IN THE COUNTY COURT AT MANCHESTER
On Appeal from Deputy District Judge Masheder

Date: 14/08/2015

Before :
HIS HONOUR JUDGE PLATTS

Case No: A00MA345 / M14X077

Between :

(1) ARCHANA GOEL
(2) JASKIRAT BAWEJA **Appellants**

- and -

RYANAIR LIMITED **Respondent**

Case No: A00MA487 / M14X076

Between :

(1) DIWAKAR TRIVEDI
(2) BABITA TRIVEDI
(3) UDIT TRIVEDI (by his litigation friend Diwakar Trvedi)
(4) SHREYA TRIVEDI (by his litigation friend Diwakar Trvedi) **Appellants**

- and –

RYANAIR LIMITED **Respondent**

Simon Murray (instructed by **Bott and Company**) for the **Appellants**
Emily McCrea-Theaker (instructed by **Ince and Co.**) for the **Respondent**

Hearing dates: 6th August 2015

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HIS HONOUR JUDGE PLATTS

His Honour Judge Platts :

1. These are two appeals, brought with my permission, from decisions of Deputy District Judge Masheder on 5th March 2014 when he dismissed the claimants' claims for compensation without holding hearings. The appeals raise identical points and I have heard them together.

The facts

2. The facts are largely undisputed. The appellants were all passengers on a Ryanair flight (flight number FR3845) from Reus to London on 6th May 2008. The flight was scheduled to arrive at 23.40 p.m. on the 6th May 2008. In fact it arrived at 7.59 a.m. on the 7th May 2008 some 8 hours and 19 minutes late. The reasons for that delay are not immediately relevant to the issues in this appeal. It is not now in dispute that the contracts of carriage for each claimant incorporated the respondent's General Conditions of Carriage for passengers and baggage dated 10th October 2006 ("the Conditions").

The proceedings

3. Both claims were brought under the European Small Claims Procedure ("ESCP"). The claimants/appellants sought compensation of 250 Euros per passenger pursuant to Article 7 of EC Regulation 261/2004 ("Regulation 261"). The respondent filed answers resisting the claims on two grounds: (a) that the claims were out of time by virtue of Clause 15.2 of the Conditions; and (b) that the delay was as a result of extraordinary circumstances and therefore the airline was not liable, relying on Article 5(3) of Regulation 261. The respondent's answers were sent by the court to the claimants' solicitors on Friday the 28th February 2014. It is not clear when they were received.

4. On the 5th March 2014 Deputy District Judge Masheder considered the claims on paper. No notice of the hearing was given to the parties. He dismissed both claims. The order records his reasoning as follows:

> "a. The Court is satisfied that the Defendant's standard terms and conditions were incorporated into the contract, including the contractual limitation clause for bringing proceedings within two years.
> b. The present Claim was lodged on the 30th January 2014 some 5 years and 8 months after the matter giving rise to this complaint. The Claim is therefore "time barred".

Each order went on to state:

> "Because this order has been made without a hearing the parties have the right to apply to have the order set aside, varied or stayed. A party making such an application must send or deliver the application to the court (together with any appropriate fee) to arrive within seven days of the service of this order."

5. No application to vary or set aside the order was made. Instead, appeals were lodged on the 27th March 2014. The appeals were then stayed pending disposal of the appeals in Dawson v Thomson Airways (*infra*) and Huzar v Jet2.com (*infra*) in the Court of Appeal, the stays being lifted on the 16th January 2015.There are five grounds of appeal which I shall deal with in turn.

Ground 1: Procedural Irregularity

6. In short, the appellants' case is that the learned Deputy District Judge made his decision without giving them any or any adequate opportunity to respond to the answers which had been filed.

7. The ESCP was created by Regulation EC No 861/2007. It is given effect in the courts of England and Wales by PD78 paragraph 10 of the Civil Procedure Rules 1998. The procedure is intended to "simplify and speed up litigation concerning small claims in cross border cases and to reduce costs" (Article 1).
Article 5.1 provides:
> "The European Small Claims Procedure shall be a written procedure. The court or tribunal shall hold an oral hearing if it considers this to be necessary or if a party so requests. The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case an oral hearing is obviously not necessary for the fair conduct of the proceedings".

