of this case do not involve an air traffic management decision, so recital (15) falls away but arguably, recital (14) may have some relevance[7].

14. In the *Wallentin-Hermann* case[8], the CJEU sought to give some guidance to the courts of members states as to how the provisions within the recitals to the Regulation may explain and help interpret the meaning and scope of the terms used within the articles in the Regulation. However, the court was entirely clear that whilst taking into account the purpose of the Regulation (as set out in the recitals) terms used in the articles were to be given their usual meaning in everyday language.

15. More specifically, in *Wallentin-Herman* the court provided specific guidance as to the meaning of '*extraordinary*' under article 5(3). Some incident or event was to be treated as '*extraordinary*', if it related to something which was not ***inherent in the normal exercise of the activity of the air carrier concerned and was beyond the actual control of that carrier on account or its nature or origin[9].***

16. The facts in *Wallentin-Hermann* which arose out of a delay due to a complex engine defect discovered on the aircraft during a routine engine check the day before the flight, was found not to be an extraordinary event given the nature of the technical sophistication involved in air travel and the steps taken to address flight safety. The events as reported were all regarded as inherent in the normal exercise of an air carrier's activity. Accordingly, no derogation was therefore available. As more recent cases have shown, the use by the court of the term 'inherent' raised a number of questions.

17. In *Jet2.Com Ltd –v- Huzar*[10], the Court of Appeal was given the opportunity of considering the interpretation of the Regulation in the light of the European case law. In giving the judgment of the court, Elias LJ[11] noted the two limb test of 'extraordinary circumstances' used in *Wallertin-Hermann.* The court concluded that in the absence of a clear explanation as to how the two limbs should interrelate, it felt able to conclude that the test in fact was one single composite test - the second limb of the test ("*beyond the actual control of the carrier*") taking its meaning from the nature or origin of the event being "*inherent in the normal exercise of the activity of the air carrier*".

18. The facts in *Huzar*, just as in *Wallertin-Hermann,* concerned an unexpected mechanical/technical fault on the aircraft – in fact, an inbound fight to Malaga, which whilst it was being resolved inevitably delayed, in the absence of an alternative aircraft, the return flight. It was not disputed that as a problem, the

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[7] Recital (14) provides – "*...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 incompatable with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier...*" *(my annotation).*

[8] *Friederike Wallertin-Hermann –v- Alitalia – Linee Aeree Italiane SpA* (case C-597/07).

[9] See paragraph 23.

[10] [2014] EWCA civ 791.

[11] with the agreement of Gloster and Laws LJJ.

fault was beyond the practical control of the flight operators. Nevertheless, the Court of Appeal found, it still remained within the 'control' of the carrier, as it was an inherent part of the normal every day activity being carried on by the carrier. In this way, limb 2 was found to be subsidiary to limb 1 and the meaning of 'control' was informed by whether the event was a part of the everyday activity of the air carrier.

19. In *Huzar*, the Court of Appeal emphasised that the court had to concentrate on the source or origin of the delay, rather than its consequences. Once the source or origin of the delay was established, the court would then seek to assess, with reference to the event, whether it was one inherent in the normal exercise of the activity of the air carrier or not – if it was, and especially so, if the source arose out of an aircraft defect, it mattered little if the carrier had no practical control over it.

20. Attempts have been made to restrict the issue of 'inherency' to technical or mechanical problems affecting the aircraft itself which were within the potential control of the carrier – but that approach was found to be wanting in the case of *Siewert –v- Condor Flugdienst GmbH*[12]. So too, in *Monarch Airlines Ltd -v- Evans & Lee*[13], Her Honour Judge Clarke, in considering an appeal against a district judge's determination, that a lightening-strike was an extraordinary event, and in rejecting the same (allowing the appeal), referred to her unwillingness to restrict the application of the consumer protection to just technical problems afflicting aircrafts and not damage to the aircrafts, as the carriers sought to distinguish the effect of the earlier cases.

21. In *Siewert*, during the course of a preliminary ruling on the interpretation of article 5(3), the CJEU was asked to consider whether the derogation could be relied on where the event delaying the flight (there a set of mobile boarding steps which had been driven into collision with an aircraft by a third party, damaging the aircraft and preventing take-off) - an event entirely outside the control of the air carriers, could be categorised as '*extraordinary circumstances*'. The court found it could not – the approach of the court on interpretation was that the use of mobile steps and gangways was '*indispensable*' to air passenger transport, with carriers being faced with the practicalities of their use every day. Accordingly, any accidental damage to the aircraft - the event causing the delay, was an event '*inherent*' in the normal exercise of the activity of the air carrier. The carrier's lack of practical control made no difference to its inherency, as part of the activities of the air carrier. On the facts in *Siewert* the reasoning continued, the carrier plainly had no obligation in preventing third parties from colliding with its aircraft – when it happened, even though in the absence of any control by the carrier, it was still an event inherent in the normal exercise of the activities of the air-carrier.

