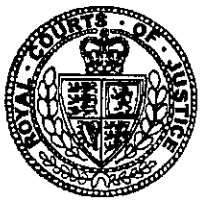

Neutral Citation Number: [2014] EWCA Civ 791

Case No: B2/2013/3277/CCRTF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER COUNTY COURT
HIS HONOUR JUDGE PLATTS
2YN 76991

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2014

Before :

LORD JUSTICE LAWS
LORD JUSTICE ELIAS
and
LADY JUSTICE GLOSTER

Between :

JET2.COM LIMITED	**Appellant**
- and -	
RONALD HUZAR	**Respondent**

Mr Robert Lawson QC and **Mr Tom Bird** (instructed by **Bird & Bird LLP**) for the **Appellant**
Mr Akhil Shah QC (instructed by **Bott & Co**) for the **Respondent**

Hearing date : 22 May 2014

Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Elias :

Introduction

1. Mr Ronald Huzar suffered no little inconvenience when his flight from Malaga to Manchester was delayed. He sought compensation pursuant to an EU regulation, Regulation (EC) No. 261/2004 ("the Regulation"). It was not disputed that *prima facie* he was entitled to such compensation from the airline carrier, Jet2.Com, but there is an exception where the operating air carrier can prove that the delay is caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". The appellant carrier alleged that the delay in this case was the result of a wiring defect in the fuel valve circuit which could not have been prevented by prior maintenance or prior visual inspection. It was unexpected, unforeseen and unforeseeable and as such amounted to an "extraordinary circumstance".

2. District Judge Dignan, sitting in the Stockport County Court, accepted the carrier's characterisation of the nature of the fault and held that in the circumstances the exception applied and there was no right to compensation. On appeal, there was no challenge to the factual finding that the fault was unforeseen and unforeseeable. Nonetheless, His Honour Judge Platts, sitting in the Manchester County Court, held that the exception did not apply and he awarded compensation. The carrier appeals against that decision. The appeal raises a point of some importance to the airline passenger industry.

The factual background

3. The background is not in dispute and I gratefully adopt the succinct description of the material facts set out by His Honour Judge Platts (paras 2-5):

> "The claim arises out of the delay to flight number LS 0810 from Malaga to Manchester on which the claimant was booked travel on 26th October 2011. The flight was scheduled to depart from Malaga at 18.25 (local time) and to arrive in Manchester at 20.25 (local time). The aircraft, a Boeing 737-33A, experienced an unexpected technical problem during its inbound flight to Malaga when the left engine fuel advisory light became illuminated indicating a possible defect in the fuel shut-off valve.
>
> When the plane landed the defendant arranged for a spare valve to be fitted but the problem remained. Despite further investigations it was not possible to identify the cause of the problem before the airport closed for the evening. The following day further investigations revealed a wiring defect in the fuel valve circuit such that the wiring needed replacement. As a result it was necessary to send a specialist engineer and spare wiring from the defendant's hangar at Leeds Bradford airport.
>
> Having reviewed the options the defendant decided to bring in another aircraft from Glasgow to take passengers from Malaga to Manchester. The flight eventually departed at 21.09 (local time) on 27th October

> 2011 and arrived in Manchester at 23.28 (local time), some 27 hours late. It is conceded that the claimant and his family were provided with appropriate transport, accommodation and refreshments free of charge during the delay. The claim before the District Judge was for compensation pursuant to Article 7(1)(b) of the Regulations.
>
> For the purposes of the appeal the appellant accepted the implicit findings of the learned District Judge namely that this technical fault was unexpected and could not have been predicted by a regular system of inspection or maintenance and, further, that the wire which failed or was defective was within its expected lifespan. Thus the fault was neither discovered nor discoverable by a reasonable regime of maintenance or on reasonable inspection and therefore was unforeseen and unforeseeable."

The relevant law

4. The title of the Regulation describes its subject matter as "establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights ....." The reasons prompting the making of the Regulation are summarised in the first four recitals:

> "(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.
>
> (2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.
>
> (3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.
>
> (4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market."