8. Regulation 861 provides for the claim to be submitted on a prescribed claim form which is served by the court. It then provides for the defendant to submit a response on an "answer form". Article 5.4 provides:
> "within 14 days of receipt of the response from the defendant the court or tribunal shall dispatch a copy thereof together with any relevant supporting documents to the claimant".

In these cases the response was dispatched on the 28th February 2014.

9. In the absence of a counterclaim, there is no provision in Regulation 861 for the claimant to file a reply to the defendant's response. However, Article 7 provides that the court shall give a judgment within 30 days of the receipt of the response or:
> "(a) demand further details concerning the claim from the parties within a specified period of time not exceeding 30 days;
> (b) take evidence pursuant to Article 9; or
> (c) summons the parties to an oral hearing to be held within 30 days of the summons."

10. The appellants argue that given the defendant's response raised issues not addressed in the claim, the learned Deputy ought to have used his powers under Article 7, or alternatively his general case management powers, to give them an opportunity to respond to those issues if they so wished. The failure to do so amounted to a serious procedural irregularity which rendered the decision unjust.

11. The respondent argues that the appellants chose to use the ESCP and therefore must accept its rules and procedures. It is also argued that the appellants could or should have filed a reply before the judgment was given. At least they could have requested an oral hearing without, at that stage, setting out a considered response.

12. I do not consider the respondent's arguments to be realistic. If there was evidence of pre action correspondence in which the respondent had raised the arguments as to limitation or extraordinary circumstances then I might have been persuaded that the appellants should have dealt with those arguments in the claim form, given the nature of the ESCP. However there is no evidence that they were aware that those issues

would be raised. I do not consider that there was adequate time for the appellants to consider the defences, take instructions and then either file a response or request an oral hearing.

13. There is an obligation on a court to ensure that both sides have a fair hearing. Even taking into account the simplified and speedy nature of the ESCP, each party should have an opportunity of addressing matters raised by the other party. In my judgment the learned Deputy should have realised that the answers raised new issues which the appellants had not addressed and he should have given them an opportunity to address those matters. There is no doubt that he has power to do so and in failing to do so in my judgment he was in error. To deny a claimant an adequate opportunity to answer the defendant's arguments before a decision is made, in my judgment, amounts to a serious procedural irregularity despite the fact that the rules do not provide for a reply.

14. However, his order expressly gave either party the right to apply to set aside or vary the order. The appellants chose not to avail themselves of the right. Had they done so, the matters now ventilated before me on appeal would probably have been ventilated at a small claims hearing before a District Judge. The fact that the appellants had that opportunity is important for the purposes of the appeal. In my judgment, by giving them that right to apply I consider that injustice was avoided. Because of that it cannot be said that the decision as a whole was unjust for the purposes of CPR 52.11(3) (b).

15. I therefore reject this ground of appeal.

Ground 2: No evidence

16. The appellants next argue that there was no evidence before the learned Deputy to entitle him to conclude that the Conditions were incorporated into the contract between the parties. I reject that argument also. There was evidence in the form of the statements containing a statement of truth signed by Glenvil Smith on behalf of the defendant. The fact that the relevant terms were not exhibited is not to the point. The effect of the terms was set out in the statement (albeit the wording was not precise). In any event there is now no issue that the Conditions were incorporated into the contract. There is nothing in this ground of appeal.

Grounds 3 and 4: the application of Clause 15.2

17. Before considering these grounds in detail it is convenient to set out the nature of the appellants' claims. They are founded on Regulation 261 which requires airlines to provide compensation and assistance to passengers in certain circumstances. The provisions were helpfully summarised by Moore-Bick LJ in Dawson v Thomson Airways Limited [2014] EWCA Civ 845 at paragraph 9 in this way:

> "Articles 4, 5, 6 and 7 are the most important parts of the Regulation for present purposes. They provide, in summary, as follows:
>
> (i) *Article 4:* that, if a passenger is denied boarding against his will, the airline must pay compensation in a prescribed amount in accordance with article