22. The approach of the CJEU appears to have been maintained by Advocate-General Bot in his advice to the full court in the case of *Pešková & Peška -v-*

[12] Case C-394/14, handed down on 14th November 2014.

[13] Case No A18YP011, 14th January 2016 (judgment of HHJ Clarke). I also note her extremely useful summary of the law at paragraph 31 of her judgment.

Travel Services a.s[14]. The case concerned a flight suffering a bird strike (requiring inspection of any damage to the aircraft). The onward flight was thereby delayed – once again, plainly a matter entirely outside the control of the carrier. His opinion on considering the case law was that this event was still inherently an ordinary event for an air carrier, which could not raise the derogation under article 5. In the course of expressing his opinion, the Advocate-General identified the conditions (as expounded in *Wallentin-Hermann*) as "cumulative" – so the fact that the carrier had no control did not make it an '*extraordinary*' event.

23. All the examples I have mention hitherto have involved the delayed availability of the aircraft, because of some event relating to the actual aircraft. So what of the situation, when the aircraft was entirely airworthy and it was only the non-availability of someone to fly it[15]?

The approach of the deputy judge

24. A reading of the judgment of deputy Ackroyd[16] confirms he did seek to set out the relevant law. However, he appears to have passed over the rather nuanced approach of the Court of Appeal at set out by Elias LJ, where the court considered whether the CJEU were in fact identifying a single or a dual test[17]. In fact, as I have identified above, it is reasonably clear that the court was really looking at a single composite test. The use of the words '*beyond the actual control of the carrier*" was in effect treated as a means of conditioning the ambit of acts which could properly be described as *'inherent in the carrier's normal activities*' and those that were not.

25. Expressly, the deputy judge adopted an approach, in interpreting the application of the term '*inherent*', with reference to the carrier's obligations of prevention and management of the given event[18]. As this pilot had developed an acute illness (viral or bacterial or other - it mattered not) and as it was not inherent in the normal exercise of the activities of the carrier to prevent or manage such illnesses, this event therefore had to be viewed as '*extraordinary*'.

26. Accepting the factual evidence from the carrier's technical staff as to the practicability and cost of laying on reserve staff to meet such an eventuality[19], the deputy judge concluded that the derogation was made out.

The parties' arguments

27. Mr Murray in his skeleton argument and in his oral submissions, seeks to identify the judge's error as focussing on the issue of the carrier's obligations

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[14] Case C-315/15 (submitted 28/7/2016), paragraph 33

[15] It is agreed that whilst the Captain was able to land the aircraft after his 1st Officer had been taken ill, he was not permitted to embark on any return flight without a co-pilot.

[16] Paragraphs 7 and 8.

[17] See paragraphs 47-48.

[18] See paragraph 9 lines 5-8.

[19] See the penultimate lines at paragraph 10.

of prevention of the cause of the delay as opposed to the occurrence of the cause of the delay in the ordinary, 'day to day' experience of the air carrier. The implication from his approach and by concentrating on prevention suggested in error, he conflated the test of inherency into a test of control. The question of control as part of the composite test was in effect subsidiary to the fundamental test of inherency – that was founded on the day to day activities of the carrier and events that impacted on the carrier's function, whether or not the carrier had control. He submitted that the jurisprudence of the court in cases such as *Huzar* and *Siewert*, shows that it is the occurrence and not prevention of the event, with which the court was concerned.

28. In support of this general approach, he relied on the cases I have set out above and most recently, the opinion of the Advocate-General. He also relied on the views I expressed in the case of *Lewis*.

29. Miss Lewis and the other passengers on a A330 flight from Cancun to Manchester, were delayed for 43 hours due to an administrative hiatus by the airport authority staff, as to alleged outstanding payment of some very modest landing fees. The authorities would not permit the aircraft to leave, notwithstanding every effort made by the carrier. The carrier was entirely innocent - in the event, no landing fees were owed or due. The delay in sorting out the dispute was due to the effects of the Mexican Presidential carnival which had brought the operation of Government to a standstill. The bureaucracy was impenetrable. I found that disputes over landing and navigation fees were events inherent in the normal exercise of the activities of the carrier because payment of landing & navigation fees was a ubiquitous element of air carriage. It mattered not that the aircraft was unaffected or that the event was totally outwith the control or responsibility of the carriers. Mr Murray states this supports his construction of the correct test.

30. In *Lewis*, it is also of note that I had been heavily influenced in my approach to interpretation, by the consumer protection purpose to the Regulation. Unless the event was clearly outwith the sort of 'day to day' event that a carrier had to potentially anticipate, regardless of whether they could prevent it, the derogation would not apply. In effect, the court should not start engaging in inventive constructions or discrete ways to distinguish one set of every day event with another to put a gloss on the decision in *Wallentin-Hermann*, so as to undermine the overall purpose of such consumer legislation, in seeking to limit the issue of 'inherency' (inherent in the normal exercise of the activity of the air carrier) to the mechanical condition of the aircraft. What I said there obviously has some relevance here.