5. As the title of the Regulation indicates, it deals with three sets of circumstances where passengers are inconvenienced as a result of not being able to travel on the flight booked at the allocated time. The first, under Article 4, is where boarding is denied to passengers with reservations (after having excluded volunteers). Although in practice this typically arises where there has been overbooking for economic reasons, the Article covers any reason why the passenger may be denied boarding: see *Finnair Ojy v Lassooy* C-22/11, [2013] 1 C.M.L.R 18. The second, under Article 5, is where a flight is cancelled. "Cancellation" is defined in Article 2(l) as "the non-operation of a

flight which was previously planned and on which at least one place was reserved." The third, under Article 6, is where there is a long delay as defined in that Article.

6. Where passengers are deprived of the opportunity to travel on their booked flight at the stipulated time, the airline may have to take some remedial action. Its precise nature depends upon the circumstances, including the nature and degree of the inconvenience and which Article is engaged. The passenger may be entitled to a right to compensation payable in accordance with Article 7; to reimbursement or re-routing under Article 8: and/or to the provision of care under Article 9 which includes, for example, free meals and hotel accommodation.

7. In this case we are concerned with the right to compensation arising out of flight delay and therefore Article 6 applies. In fact, in contrast with Article 5, which by Article 5(1)(c) specifically provides for compensation in certain circumstances where the flight is cancelled, Article 6 makes no reference to the payment of compensation at all. However, in *Sturgeon v Condor Flugdienst GmbH and Böck v Air France SA* Joined Cases C-402/07 and C-432/07,[2010] 2 All E R (Comm) 983, the CJEU held that the Community principle of equal treatment, which requires that comparable situations should be treated in the same way, was applicable. The Court concluded that there was no justification for distinguishing between cancellations and delays where passengers suffer equal inconvenience. In such cases passengers subject to a qualifying delay should, like those similarly affected by cancellations, be entitled to compensation under Article 7. The Court held that this should be payable where a passenger suffers, on account of flight delay, "a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier ." That was the position here.

8. However, there is an exception to the obligation to provide compensation conferred by Article 5(3) - which *Sturgeon* confirmed applies to delays as it does to cancellations - in the following terms:

> "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 are, therefore, two elements to this exception and the burden is on the carrier to show that each is satisfied: the cancellation must be caused by extraordinary circumstances; and the carrier must have been unable to avoid the cancellation even by taking all reasonable measures. The latter is not now in issue in this case. The District Judge found that the condition was satisfied and his ruling on that point was not appealed.

9. There is no definition of "extraordinary circumstances" in the Regulation. However, some assistance is gleaned from recitals (14) and (15) which are in the following terms:

> "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."

The Wallentin–Hermann case

10. The scope of the exception was analysed by the CJEU in *Wallentin-Hermann v Alitalia–Linee Aeree Italiane SpA* Case C-597/07, [2009] Bus LR 1016 ("*Wallentin-Hermann*"). The claimant, together with her husband and daughter, was booked on a flight from Vienna to Brindisi via Rome. The flight was cancelled five minutes before it was due to depart and they were transferred to another flight to Rome, operated by another carrier. The reason for the cancellation was an engine defect that had been discovered during a routine check of the aircraft. As a consequence of the cancellation, the claimant missed her connection in Rome and arrived at her final destination in Brindisi some three and a half hours after her scheduled arrival time. She brought a claim for compensation under Article 5(1)(c) and the airline raised in its defence Article 5(3).