7 and offer assistance in the form of reimbursement or re-routing in accordance with article 8, as well as meals and refreshment, transport and hotel accommodation and two free telephone calls in accordance with article 9;

(ii) *Article 5:*that, if a flight is cancelled, the airline must offer passengers prescribed compensation, reimbursement or re-routing and assistance in accordance with articles 7, 8 and 9;

(iii) *Article 6:* that, if an airline reasonably expects a flight to be delayed beyond its schedules (*sic*) time of departure by two hours or more (depending on the distance of the flight involved), it must offer passengers assistance in accordance with article 9 and in extreme cases reimbursement in accordance with article 8.

(iv) *Article 7:* that, where this article applies, passengers should receive a payment in compensation determined by reference to the length of the journey."

18. In Sturgeon v Condor Flugdienst G.m.b.H. (Cases C-402/07 and C-432/07), [2012] 2 All E.R. (Comm) 983 it was held that passengers affected by a delay of over three hours should be treated equally with those whose flights were cancelled and entitled to compensation pursuant to Article 7.

19. Subject to arguing that the delay was caused by extraordinary circumstances under Article 5(3) of Regulation 261, the appellants' entitlement to compensation under Article 7 is not disputed by the respondent. Further, it is common ground that, following the decision of the Court of Appeal in Dawson, claims for compensation under Regulation 261 fall outside the Montreal Convention and therefore as a matter of domestic law are subject to a six year limitation period pursuant to section 9 of the Limitation Act 1980. Therefore, these claims were brought in time unless the respondent can rely on Clause 15.2.

20. By grounds 3 and 4 the appellants challenge the applicability of Clause 15.2 on which the learned Deputy relied when dismissing the claims.

21. Clause 15.2 of the Conditions reads:

"Any right to Damages shall be extinguished if an action is not brought within two years of the date of arrival at destination..... The method of calculating the period of limitation shall be determined by the law of the court where the case is heard."

Article 15.1 of Regulation 261 provides:

"Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived notably by a derogation or restrictive clause in the contract of carriage."

22. Although the Conditions refer to its terms as "Articles" I refer to them as "Clauses" in this judgment in order to clearly differentiate between Article 15 of the Conditions

(Clause 15) and Article 15 of Regulation 261, both of which are relevant to this appeal.

23. The appellants argue that the learned Deputy was wrong to rely on Clause 15.2 because:
    (i) the right created by the Regulation is not a right to "Damages" but is rather a right to statutory compensation under Article 7 of the Regulation; and/or
    (ii) in any event Articles 5 and 7 of the Regulation create an obligation on the Respondent to pay compensation to passengers which (whether categorised as damages or not) cannot be limited or waived as a result of Article 15.1.

24. The respondent argues:
    (i) the right created by the Regulation is a right to "Damages" because the word "damages" includes compensation under Article 7 of the Regulation; and
    (ii) the obligation referred to in Article 15.1 is the obligation under Articles 5 and 7 to pay compensation. That is not restricted by clause 15.2 because on its proper construction Clause 15.2 restricts the right to make a claim for damages for breach of that obligation not the obligation itself.

25. The respondent argues that these claims are properly characterised as claims for damages for breach of statutory duty. Hence it is argued that the appellants' "right" is (a) a right to <u>damages</u> for breach of that statutory duty as opposed to a free standing right to compensation (and therefore caught by Clause 15.2); and (b) a right to <u>bring a claim</u> for breach of statutory duty which is distinct from the airline's obligation to pay compensation and therefore not caught by by Article 15.1

26. It is therefore necessary to consider what is meant by the phrase "Any right to Damages" in Clause 15.2 in order to decide whether it applies to these claims and whether it is excluded by Article 15.1.

<u>The meaning of "Any right to Damages"</u>

27. The appellants argue, first, that the word "Damages" is to be construed by reference to the word "Damage" as defined in Clause 1 of the Conditions. The definition is:

> "DAMAGE includes death wounding or bodily injury to a Passenger or loss, partial loss, theft or other damage to baggage arising out of or in connection with carriage or other services incidental thereto performed by us".

