Case No: B33LU039

IN THE COUNTY COURT AT LUTON

ON APPEAL FROM DISTRICT JUDGE RICHARD CLARKE
A18YP011

Luton County Court
Cresta House, Alma Street,
Luton, Bedfordshire
LU1 2PU

Date: 14th January 2016

Before:

HER HONOUR JUDGE MELISSA CLARKE

- -

Between:

MONARCH AIRLINES LTD	**Appellant/ Defendant**
- and -	
(1) MICHAEL EVANS **(2) JULIE LEE**	**Respondents/ Claimants**

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Max Davidson (instructed by **Monarch Airlines Ltd**) for the **Appellant**
Matthew Mawdsley (instructed by **Bott & Co Solicitors**) for the **Respondents**

Hearing date: 5 January 2015

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JUDGMENT

Her Honour Judge Melissa Clarke:

Introduction

1. On 4 July 2014 the Respondents were scheduled to return from their holiday in Hurgada, Egypt, on flight ZB771 to London Gatwick, operated by the Appellants.

2. The aircraft that was supposed to fly from Gatwick to Hurgada to take them back to the UK had arrived in Gatwick from Nice that morning. On taking off in Nice, the pilot reported that it might have been struck by lightning. It continued onto Gatwick and landed safely. On arrival at Gatwick, the Appellant's engineers inspected the plane and found that it had, indeed, been struck by lightning. It was grounded for damage to be repaired.

3. The Appellant instead sent another of its fleet to Hurgada to operate the Respondents' flight back to Gatwick. As a consequence, the Respondents' flight took off from Hurgada 4 hours and 56 minutes later than its scheduled departure time. There was no dispute over these or any of the facts of the case.

4. The Respondents sought compensation for this delay pursuant to EU Regulation (EC) No.261/2004 of 11 February 2004 ("the Regulation") and issued a Claim on the small claims track on 8 September 2014. The Appellant accepted that the compensation sought was *prima facie* payable under the Regulation, but relied in their Defence upon an exemption from paying compensation contained in Article 5(3) of the Regulation.

5. The Appellant pleaded that the delay was caused by an unexpected flight safety shortcoming, namely damage arising from the lightning strike, and that

this was an extraordinary circumstance within the meaning of Article 5(3) exempting the airline from paying compensation for the delay.

Legislative framework

6. The title of the Regulation describes its purpose, namely in *"establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights...*"

7. The first four recitals set out the aims of the Regulation:

> *"(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."*

8. The three heads of inconvenience to passengers covered by this Regulation are dealt with in Article 4 (denied boarding), Article 5 (cancellation) and Article 6 (delay).

9. Articles 4 and 5 set out the circumstances in which passengers who are denied boarding or whose flights are cancelled have the right to compensation by the air carrier in accordance with Article 7. Article 6, however, makes no

reference to compensation for delay. For a passenger's right to claim compensation under Article 7 for delay, we must turn to the decision of the Court of Justice of the European Union ("CJEU") in Sturgeon v Condor Flugdienst GmbH & Bock v Air France SA (joined cases C-402/07 and C-432/07, [2010] 2 All ER (Comm) 983), in which it applied the principle of equal treatment to hold that passengers who had suffered a qualifying delay should be entitled to compensation under Article 7, subject to the equal application of the Article 5(3) exception to provide compensation.

10. Article 5(3) provides:

> *"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".*

11. The Regulation contains no definition of 'extraordinary circumstances'. Recitals 14 and 15 provide some guidance as follows:

> *"(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."*

Decision of the District Judge

12. At the trial on 10 September 2015, it was accepted by the Respondents that the Appellant could have avoided neither the lightning strike, nor the

consequential damage to the aircraft, nor the delay. None of the facts of the case were disputed. Accordingly, there was only one question to be determined, namely “was the delay caused by extraordinary circumstances?” If so, the Appellant could rely on the Article 5(3) exemption and the claim would be dismissed. If not, it could not and compensation would be payable to the Respondents in an agreed amount. It was common ground that the burden of proof fell on the Appellant who sought to rely on the exemption.

13. District Judge Richard Clarke held that the Article 5(3) exemption did not apply. He awarded the Respondents the compensation sought. He gave an *ex tempore* judgment but said he would give his reasons in writing. He handed down that written judgment on 15 September 2015.

14. The decision and reasoning in the District Judge’s judgment is found in paragraphs 11 – 13 as follows:

> “*11. The simple issue, as I see it, in this case is whether a lightning strike is inherent in the normal activity of the Defendant air carrier such that it does not amount to an extraordinary circumstance for the purposes of the Defence.*
>
> *12. Any golfer will be able to warn of the risks of taking a metal object and moving it through the air at speed near a storm. In essence, a plane is a very large metal object which is being moved through the air at speed and that is the fundamental nature of the activity of an airline. It matters not whether the metal object is regularly or rarely struck by lightning, as <u>Wallentin-Hermann</u> cuts both ways. The issue is whether it is reasonably likely to be struck by lightning in the ordinary course of operations.*
>
> *13. I would not categorise lightning as a freak weather condition. I am satisfied on a basic interpretation of the case law and regulations that it is an event which is inherent in the normal exercise of the activity of the air carrier concerned. I therefore find that the extraordinary circumstances defence does not apply.”*

15. The District Judge refused the Appellant's permission to appeal. The Appellant renewed its application and permission to appeal was granted by Honour Judge Charles Harris Q.C. on 29 October 2015.