11. Four questions were referred to the Court, of which only three, questions 1, 2 and 4, are material to this case. They were as follows:

> "(1) Are there extraordinary circumstances within the meaning of Article 5(3) of Regulation No 261/2004 ..., having regard to recital 14 in the Preamble to the Regulation, if a technical defect in the aeroplane, in particular damage to the engine, results in the cancellation of the flight, and must the grounds of excuse under Article 5(3) of the Regulation be interpreted in accordance with the provisions of Article 19 of the Montreal Convention?
>
> (2) If the answer to the first question is in the affirmative, are there extraordinary circumstances within the meaning of Article 5(3) of Regulation No 261/2004where air carriers cite technical defects as a reason for flight cancellations with above -average frequency, solely on the basis of their frequency?....
>
> (4) If the answer to the first question is in the negative, are extraordinary circumstances within the meaning of Article 5(3) of Regulation No 261/2004 cases of *force majeure* or natural

> disasters, which were not due to a technical defect and are thus unconnected with the air carrier?"

12. The Court considered questions 1 and 4 together. It first set out the principles for construing the concept of "extraordinary circumstances" (para.17):

> "It is settled case law that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. Moreover, when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly (see, to that effect, Case C-336/03 *easyCar (UK) Ltd v Office of Fair Trading* (Case C-336/03)[2005] ECR I-1947, paragraph 21 and the case law cited. Furthermore, the Preamble to a Community measure may explain the latter's content: see, to that effect, inter alia, R (*International Air Transport Association) v Department of Transport* Case (C-344/04) [2006] ECR I-403, para.76."

13. Having observed that Article 5(3) is a derogation from the principle of compensation and should be strictly applied, the Court then considered the significance of recital 14, set out above. It observed that the circumstances referred to in that recital are only indicators; they identify events which may, but not necessarily will, constitute or give rise to exceptional circumstances. Accordingly, "It follows that not all circumstances surrounding such events are necessarily grounds of exemption from the obligation to pay compensation provided for in Article 5(1)(c) of the Regulation" (para. 22). The Court also later held that although recital 14 refers to the Montreal Convention, an international treaty imposing similar liabilities in certain circumstances, that Convention could not determine the proper construction of Article 5(3).

14. The critical part of the judgment for the purposes of this appeal is where the Court analysed the question whether, and if so when, technical problems may amount to exceptional circumstances (paras 23-27):

> "23. Although the Community legislature included in that list 'unexpected flight safety shortcomings' and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of Article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the Preamble to that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.
>
> 24. In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of

> aircraft, it must be stated that air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise. It is moreover in order to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft are subject to regular checks which are particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity.
>
> 25. Consequently, technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, 'extraordinary circumstances' under Article 5(3) of Regulation No 261/2004.
>
> 26. However, it cannot be ruled out that technical problems are covered by those exceptional circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.
>
> 27. It is therefore for the referring court to ascertain whether the technical problems cited by the air carrier involved in the case in the main proceedings stemmed from events which are not inherent in the normal exercise of the activity of the air carrier concerned and were beyond its actual control."

15. A composite answer to questions 1 and 4 was given, so far as relevant, in the following way in the first ruling (immediately following paragraph 44):

> "Article 5(3) of Regulation (EC) No 261/2004.....must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems 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."

16. Curiously, this is a slightly different formulation than that adopted in paragraph 23; the words "by their nature and origin" qualify the normal exercise of the activity, whilst in paragraph 23 they appear to qualify the element of control. In so far as it

matters, we must take the formal answer to the questions in the first ruling as the definitive text.

17. Consistently with this analysis, the Court answered question 2 by saying that the frequency of technical problems experienced could not in itself be a factor from which the presence or absence of extraordinary circumstances could be concluded.

18. Mr Lawson QC, counsel for the appellant carrier, relied on two subsequent cases where the *Wallentin-Hermann* case was considered. In *Sturgeon* one of the questions posed to the Court was whether Article 5(3) could apply where delays resulted from technical problems. In holding that in certain cases it could, the Court referred specifically to the reasoning in *Wallentin-Hermann* and answered the question in precisely the same way as it had done in that case in its first ruling: see paras. 70-72. Curiously, however, when answering an earlier question whether compensation was in principle payable in these circumstances, the Court stated in the course of its answer that it would not be payable in certain circumstances which it defined as follows (para.73):

> "…. Such a delay does not, however, entitle the passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier."