28. It is argued that because the definition in Clause 1 does not make any reference to compensation under Regulation 261 then compensation under the Regulation does not amount to "damage" for the purposes of the contract. From this it is argued that the reference to "Damages" in clause 15.2 cannot refer to such compensation. The appellants pray in aid the use of the capital "D" in Clause 15.2 because it is consistent with the use of a capital first letter when other words or phrases used in the contract are defined in Clause 1.

29. I do not accept that argument for two reasons. Firstly, the definition of "Damage" only "includes" those matters stated and does not purport to be an exhaustive definition. Second, in any event, I do not accept that there is necessarily a correlation between the concept of "damage" and the concept of "damages". It is not the case that damages are only awarded to compensate for "damage"; damages can be and frequently are awarded for personal injury and/or financial losses. The definition clause here defines "damage" in this contract as including some injury (bodily) and some loss (to baggage as defined) but, in my judgment, on any proper reading it is not intended to set out the only circumstances in which damages will become payable. I deal further with the accepted definition of "damages" below.

30. Next it is argued that a number of clauses in the Conditions, including Clause 15.2, appear to mirror the provisions of the Montreal Convention and should therefore be construed in the same way. Again, I do not accept that argument. I doubt that the appellants when they accepted these Conditions would have been aware of the provisions of the Montreal Convention. If the parties had intended any provisions of the Montreal Convention to be included in the contract they could and should have said so expressly. In my judgment the contract has to be construed as it is and without reference to the Montreal Convention.

31. Of more merit in my judgment, is the argument that since both the words "damage" and "compensation" are used in the contract, the parties must have recognised that they have different meanings. Indeed, the word "compensation" is used in those clauses of the contract which appear to reflect or refer to passengers' rights under Regulation 261: for example Clause 9.2 (cancellation and delays) and Clause 9.4 (denied boarding compensation). I have already indicated that I do not consider that the use of the word "damage" is of itself of particular assistance. However, the word "Damages" is used in Clause 14.4.5 where reference is made to "compensatory Damages for proven losses and costs…" The use of the word "compensation" in other contexts does suggest that a different meaning was intended.

32. Finally, the appellants refer to the accepted definition of "damages" in English Law, in particular as set out in McGregor on Damages 19th Edition. The work starts with the words:

> "Damages are now defined in this book quite simply as an award in money for a civil wrong."

At paragraph 1-004 the learned editors continue:

> "To retain the requirement of a wrong is entirely necessary; it is the essential feature of damages. There is thus excluded from damages three types of case giving pecuniary satisfaction by success in an action because they are not dependent on wrongdoing. These are actions for money payable by the terms of a contract, actions in restitution not based on a wrong, and actions under statutes where the right to recover is independent of any wrong."

In paragraph 1-005 the learned editors explain why monies payable as a contractual debt are not damages:

> "They are based not on a wrong done but on a promise made. They are in a sense a form of specific performance, seeing to it that a contractual obligation is carried out."

Examples given of actions claiming money under statutes are given in paragraph 1-007. It is also pointed out (paragraph 1-008) that damages and compensation are not synonymous. There can be awards of damages which are not compensatory and there can be awards of compensation which are not damages.

33. I turn now to the respondents' submissions. The respondent's central argument is that the appellants' claims are essentially claims for damages for breach of statutory duty and are therefore claims for Damages within Clause 15.2. I do not accept that argument. A claim for damages for breach of statutory duty arises in circumstances where a defendant has an obligation created by statute to act, he fails to act in accordance with that obligation and the claimant suffers some recognised injury loss or damage as a result. The damages awarded are to compensate him for such injury loss or damage as he proves.

34. I consider that to be distinct from Regulation 261 which gives a direct entitlement to payment which the claimant seeks to enforce through the courts. Such a claim is more akin to a claim on a debt (created by statute rather than contract) or a claim for specific performance of the obligation. In my judgment it cannot be properly categorised as a claim for damages for breach of statutory duty. The present claims are claims in respect of which the County Court has jurisdiction pursuant to section 16 of the County Courts Act 1984, rather than section 15; and to which the provisions of section 9 of the Limitation Act 1980 apply (as indeed was accepted by the Court of Appeal in Dawson (supra)) rather than section 2. They are not claims founded on the tort of breach of statutory duty.

