CASE UPDATE: *DAWSON V THOMSON AIRWAYS LIMITED*[1]

Lessons on the interplay between the EC Regulation 261/2004 and the Montreal Convention 1999 relearnt

Court of Appeal confirms limitation under EC Regulation 261/2004 to be determined in accordance with domestic law

In an unsurprising judgment handed down by the Court of Appeal last week, the notion that the two year limitation period provided by the Montreal Convention 1999 (**"Convention"**) could be applicable to claims brought pursuant to EC Regulation 261/2004 (**"Regulation"**) by default was ruled out.

BACKGROUND

In December 2012, Mr Dawson brought a claim against the Defendant/Appellant carrier Thomson Airways Limited for delay to a flight from London Gatwick to the Dominican Republic in December 2006. The timing of Mr Dawson's claim is pertinent as he issued proceedings just prior to the expiration of the six year limitation period applicable in England and Wales pursuant to section 9 of the Limitation Act 1980.

At County Court level, it was held that Mr Dawson was entitled to bring his claim due to the fact that the six year limitation period provided by domestic law had not yet expired. The Appellant carrier sought to appeal on the basis that the two year limitation period provided by the Convention was, in fact, the correct limitation period and had expired nearly four years previously.

Whilst the Regulation itself does not stipulate an applicable limitation period, Article 35 of the Convention, which has force of law in the EU through implementing Regulation 2027/97, provides that "*the right to damages shall be extinguished if an action is not brought within a period of two years…*"

In *Sidhu*[2], 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. 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 law in respect of the limitation period applicable to claims brought by reference to the Regulation.

COURT OF APPEAL JUDGMENT

The leading Court of Appeal judgment was given by Lord Justice Moore-Bick who explored the interplay between the Convention and the Regulation. He cited *IATA*[3], the case in which the then European Court of Justice attempted to differentiate between the types of

[1] [2014] EWCA Civ 845
[2] *Sidhu v British Airways Plc* [1997] A.C. 430
[3] *International Air Transport Association (IATA) v Department for Transport* (Case C-344/04) [2006] 2 C.M.L.R. 20

award available under the Convention and the Regulation: whilst the former 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 a delay, being standardised measures for inconvenience.

In *Nelson*[4], it was further held by the Court of Justice of the European Union (**"CJEU"**) 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.

The question of limitation specifically arose for consideration by the CJEU in *Moré*[5]. Here it was held that the time limit for bringing a claim under the Regulation was a matter for national law (in that case, Spanish 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.

Whilst the Appellant carrier in the instant case 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*, but as a matter of national law, must follow the reasoning applied in *Sidhu*. In support of this submission, the Appellant carrier 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 decisions of the European Court when determining the compatibility of the Regulation with the Convention. In this regard, the Court contrasted the case with the *Stott*[6] judgment handed down 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, Lord Justice Moore-Bick 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, the Court concluded that it was bound to follow and apply the decisions of the CJEU in resolving the tension between the Convention and the Regulation. The Court therefore 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 domestic limitation periods, rather than the two year period stipulated in Article 35 of the Convention.

CONCLUSION

The Court of Appeal's judgment, in as far as it endorses previous European case law, will not come as a surprise to carriers. However, notwithstanding the ruling, airlines may still have the ability to rely on any contractual limitation period stipulated in their conditions of carriage, which often incorporate a period of two years in line with the Convention for all claims for damages, however sought.

The fact that the Convention provides for a period of just two years in respect of claims for death and bodily injury suggests that a similar amount of time allowed in respect of claims for compensation for delay and cancellation would be entirely reasonable.[7] Indeed, the general conditions of carriage adopted by the International Air Transport Association[8] which are generally accepted as industry standard, stipulate a two year limitation period within which passengers can bring a claim against a carrier. In light of the Court of Appeal's latest decision, it is advisable that carriers review their own conditions to ensure maximum protection going forward.

CONTACTS

Shereena Rai
Associate
T +44 (0)20 7796 6080
shereena.rai@dlapiper.com

Gareth Grand
Trainee Solicitor
T +44 (0)20 7796 6106
gareth.grand@dlapiper.com

[4] *Nelson v Deutsche Lufthansa A.G.* (Cases C-581/10 and C-629/10) [2013] 1 All E.R. (Comm) 385
[5] *Cuadrench Moré v Koninklijke Luchtvaart Maatchappij N.V.* (Case C-139/11), [2013] All E.R. (Comm) 1152. See further DLA Piper article "*EC Regulation 261/2004 and Limitation*"
[6] *Stott v Thomas Cook Tour Operators Ltd* [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*"
[7] A two year limitation period imposed in a carrier's conditions of carriage has been upheld to be fair and binding in the following County Court decisions: *Clissold v Ryanair Limited* [unreported, 3 May 2012] and *Stephen Pickard v Ryanair Limited* [unreported, 19 July 2013]
[8] See Article 17.2 of IATA's Recommended Practice 1724: General Conditions of Carriage (Passenger and Baggage)