This answer reproduces the language of Article 5(3) but with the addition of the words "namely circumstances beyond the actual control of the air carrier."

19. *Wallentin-Hermann* was also considered in *McDonagh v Ryanair Ltd* Case C-12/11,[2013] 2 All ER (Comm) 735, a case concerning the provision of care under Article 9 during the problems caused by the Iceland ash cloud. The CJEU observed at paragraph 29 that as a matter of everyday language "extraordinary circumstances" are circumstances which are "out of the ordinary". The Court then referred to the definition given in para. 23 of *Wallentin-Hermann* (rather than the actual answer given by the Court in the first ruling in that case) and agreed with the observations of Advocate General Bot in *McDonagh* (para. 34 of his opinion) that:

> "[extraordinary circumstances] relate to all cases which are beyond the control of the air carrier, whatever the nature of those circumstances or their gravity."

20. HH Judge Platts interpreted the Court in *Wallentin-Hermann* as saying that "it is the consequences of the technical problem and not the problem itself which must be considered." His analysis thereafter was as follows:

> "27. Against that background I am persuaded that in this case the cause of delay or cancellation was the need to resolve the technical problem which had been identified. That being the case, in my judgment it does not matter how the technical problem was identified. Whether it was identified by routine maintenance (as was the case in *Wallentin*) or as a result of a

> warning light during flight (as in the present case) seems to me to be irrelevant. Equally and for that very reason the fact that it was unexpected and unforeseeable is also irrelevant. The reality is 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. Further, the resolution of the problem, as was demonstrated in this case, is entirely within the control of the carrier.
>
> 28. On such an analysis the delay caused by the resolution of an unexpected, unforeseen and unforeseeable technical problem cannot be said to be an extraordinary circumstance given the *Wallentin* test. Air carriers have to encounter and deal with such circumstances as part of running an airline just as the owner of a car has to encounter and deal with unexpected and unforeseen breakdowns of his car."

The submissions on appeal

21. Counsel for the carrier, Mr Lawson QC, submits that the judge below adopted a mistaken reading of the CJEU's judgment. He focused on the consequence of the technical problem whereas *Wallentin-Hermann* concentrates on its source. I agree with counsel's submission. In my judgment, it is plain from the Court's answer to questions 1 and 4 that when considering whether there are extraordinary circumstances, the Court has to focus on the source or events which cause the problem, not its resolution. A technical problem may indeed constitute an extraordinary circumstance provided it stems from an event which is not inherent in the normal exercise of the activity of the air carrier concerned and is an event which is outside the carrier's control.

22. Mr Lawson submits that where the technical defect is one which was neither foreseen nor foreseeable, it cannot properly be described as being inherent in the normal exercise of the airline's activity. That is so even if, as he concedes is the position here, it can properly be described as being the result of usual wear and tear. He advances his case on a number of fronts which can, I think, fairly be reduced to the following propositions.

23. First, he submits that the Court in *Wallentin-Hermann* was intending to lay down a single composite test and not two distinct conditions for determining whether a technical problem could amount to an extraordinary circumstance. It does not require the carrier to prove both that the problem stems from an event which is not inherent in the normal exercise of the activity of the airline and, as a distinct requirement, that it was beyond its actual control. There is but one condition.

24. Second, he contends that in the light of the way in which *Wallentin-Hermann* has been interpreted and applied in the passages in *Sturgeon* and *McDonagh* to which I have made reference, it is clear that the concept of control – and more specifically actual control - is paramount. He contends that this is the critical concept which effectively determines whether a technical problem will or will not be inherent in the normal exercise of the carrier's activity.

25. Third, he submits that the concept of control, particularly given the emphasis on actual control, envisages the possibility that the carrier can influence the event. The event will therefore be beyond the control of the carrier if it is both unknown and unforseeable. The carrier will not then be in a position to prevent the problem arising by appropriate and proper maintenance precisely because it is unforeseeable. It is beyond his control and he ought not to be liable for compensation.