35. The respondent seeks to draw a parallel with claims for reimbursement of out of pocket expenses payable under Article 9 of regulation 261. It is argued that such claims are essentially claims for damages although described in the authorities as "compensation". Reliance is placed on the decision of the European Court McDonagh v Ryanair [2013] 1 Lloyds Rep 440 at paragraph 24. Consequently the use of the words "compensation" and "damages" amount to the same thing. However, at paragraph 20 in McDonagh the court said that:

> "such a claim (based on Article 9) cannot be understood as seeking damages, by way of redress on an individual basis".. but rather "equivalent compliance with its obligation to provide care arising from Articles 5(1)(b) and 9 of regulation 216".

In my judgment, this passage appears to support the appellants' arguments rather than those of the respondent.

36. Finally, reliance is placed on the decision of the Court of Appeal in Bedfordshire Police Authority v Constable [2009] EWCA Civ 64, where the meaning of the word "damages" was considered in the context of a claim for payment under a contract of insurance which provided indemnity for sums the insured had to pay "as damages". The claimant police authority had been liable to pay "compensation" to certain property owners under the Riot (Damages) Act 1886. The insured risk was the liability to pay "damages". The Court of Appeal held that in the context of an insurance policy the important point is whether the insured was in breach of some

overall obligation or responsibility. Given that the police were responsible for the preservation of law and order in their area that was sufficient for the payments to be categorised as "damages" and therefore covered by the contract of insurance. As Longmore LJ put it at paragraph 25

> " It is this concept of responsibility which affords the distinction between sums for which an assured is liable in damages and sums for which he is not so liable".

It is noted that responsibility was conceded by the police that case. A case on the other side of the line is Bartoline Ltd v Royal & Sun Alliance Insurance Plc [2007] 1 All E.R. (Comm) 1043 where compensation paid under the Water Act was held not to be damages but rather "a debt under a statute".

37. I do not accept that these authorities, or the line of authorities on which they are based, necessarily assist in this case. The principles set out related to the meaning of "damages" in the context of indemnity insurance contracts. Longmore LJ noted in Bedfordshire Police Authority that the principle was not confined to marine insurance but extended to "in general to public liability insurance" (paragraph 28). I am not persuaded that his comments were intended to be of wider application than that. In any event, in the present case there does not appear to be any element of overall responsibility on the part of the airline. It is clear from the decision of the Court of Appeal in Huzar v Jet2.com Ltd [2014] EWCA Civ 791 that fault plays no part in the obligation of the airline to compensate. If there is a delay of more than 3 hours the airline is obliged to compensate subject only to the defence of extraordinary circumstances.

38. Both parties have referred to the decision of the European Court in Nelson v Deutsche Lufthansa AG (Case C-58/10) which I have found to be of some assistance. At paragraphs 48 to 59 of the judgment the following comments were made as to the nature of the right to compensation under Regulation 261. The Court stated the right to compensation for delay under Article 7:

> "48 .... was specifically examined in *Sturgeon [2010] 2 C.M.L.R. 12* , in which the Court stated, first, that loss of time constitutes an inconvenience covered by Regulation 261/2004 , like the other inconveniences which the measures laid down by that regulation must redress. Secondly, it found that that inconvenience must be redressed by means of compensating the passengers concerned pursuant to that regulation (see, to that effect, *Sturgeon [2010] 2 C.M.L.R. 12* at [52] and [61]).
>
> "49 In that connection, it should be made clear that, like the inconveniences referred to in *IATA [2006] 2 C.M.L.R. 20* , a loss of time cannot be categorised as "damage occasioned by delay" within the meaning of art.19 of the Montreal Convention, and, for that reason, it falls outside the scope of art.29 of that convention.
>
> "50 Article 19 of the Montreal Convention implies, in particular, that the damage arises as a result of a delay, that there is a causal link between the delay and the damage and that the damage is individual to passengers depending on the various losses sustained by them.