31. As if to underline that point, I referred to the observation of the CJEU in the case of *McDonagh –v- Ryanair Ltd*[20], sometimes referred to as the 'Ash Cloud' case. *McDonagh* was an article 9 case. The facts involving the effects on air transport across Europe due the Icelandic volcanic ash cloud in April 2010 are not relevant here. The ash cloud, no doubt taking into account recital (14), was

[20] Case C-12/11, handed down on 31st January 2013.

found to be an 'extraordinary' event. However, in referring to the opinion of the Advocate-General, the court stated as follows:

> "*...in accordance with everyday language, the words 'extraordinary circumstances' literally refer to circumstances which are 'out of the ordinary'. In the context of air transport, they refer to an event which is not inherent in the normal exercise of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin...In other words, as the Advocate General noted at point 34 of his Opinion, they relate to all the circumstances which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity...* "[21].

32. Mr Walthall, well aware of what I said in the *Lewis* case, sought to argue that the district judge, had approached the test in the correct way. In fact, he adopted the approach of district judge Hovington in the case of *Marchbank-Smith -v- Atlantic Airways Limited*[22]- a case almost on 'all fours' with the facts of this case, where district judge Hovington found that the medical unfitness of a pilot on a Virgin Atlantic flight from Manchester to Orlando, was an extraordinary event that engaged the derogation. In *Marchbank-Smith,* as in this case, the judge focussed on the assertion that whereas rectification of mechanical and electrical (technical) aircraft defects (the origin of the delay) are inherent in the ordinary activity of a carrier - prevention and management of a viral illness of the pilot (the origin of the delay) is not. The key issue is the cause of the sickness of the staff member and not its consequences. He then went on to find that the circumstances of such a delay through illness and the non-availability of a replacement pilot could not reasonably have been avoided.

33. In his skeleton argument, as he developed in the course of argument, Mr Walthall sought to distinguish between an illness that would not attract the derogation (i.e. pilot stress, where he was not able to fly aircraft at the last minute), where the carrier would have a duty to prevent the condition (included in regulated medical assessments) and an acquired viral illness, which they had no duty to prevent. The latter attracting the derogation.

34. The real question is whether this is really a legitimate distinction to make, given both are simple factors of life which can effect pilots. Put another example which no doubt Mr Walthall would accept would not attract the derogation would be, if a pilot arrived for duty and was intoxicated – although a very rare event, it being part of the airline's duty to prevent a pilot flying wholly unfit (contrary to regulations), they could not claim it was an extraordinary event.

35. It is evident that when faced with this issue of illness affecting a pilot, district judges[23] had have not always reached the same conclusion.

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[21] Paragraph 29.

[22] Handed down on 14th January 2015 under case reference 3QZ32861

[23] For example, Walsh -v- Virgin Atlantic Airways Limited (6th August 2014) DJ Foss.

My Judgment

36. I have read with interest the reasoning expressed by district judge Hovington, in *Marchbank-Smith* which in effect, deputy Ackroyd adopted. I take the view the only basis for distinguishing these separate causes of incapacity, is over the question of the carrier's control - it may be that the reasoning is dressed up as a 'duty of prevention' on the part of the carrier – but ultimately, it is control - control as part of the 'inherency' limb in the *Huzar* composite test. Yet, ill health in the workforce, whether it is something the carrier needs to be on the lookout for (whether under a duty or otherwise) or not, is ubiquitous. Not uncommonly, pilots will pick up, whether travelling to or returning from overseas, all sorts of things rendering immediate continued working of a pilot wholly ill-advised - whether an infection, a virus or other cause.

37. I am not persuaded that 'prevention' obligations really do provide an acceptable distinguishing feature on the facts here. It reintroduces 'control' as the main component within the primary test of 'inherency' and in so doing, by an interpretation which is very doubtful under *McDonagh*. In every-day language, seen objectively, if a person is told an aircraft cannot fly because the pilot is ill (an unusual but far from uncommon event), a view is likely to be formed that that is an event entirely inherent in the normal exercise of the activity of a carrier - quite beyond the control of the carrier, on account of its nature and origin. I cannot see any clear basis for distinguishing it from a technical defect, which delays the aircraft from flying. It is only in a clearest case, where a derogation from a consumer protection measure will be entertained. Not the facts here.

38. Plainly, I have not adopted the 'prevention' duty as a distinguishing factor in *Lewis*. So too, Her Honour Judge Clarke, did not reach her conclusion on the facts in the *Monarch Airlines* case, on the basis of any 'prevention' duty. There should be consistency in approach here where possible.

My ruling

39. I am therefore driven to the conclusion the derogation did not apply - the deputy judge, in setting out the correct composite test, has failed to apply it appropriately. Had he done so, he ought to have concluded the event here, pilot illness, was an event inherent in the normal exercise of the activities of the air carrier. As the judge fell into error, the appeal will be allowed. I direct that each of the relevant claimants, subject to the appropriate Sterling currency conversion, shall be entitled to the payment of the sum of €600.00 plus interest.

Judge P.R. Main QC