26. Fourth, he reinforces this submission by relying upon the observations of Advocate General Bot in the *Finnair* case who said, at paragraph 34, that the purpose of the Regulation was to lay down "strict and deterrent rules". He later added (paragraphs 60-61) that the purpose of compensation was to dissuade the carrier from resorting to steps harmful to the passengers. This dissuasive role would not be necessary, according to the Advocate General, where the carrier "had no control over events".

27. Fifth, Mr Lawson places weight in particular on the observation of the Court in the final sentence of paragraph 24 of *Wallentin-Hermann* (para. 14 above) when it said that technical problems resulting from failure to maintain must be regarded as inherent in the normal exercise of the air carrier's activity. He submits that the logical inference was the converse, namely that where the problem could not have been anticipated and eliminated by proper maintenance, it would not be inherent in the carrier's normal activity.

28. Applying these principles, he submitted that the conditions in Article 5(3) were met in this case. The carrier could in no sensible way be said to have been responsible for the failure of the wiring; it had no control over the event causing the technical problem and could have done nothing about it in advance. This also compelled the conclusion that the fault was not inherent in the normal operation of the carrier's activity. The judge had accordingly reached the wrong conclusion. Language, context and purpose all pointed towards these circumstances as being extraordinary.

29. Mr Lawson also asserted that this analysis strikes a fair balance between the interests of carriers and passengers. It does not open up a wide defence given that the onus of proof is on the carrier to show both that the extraordinary circumstances exist and that the delay could not have been avoided even if all reasonable measures had been taken.

Discussion

30. I accept that the issue is not without some difficulty but in my view, despite the attractive way in which these arguments were advanced, I would reject them.

31. The Court in Luxembourg has defined the concept of "extraordinary circumstances" by reference to the two limbs; first, that 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 (limb 1); and second, that it should be beyond its actual control (limb 2). There is no clear explanation as to how the two limbs interrelate. To compound the uncertainty, the Court uses slightly different language when seeking to encapsulate the concept, not only in different cases but even in the same case, as the contrasting language in paragraph 23 and the first ruling of *Wallentin-Hermann* demonstrate.

32. As I have said, the appellant submits that there is a single test whose meaning is dictated by the second limb of control. Since the technical problem was beyond the control of the carrier, it was therefore not inherent in its normal activity.

33. Mr Shah QC, counsel for the respondent passenger, submits that the Court is intending to lay down two distinct conditions each of which must be satisfied before the circumstances can be described as "extraordinary". He, for his part, submits that the dominant limb is the first and that the concept of control should take its meaning from that first limb. On this analysis the concept of control does not have the narrow meaning relied upon by the appellant, namely the power to influence events. It has a wider meaning, capturing the notion that the carrier can sensibly be said to be in control of its own operations, even when problems arise which it could not have anticipated. The contrast, which he submits is entirely consistent with recitals 14 and 15, is between problems which are internal and those which are extraneous to the carrier's operations. Typically the latter are beyond the carrier's control because they are caused by third parties or by wholly exceptional climate difficulties.

34. It may be said that this analysis comes very close to establishing a single test and eliminating the second limb altogether. For reasons I explain below, I do not think that it does have that consequence.

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 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.

38. As to the specific arguments which Mr Lawson used to make good his contention that the underlying principle is actual control, they do not in my judgment overcome the fundamental difficulties which I have identified.

39. First, there was the reliance on the last sentence of paragraph 24 in *Wallentin-Hermann.* The Court was not, in my judgment, intending to say that only technical problems which could have been picked up in the course of maintenance can be said to be inherent in the nature of the carrier's activity. That is not a logical or necessary inference from that sentence. The Court was simply providing a typical example of problems which will necessarily fall within that category, not purporting to give an exhaustive definition.

40. Second, Mr Lawson emphasised the deterrent effect of the Regulation. I would accept that if the purpose of compensation were purely to deter carriers from adopting bad practices, there would be some force in the construction which he urged upon us. But whilst that is no doubt an important function of the Regulation, it does not express the full range of its objectives as enunciated in recitals 1 to 4, and I do not believe that Advocate General Bot in *Finnair* was intending to suggest otherwise. The 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.