"51 First of all, a loss of time is not damage arising as a result of a delay, but is an inconvenience, like other inconveniences inherent in cases of denied boarding, flight cancellation and long delay and encountered in them, such as lack of comfort or the fact of being temporarily denied means of communication normally available.

"52 Next, a loss of time is suffered identically by all passengers whose flights are delayed and, consequently, it is possible to redress that loss by means of a standardised measure, without having to carry out any assessment of the individual situation of each passenger concerned. Consequently, such a measure may be applied immediately.

"53 Lastly, there is not necessarily a causal link between, on the one hand, the actual delay and, on the other, the loss of time considered relevant for the purpose of giving rise to a right to compensation under Regulation 261/2004 or calculating the amount of that compensation.

"54 The specific obligation to pay compensation, imposed by Regulation 261/2004, does not arise from each actual delay, but only from a delay which entails a loss of time equal to or in excess of three hours in relation to the time of arrival originally scheduled. In addition, whereas the extent of the delay is normally a factor increasing the likelihood of greater damage, the fixed compensation awarded under that regulation remains unchanged in that regard, since the duration of the actual delay in excess of three hours is not taken into account in calculating the amount of compensation payable under art.7 of Regulation 261/2004.

"55 In those circumstances, the loss of time inherent in a flight delay, which constitutes an inconvenience within the meaning of Regulation 261/2004 and cannot be categorised as "damage occasioned by delay" within the meaning of art.19 of the Montreal Convention , cannot come within the scope of art.29 of that convention.

"56 Consequently, the obligation under Regulation 261/2004 intended to compensate passengers whose flights are subject to a long delay is compatible with art.29 of the Montreal Convention .

"57 Furthermore, it should be stated that the obligation to pay compensation which stems from Regulation 261/2004 is additional to art.29 of the Montreal Convention , inasmuch as it operates at an earlier stage than the system laid down in that article (see, to that effect, *IATA [2006] 2 C.M.L.R. 20* at [46]).

"58 It follows that that obligation to pay compensation does not itself prevent the passengers concerned, should the same delay also cause them individual damage conferring entitlement to compensation, from being able to bring in addition actions to obtain, by way of redress on an individual basis, damages under the conditions laid down by the Montreal Convention (see, to that effect, *IATA [2006] 2 C.M.L.R. 20* at [44] and [47]).

> "59 In that connection, the Court has held, when interpreting art.12 of Regulation 261/2004 , entitled "Further compensation", that that article is intended to supplement the application of measures provided for by that regulation, so that passengers are compensated for the entirety of the damage that they have suffered due to the failure of the air carrier to fulfil its contractual obligations. That provision thus allows the national court to order the air carrier to compensate damage arising, for passengers, from breach of the contract of carriage by air on a legal basis other than Regulation 261/2004, that is to say, in particular, in the conditions provided for by the Montreal Convention and national law (*Sousa Rodríguez v Air France SA (C-83/10) [2012] 1 C.M.L.R. 40* at [38])."

39. It seems here that the European Court was drawing a distinction between the right to standardised compensation under Regulation 261, which is available to all passengers and does not depend on the length of the delay or its effect on individual passengers; and the right (which exists alongside the right under Regulation 261) to claim "damages" under the Montreal Convention (see paragraph 58 (supra)). In my judgment, that distinction supports the appellants' arguments and seems to accord with the definition of damages in McGregor on Damages 19th Edition (supra).

40. The task of the court when construing the Conditions is to ascertain the meaning which the phrase would convey to a reasonable person against the relevant background of the transaction. Having considered the arguments I conclude that there is a real distinction to be drawn between the right to compensation under the Regulation and a right to damages as generally accepted in English law. I therefore find that on the proper construction of the contract the reference to "Any right to Damages" does not include the right to compensation under Article 7 of the Regulation and therefore the clause does not apply to the appellants' claims.

Article 15.1

41. If I am wrong about that and the reference to "Damages" in Clause 15.2 does include compensation under Article 7, the appellants argue that Article 15.1 of Regulation 261 operates so as to prevent the respondent from relying on it. This argument was not raised before or considered by the learned Deputy for reasons which I have set out. Both parties rightly invited me to deal with it on appeal rather than remit it for a decision at first instance.

