In the Manchester County Court
On Appeal from the Stockport County Court
Order of District Judge Dignan dated 10th June 2013
Case number: 2YN76991
Appeal ref: M13X134

BETWEEN

RONALD HUZAR

Claimant and Appellant

and

JET2.COM

Defendant and Respondent

Before **His Honour Judge Platts**

Mr Crilley (instructed by **Bott & Co**) for the **Appellant**
Mr Bird (instructed by **Bid and Bird LLP**) for the **Respondent**

Hearing date: 15th October 2013

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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.

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HIS HONOUR JUDGE PLATTS

His Honour Judge Platts:

1. This is an appeal against the decision of District Judge Dignan at Stockport County Court on the 10th June 2013 when he dismissed the claimant's claim for compensation under Regulation (EEC) No: 261/2004. The hearing below was the trial of the claim on the small claims track. The claimant appeared in person at the hearing and was not represented. The defendant was represented by counsel. On this appeal I have been greatly assisted by the submissions of counsel for both the appellant and the respondent.

The factual background

2. For the purposes of the appeal there is no dispute as to the factual background. 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.

3. 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.

4. 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 €400 compensation pursuant to article 7 (1) (b) of the Regulations.

5. 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.

6. At trial, the defendant accepted that there had been a delay which would ordinarily entitle passengers to compensation under Article 7, but argued that they were entitled to rely upon Article 5(3) of the Regulation in order to avoid liability to pay compensation since the delay in question was caused by "extraordinary circumstances" within the meaning of Article 5(3). The defendant's case was summarised at paragraph 10(e) of the defence which reads "in the premises, the technical problem encountered was random, unexpected and not one which the

defendant could reasonably have been able to anticipate. It was therefore not inherent in the normal activity of the defendant and beyond its control."

The judgment below

7. The learned District Judge gave a short ex-tempore judgment. He had had the benefit of reading a skeleton argument from counsel for the defendant, to which he makes reference. The burden of the reasoning for his decision appears in paragraph 3 when he said

> "... it seems to me that, given the nature of the defect in the wiring, all reasonable measures were taken by Jet2.com in terms of the servicing of their aircraft and the examination that had taken place. ... What is critical is "and beyond its actual control", the carrier's actual control."

He then continued in paragraph 4:

> "I am prepared to find that that sort of fault is beyond the control of the carrier and therefore the exception to the regulations does apply in this case."

He concludes at paragraph 6

> "my finding is that a fault of this nature is an extraordinary circumstance and for the purposes of this case the claim is dismissed."

8. On appeal the appellant argues that the learned District Judge either applied the wrong test of "exceptional circumstances" or, if he applied the correct test he applied it wrongly. The appeal therefore turns upon the interpretation of Article 5(3). Although the amount in issue is relatively modest, the issue is one which affects a number of small claims which are pending in a number of County courts.

The Law

9. Article 5 (3) provides:

> 3. 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.

10. There are a number of pointers to the proper interpretation of Article 5(3). In particular the provision was considered in detail by the European Court of Justice in *Wallentin-Hermann v Alitalia - Linee Aeree Italiane SpA* (C-549/07). At paragraph 17 of the judgement the court said generally in relation to interpretation:

> "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, *Easycar (UK) Ltd v Office of Fair Trading (C-336/03) [2005] E.C.R. I-1947; [2005] 2 C.M.L.R. 2* at [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. (on the application of International Air Transport Association (IATA)) v Department of Transport (C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20* at [76]).”

11. In relation to the context of the Article and the purpose of the Regulation Mr Crilley on behalf of the appellant relies on those parts of the preamble which stress that the purpose of the regulation is to further the goal of consumer protection. In particular the preamble to the regulation provides amongst other things the following:

    (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.
    …..

    (12) The trouble and inconvenience to passengers caused by cancellation of flights should also be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable rerouting, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

12. With regard to the intended meaning of article 5 (3) the preamble provides at paragraph 14:

    (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.

13. In *Wallentin* the delay or cancellation resulted from "a complex engine defect in the turbine" which had been discovered the day before the scheduled flight during a routine check. The repair of the aircraft was only completed after the dispatch of spare parts and engineers. Four questions were posed to the European Court for a preliminary ruling touching upon the interpretation of Article 5(3). In its judgment the European Court made the following comments in relation to how Article 5(3) should be interpreted:

> 19 As is apparent from recital 12 in the preamble to, and art.5 of, Regulation 261/2004 , the Community legislature intended to reduce the trouble and inconvenience to passengers caused by cancellation of flights by inducing air carriers to announce cancellations in advance and, in certain circumstances, to offer re-routing meeting certain criteria. Where those measures could not be adopted by air carriers, the Community legislature intended that they should compensate passengers, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
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> 20 In that context, it is clear that, whilst art.5(1)(c) of Regulation 261/2004 lays down the principle that passengers have the right to compensation if their flight is cancelled, art.5(3) , which determines the circumstances in which the operating air carrier is not obliged to pay that compensation, must be regarded as derogating from that principle. Article 5(3) must therefore be interpreted strictly.
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> 21 In this respect, the Community legislature indicated, as stated in recital 14 in the preamble to Regulation 261/2004 , that 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 air carrier.
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> 22 It is apparent from that statement in the preamble to Regulation 261/2004 that the Community legislature did not mean that those events, the list of which is indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances. It follows that all the circumstances surrounding such events are not necessarily grounds of exemption from the obligation to pay compensation provided for in art.5(1)(c) of that regulation.
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> 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 art.5(3) of Regulation 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.
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> 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.
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> 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 art.5(3) of Regulation 261/2004 .
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> 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.
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> 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.

The arguments

14. The focus of the appellant's case is the statement in paragraph 23 of the judgment in *Wallentin* that circumstances surrounding an event can only be characterised as “extraordinary” if they relate to an event which “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”.

15. It is argued that it is important to look at both limbs of the test. First, was the fault "inherent in the normal exercise of the activity of the air carrier concerned"? and, second, in addition, was the fault "beyond the actual control of that carrier on account of its nature or origin"? In relation to the first limb it is argued that the proper distinction to be drawn is between those attributes of the flight which are either inherent or internal to it and those which are extraneous or external. Adopting that approach it is argued that the wiring which failed was an essential part of the aircraft

and inherent to the operation of the flight. It could not be said to be extraneous or external. As such the first limb was satisfied. The approach advanced by the defendant, and seemingly adopted by the learned District judge, wrongly introduced into the concept of "inherent" notions of whether the fault was either expected or discoverable.

16. In relation to the second limb of the *Wallentin* test the claimant argues that something is within the control of the carrier if it is within the overall domain of the carrier. If the question is asked "under whose control was the wiring concerned?" the answer must be the airline. Nobody else could be identified as having control over this particular wiring or fault and therefore the carrier is in control even though the fault was unforeseen or unforeseeable. The claimant argues that the practical effect of the defendant's argument (and indeed the learned District Judge's decision) is that a carrier can avoid liability to compensate a passenger for delay caused by technical fault by showing that the fault could not have been detected by a reasonable system of maintenance. It is argued that on a true construction of the Regulation the liability to compensate for delay or cancellation due to technical fault is a strict one and not dependent on fault or responsibility.

17. The respondent argues that the learned judge made findings of fact which the appellate court should be slow to interfere with. The carrier's obligations in so far as consumer protection is concerned were satisfied by compliance with the remedies offered in articles 8 and 9 of the Regulation. It is conceded that those provisions impose strict obligations on the carrier where there is cancellation or delay since there is no equivalent Article 5(3) exclusion. The words "which could not have been avoided even if all reasonable measures had been taken" in Article 5(3) itself and the wording of paragraph 23 of the judgment in *Wallentin* clearly contemplate that the carrier will not be liable if it can show that the fault happened without any responsibility (using the term in its loosest sense) on its part. It is pointed out that at least two other claims arising out of the same flight have failed before different courts; further, reliance is placed on a national enforcement body preliminary list of extraordinary circumstances drawn up following a meeting of European enforcement bodies on 12 April 2013.

Discussion

18. When interpreting this regulation the court must take into account those matters set out in paragraph 17 of the judgment of the European Court in *Wallentin*. Recitals 1 to 4 of the preamble to the Regulation stress that the overriding purpose of the legislation is to promote consumer protection as was recognised in *Wallentin* at paragraph 18 of the judgment of the Court. Further, it is clear that Article 5(3) is a provision which seeks to derogate from the operation of Article 7, a rule for the protection of consumers, and therefore must be interpreted strictly.

19. Recital 14 is relevant in that it seeks to give guidance as to the interpretation of Article 5(3). Of particular relevance to this appeal is the phrase "unexpected flight safety shortcomings" which is not defined further.

20. In *Wallentin* (paragraph 22) it was pointed out that the recital does not illustrate events which are themselves extraordinary circumstances but, rather, events which

"may produce such circumstances". So it is the result of the event which is important. This distinction is apparently maintained in paragraph 24 of the judgment when the court speaks of the "resolution of a technical problem" being the relevant event. In other words, the court seems to be saying that it is the resolution of the fault rather than the fact of the fault itself which has to be looked at. It is the repair which causes the delay / cancellation not the fault itself.

21. In paragraph 23 the European Court referred to events "like those listed in recital 14". This is clearly an invitation when interpreting the phrase "unexpected flight safety shortcoming" to given it a meaning in line with the phrases that precede and follow it. Events such as political stability, the weather, security and strikes are clearly outside the control of the carrier. One might contemplate flight safety shortcomings which are also outside the control of the carrier for example sudden and unexpected ill-health of the pilot, passenger disturbance or misbehaviour, or, as was suggested in argument, collision with a bird during flight causing damage to the aircraft.

