OUT OF THE EXTRAORDINARY: THE COURT OF APPEAL'S JUDGMENT IN *HUZAR V JET2.COM*

Court of Appeal hands down judgment on the meaning of "*extraordinary circumstances*" in the case of cancellation or delay arising out of technical faults pursuant to EC Regulation 261/2004

It is somewhat regrettable that the Court of Appeal has missed an opportunity to bring some much-needed clarity to the airline industry as to the meaning of "*extraordinary circumstances*" in relation to claims for compensation in respect of flight delays and cancellations arising out of technical faults.

In the judgment handed down this week in respect of *Huzar v Jet2.com*[1] the Court of Appeal considered a point of law in relation to claims for fixed compensation pursuant to EC Regulation 261/2004 (**"Regulation"**) that has been shrouded in uncertainty since the very inception of the Regulation in 2005, namely: is compensation awardable in the case of cancellation or delay arising out of technical faults with the aircraft scheduled to operate the flight?

The decision is attracting significant attention from passengers and airlines alike. Whilst the judgment may on its surface symbolise a victory for passengers, in the event it is not overturned by the Supreme Court, the financial repercussions for the airline industry could 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 *TUI*[2] in October 2012, it has generally been accepted that carriers 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 "*extraordinary circumstances*" can be proven by the carrier "*which could not have been avoided even if all reasonable measures had been taken.*"

Recital 14 of the Regulation provides the following insight into the intended limits of that exception: "*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 the operating carrier.*" Notwithstanding this, the term "extraordinary circumstances" itself is left undefined in the Regulation, and has since been subject to considerable judicial interpretation.

FIRST INSTANCE DECISION

In the instant case the Claimant, Mr Huzar, purchased a ticket from Jet2.com to travel from Malaga to Manchester in October 2011. The aircraft due to

[1] [2014] EWCA Civ 791
[2] TUI Travel plc and Others -v- Civil Aviation Authority (C-629/10) brought simultaneously and joined to Nelson and Others -v- Deutsche Lufthansa AG (C-581/10)

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 that evening proved unsuccessful, and subsequent investigations meant that it would be necessary to dispatch a specialist engineer and parts from the UK. Given the time that this was likely to take, Jet2.com sourced another aircraft from Glasgow to operate the flight, with the result that the flight was delayed in its arrival into Manchester by a total of 27 hours. Mr Huzar subsequently brought a claim for fixed 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 therefore dismissed the claim on the basis that such a fault constituted an "*extraordinary circumstance*" within the meaning of the Regulation.

COUNTY COURT APPEAL DECISION

Upon appeal, HHJ Platts at the County Court at Manchester reversed the first instance decision. He held that the true cause of delay to the flight was "*the need to resolve the technical problem which had been identified*" as opposed to the technical problem itself, and was of the opinion 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, the technical issue could not be regarded to be an extraordinary circumstance. Jet2.com appealed to the Court of Appeal.

COURT OF APPEAL DECISION

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 the appeal on a different basis.

Accepting that "*all reasonable measures*" had been taken by Jet2.com in the circumstances, the Court went on to consider the relevant test in defining the concept of "*extraordinary circumstances*". The Court turned to guidance provided by the CJEU in *Wallentin*[3], 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.*"

Counsel for Jet2.com submitted that the policy behind the Regulation was to provide a clear deterrent to carriers in preventing them from resorting to harmful steps being taken 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 has experienced an unforeseeable technical fault, remarking that: "*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. Alternatively, simply by raising the defence a carrier would be likely to discourage inconvenienced passengers from pursuing their claims… 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 judgment indicating its disconnect

[3] *Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA* (C-549/07)

from the commercial reality of running an airline. Specific reference to "*unexpected flight safety shortcomings*" in the Regulation does not appear to have been considered and, further to this judgment, would appear to have become obsolete.

CONCLUSION

Elias LJ acknowledged that the extraordinary circumstances issue "*is not without some difficulty.*" However, perhaps surprisingly, the judgment culminates 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 would appear to be 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.*" On the basis of this conclusion alone, it appears that there are potential grounds for permission to the Supreme Court to be granted.

In terms of the broader implications of the judgment, it is estimated that hundreds of small claims in the county courts have been stayed pending the final determination of the case, and it is likely that many more claims will be issued against carriers should the Court of Appeal's decision be upheld. Further, the decision paves the way for forum shopping by passengers who are not based in the UK but are able to establish jurisdiction in the county court in order to take the benefit of 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 might now be considered to be inherent in the normal exercise of the activity of the carrier.

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 could significantly increase the cost of air travel. Standing back from the legal vacuum of the judgment, it is curious to contemplate that this could have possibly been the intention of the drafters of the Regulation. It now seems only appropriate to allow the Supreme Court to have its say on this much debated point of law.

If permission to appeal is not sought or granted, there is a chink of light for the carriers 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 faults as being extraordinary. If implemented in its current form, this could potentially restore some much needed sense to the current situation and preserve the cost of air travel.

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