42. The obligation under Regulation 261 is an obligation to provide fixed compensation in given circumstances. It does not provide a time within which that compensation has to be paid. The limitation period for bringing an action to enforce payment is a matter of national law. In England and Wales it is 6 years pursuant to section 9 of the Limitation Act 1980. It is common ground that the Limitation Act provides a procedural and not a substantive bar to the claim.

43. The appellants argue that the converse of the airline's obligation to provide compensation is the right of passengers to receive it. On a proper construction of the contract, it is that right to which Clause 15.2 refers. Therefore if, contrary to my finding, the right to damages includes compensation payable under Regulation 261, then Clause 15.2 has the effect of "extinguishing" that right unless an action is

brought within 2 years. On any view that must amount to a restriction or limit on the airline's obligation to pay and thus fall foul of Article 15.1.

44. The respondent argues that, although there is an obligation to provide compensation created by Regulation 261, Clause 15.2 does not affect that obligation. The obligation still exists (and indeed could still be the subject of action in this country by the CAA under Article 16 of Regulation 261). What is curtailed is the right to bring an action in the courts to enforce the obligation.

45. Of course, the respondent is correct in that if the airline fails to fulfil its obligation to pay compensation then (subject to national laws of limitation) the passenger has a right to seek to enforce that obligation. However, for reasons I have given I do not consider such enforcement as being based on a claim for breach of statutory duty. The right to enforce is necessarily and solely dependent on the existence of the obligation to pay. If there was no obligation to pay there would be no right to enforce. Therefore if the passenger's right to enforce is "extinguished" so must be the airline's obligation to pay. Absent Clause 15.2 the passenger would have 6 years to bring an action. If a clause of the contract purports to "extinguish" the right to bring an action to enforce the obligation to pay before then, it seems to me that on any reasonable interpretation it is restricting the obligation pay.

46. In my judgment the ordinary meaning of words used is that it is the substantive obligation which is "extinguished" not the right to enforce it. Were it otherwise, the clause could simply have provided that "no action to enforce a right to damages/compensation shall be brought after two years" or words to that effect.

47. I do not accept that the fact that the CAA might still be able to take action pursuant to Article 16 assists the respondent. Article 15.1 is concerned with obligations vis-à-vis passengers. As the ECJ said in McDonagh (supra)

> "The fact that ....each passenger may complain to ...(the body designated as responsible for enforcement) .. about an alleged infringement of that Regulation in accordance with Article 16 of the Regulation is not such as to affect the right of a passenger to reimbursement." (paragraph 22).

48. I therefore accept the appellants' arguments. I see no difficulty in construing the words of the contract as limiting or restricting the obligation to pay. The alternative construction contended for by the respondent requires a somewhat ingenious legal analysis which I doubt was in the mind of the parties when the contract was made.

49. In my judgment therefore the learned deputy was wrong to find that Clause 15.2 applied to defeat the appellant's claims.

Ground 5: unfair term

50. In view of these conclusions it is not necessary for me to consider ground 5 of the appeal by which the appellants argue that clause 15.2 is not binding because it is unfair. In any event I would not have been prepared to make a finding as to that issue on appeal given that it was not raised below and it is an issue on which the parties may have wished to file evidence.

Conclusion

51. It follows that the appeals will succeed and the orders of Deputy District Judge Masheder should be set side.

52. It seems that the only issue remaining between the parties is the defence of "extraordinary circumstances" raised by the respondents in their defence. It may be that the respondent will wish to consider its position on this in view of the decision of the Court of Appeal in Huzar.

53. The parties should attempt to agree all consequential orders both relating to the further conduct of these actions and the costs of the appeal. If they are able to agree they should submit an agreed order no later than 14 days after this judgment is handed down. If they are unable to agree they should each submit their proposed directions /orders and written submissions in support thereof within 14 days of the handing down of this judgment. I will then deal with the outstanding issues on the basis of those written submissions.