22. The European Court recognised that a technical problem in an aircraft might amount to an “unexpected flight safety shortcoming” but said that that of itself did not mean that it was extraordinary within article 5(3). It was in that context that the court attempted to clarify the phrase "extraordinary circumstances" in so far as it relates to technical problems which has been at the heart of this appeal namely whether or not the circumstance is "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."

23. With regard to technical problems some guidance was given. Technical problems which are revealed by routine maintenance or technical problems which arise due to a failure to carry out routine maintenance and cannot amount to extraordinary circumstances (paragraph 25). However technical problems caused by hidden manufacturing defects which impact on flight safety or sabotage are cited as problems which would be extraordinary in that they are not inherent in the normal exercise of the activity air carrier and beyond its actual control. (paragraph 26).

24. The issue in this case is whether delay due to an unexpected, unforeseen and unforeseeable technical defect can amount to an extraordinary circumstance. The question does not admit to an easy answer and is not directly answered by the judgment of the European Court. Indeed both sides pray in aid their own interpretation of what the European Court said in support of their contentions.

25. Mr Crilley on behalf of the appellant accepts that if the appellant's contention is correct then it would amount to imposing strict liability on airlines in respect of delays caused in these circumstances. It seems that this would at first blush be contrary to the qualification in Article 5(3) that the carrier could benefit form the exclusion of liability to pay compensation if it could show that the extraordinary circumstances "could not have been avoided even if all reasonable measures had been taken". But, of course that begs the question: what are extraordinary circumstances?

26. The court must take into account that the purpose of the Regulation is to compensate passengers for delay or cancellation and that Article 5(3) derogates from the requirement to compensate and as such must be interpreted strictly. Further, in my

judgment it is important that, following the reasoning in *Wallentin*, it is the consequences of the technical problem and not the problem itself which must be considered.

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.

29. I reach this conclusion not without some hesitation. First I am aware that this conclusion means that the qualification of Aticle 5(3) has limited effect in these circumstances. However if the circumstances are not extraordinary then the qualification does not fall for consideration. Second, I am conscious that three different District Judges at different courts (including in this case) have found extraordinary circumstances to have existed in relation to this very flight. However I note that in all those cases the claimants appeared at the hearing in person and it seems to me unlikely that the learned district judges would have had the benefit of the detailed argument from counsel that I have had. Third, I am informed that a meeting of European national enforcement bodies has provided guidance on this issue which would tend to support the respondent's argument. However its provenance is unclear and in any event the guidance is just that. It does not purport to be definitive or binding. Whilst it is drawn up by a body whose view deserves some respect, that body is not part of the legislature and is not tasked with interpreting the intention of the legislative body in any particular case. It is not known what interest groups, if any, had input into the discussions.

30. The learned District Judge did not have the benefit of the detailed argument that I have had in particular from the claimant who before him was acting in person. Whether he would have reached a different decision had he had full argument is difficult to say since, as I have indicated, the interpretation of the Regulation and the judgment of the European Court is not straightforward. However, for the reasons which I have given and with the greatest respect to him I conclude that his decision was wrong. In my judgment and on the facts of this case the defendant respondent had not shown that the delay was caused by extraordinary circumstances and therefore was not entitled to the protection afforded by Article 5(3). In the circumstances the appeal will be allowed, the decision of the District Judge will be set aside and there will be judgment for the claimant in the relevant sum.

31. Finally I wish to say something about paragraphs 18 to 20 of the appellant's grounds of appeal. It is alleged that because the claimant appeared in person against counsel at the original hearing he was in some way disadvantaged (a) because he did not possess the necessary advocacy skills to convey the correct legal test and (b) because he felt "bullied and downtrodden" by the defendant's experienced counsel. There has been produced to me grounds of appeal in another case where identical allegations are made by the same solicitors on appeal from a decision against a litigant in person. Quite properly, Mr Crilley on behalf of the appellant did not pursue that allegation on appeal in this case and there was absolutely no evidence to support it. One can understand that a litigant in person appearing against counsel may feel disadvantaged in that he/she does not have the ability to advance difficult legal arguments but that is not a proper ground for appeal. But of more concern is the suggestion that counsel has been guilty of bullying his/her opponent, an allegation which reflects badly on both on counsel and indeed the trial judge whose duty it is to control the proceedings and ensure they are conducted fairly. Such allegations should not be made as a matter of course and without good reason supported by evidence. If such allegations are being made as a matter of course then the practice is to be deplored.

32. I invite the parties to attempt to agree an order to reflect this judgment and any consequential orders. In the event that agreement is reached then an agreed draft order should be submitted before the date fixed for handing down of the judgment and attendance will not be required. If agreement cannot be reached then the parties should set out in writing their respective submissions and I will given directions for the resolution of those issues at the time the judgment is handed down.