41. Third, Mr Lawson claimed that the observations in *Sturgeon* and *McDonagh*, (reproduced in paras 18 and 19 above) were construing the test laid down in *Wallentin-Hermann* in the manner he suggests. In fact the *Sturgeon* quote on which he relies was not dealing specifically with Article 5(3); and although both quotes talk of liability only where the event is beyond the carrier's control, neither assists in determining the critical question of when that will be the case. I would accept, however, that the reference to "actual control", which is the language of *Wallentin-Hermann* itself, is ambiguous and could be said to support the narrow concept of control for which Mr Lawson contends. But even if he is right about that, this does not assist him unless limb 2 controls limb 1, and for reasons I have given, I do not accept that it does.

42. The appellant advanced one further argument. It was suggested that an unforeseeable technical problem would constitute an unexpected flight safety shortcoming which recital 14 identifies as a potential extraordinary circumstance. I do not accept the submission; the fact that a particular technical problem may be unforeseeable does not mean that it is unexpected. Problems of this nature frequently arise.

43. Mr Lawson seeks to counter this point by relying upon an observation in paragraph 37 of *Finnair*, where the Court said this:

> "... it is apparent from recital 15 .... that "extraordinary circumstances" may relate only to "a particular aircraft on a particular day ... ".

44. He submits that this places the focus on the particular technical problem experienced by the particular aircraft; if that was unforeseeable, it is properly described as an unexpected flight shortcoming with respect to that flight, notwithstanding that it would be anticipated that unforeseeable problems will in general occur from time to time.

45. I do not accept that this observation meets the point. First, the Court was referring to recital 15 which deals with the particular problems which may arise where there are delays or cancellations resulting from the impact of an air traffic management decision. Second, whilst it would no doubt be accurate to say that the particular defect in the particular flight was not expected, since defects of that nature do arise from time to time, that is not in my view the same as saying that the particular problem was unexpected.

46. In my judgment, the potential consequences of Mr Lawson's argument also militate against his construction. If he were right, 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.

A single or dual test?

47. In my judgment, therefore, for all these reasons the appeal fails even on the assumption that the concept of extraordinary circumstances should be defined by reference to a single composite test and not two distinct conditions. If the appellant is right about there being a single composite test, then in my judgment it is essentially as the respondent described it. The second limb will take its meaning from the first rather than vice versa. The event causing the technical problem will be within the control of the carrier if it is part of the normal everyday activity which is being carried on and will be beyond the carrier's control if it is not.

48. I am inclined to think that this is indeed the correct analysis. I recognise that it can be said to render the second limb redundant. But it does not in my view strip the limb of all significance. It helps identify the parameters of those acts which can properly be described as inherent in the carrier's normal activities and those which cannot; and it also chimes with the examples of events identified in recitals 14 and 15 as being potentially capable of constituting extraordinary circumstances. It makes it clear that events which are beyond the control of the carrier because caused by the extraneous acts of third parties, such as acts of terrorism, strikes or air traffic control problems, or because they result from freak weather conditions, cannot be characterised as inherent in the normal activities of the carrier. It is not fanciful to suggest that there may otherwise be an argument that they can be so described; indeed, Mr Lawson advanced that very argument in the course of his submissions. So on this analysis the second

limb is intended to help elucidate the scope of the first but is not intended to establish a distinct and independent condition.

49. Ultimately, however, it is not necessary to determine whether there is a single composite test or whether it is a dual test. If the latter, for reasons I have given, in my view the first limb is not satisfied. So on this approach, even if the second limb has the narrow meaning of control urged upon us by the appellant, and 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.

Conclusion

50. Accordingly, in my view HH Judge Platts was right to say that the extraordinary circumstances defence did not apply, albeit that I respectfully disagree with his reasoning. I would dismiss the appeal.

Lady Justice Gloster:

51. I agree.

Lord Justice Laws:

52. I also agree.