Grounds

16. The Appellant appeals on two grounds: Ground 1 that the District Judge wrongly defined the relevant issue in paragraph 12 of his judgment as *"whether [the aircraft] is reasonably likely to be struck by lightning in the ordinary course of operations",* which Mr Davidson for the Appellant submits is not the legal test; and Ground 2 that the District Judge was wrong to find that a lightning strike was "*an event which is inherent in the normal exercise of the activity of the air carrier concerned"* and so not 'extraordinary circumstances' under Article 5(3).

Case law

17. There are a number of cases in which the CJEU and our domestic courts have considered the extent of the Article 5(3) exemption and the meaning of "extraordinary circumstances". Counsel for both the Appellant and the Respondents cite the following four cases which I am bound to follow:

    a) Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA (Case C-549/07) [2009] Bus LR 1016 ("Wallentin-Hermann")

    b) Jet2.com Limited v Huzar [2014] EWCA Civ 791 ("Huzar")

    c) Siewert v Condor Flugdienst GmbH (C-394/14) ("Siewert")

    d) van der Lans v KLM (C-257/14) ("van der Lans")

18. Mr Mawdsley also put before me the unreported case of Zoltan Fabian v Thomson Airways, a decision of District Judge Hovington sitting at the County Court in Manchester which does not bind me.

19. Counsel for both parties relied on Wallentin-Hermann and Huzar in the trial before the District Judge. He provided a succinct summary of those two cases in paragraphs 7 to 10 of his judgment, in relation to which no point has been taken:

> "*7. Wallentin-Hermann confirmed "the concept of extraordinary circumstances is not amongst those which are defined in article 2 of the Regulation no 261/2004. Moreover, that concept is not defined in the other articles of the Regulation." The case confirmed "the objectives pursued by article 5… are clear from recitals 1 and 2…" and "article 5(3) must therefore be interpreted strictly." The list of circumstances in recital 14 was also referred to as "only indicative" and "only that they may produce (extraordinary) circumstances". Technical problems would amount to extraordinary circumstances "only if they relate to an event which, like those listed in recital 14 of the preamble to (Regulation 261/2004), 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 and origin".*
>
> *8. The frequency of the issue was referred to as "not in itself a factor from which the presence or absence of "extraordinary circumstances"… can be concluded". It would therefore appear to be indicative, but not determinative, and something to be weighed in the balance.*
>
> *9. Huzar was the Court of Appeal decision on technical defences and related to a "wiring defect… which could not have been prevented by prior maintenance or prior visual inspection". There was no challenge to the fact the fault was "unforeseen and unforeseeable" and it was accepted "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".*
>
> *10. The airline in Huzar sought to argue that "since the technical problem was beyond the control of the carrier, it was therefore not inherent in its normal activity". The leading judgment of Lord Justice Elias, on which the other judges agreed, said the following in respect of that point and the Wallentin-Hermann decision: "This requires that the circumstances must be out of the ordinary… 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 are part of the wear and tear… Firstly 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. Secondly, 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… The wider purpose (of the Regulation) 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.""*

20. The District Judge was not referred to Siewert, for reasons unknown. Nor was he referred to van der Lans, for the simple reason that it had not yet been decided by the CJEU, being dated some two days after the District Judge's judgment was handed down.

21. The case of Siewert clarified a difficulty that Lord Elias wrestled with in Huzar, namely whether the Wallentin-Hermann test was a composite or a two-stage test and how to reconcile those two limbs of inherency and control. This issue was not specifically addressed in the District Judge's summary of Huzar, no doubt because "control" was not an issue in this case.

22. In Siewert the aircraft upon which the Siewert family were scheduled to travel had been physically damaged by a third party, over whom the airline had no control, who accidentally collided a set of mobile boarding stairs with the parked plane. The CJEU found that these were not 'extraordinary circumstances', reasoning in paragraph 19: "*…such mobile stairs or gangways are indispensable to air passenger transport, enabling passengers to enter or leave the aircraft and, accordingly, air carriers are regularly faced with situations arising from their use. Therefore, a collision between an aircraft and any such set of mobile boarding stairs must be regarded as an event*

inherent in the normal exercise of the activity of the air carrier. Furthermore, there is nothing to suggest that the damage suffered by the aircraft which was due to operate the flight at issue was caused by an act outside the category of normal airport services (such as an act of sabotage or terrorism) and would thus, [applying Wallentin-Hermann], be covered by the term 'extraordinary circumstances', which is what Condor had to demonstrate before the referring court…"

23. In my judgment it is clear, following Siewert, that the statement in paragraph 48 of Huzar that "*events which are beyond the control of the carrier because they are 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"* is no longer an accurate statement of the law. The CJEU in Siewert makes it clear that extraneous acts of third parties beyond the control of the carrier can be inherent in the normal activities of the carrier. However Siewert reinforces the importance that Lord Elias placed on the everyday meaning of the phrase 'extraordinary circumstances' itself, and therefore, in my judgment, also the warning Lord Elias gives in paragraph 36 of Huzar against construing Article 5(3) in such a way to make "*an event extraordinary which in common sense terms is perfectly ordinary*".

24. In the van der Lans case, the aircraft scheduled to take Ms van der Lans from Quito, Ecuador, to Amsterdam developed a combination of technical faults, the repair of which delayed the flight by more than a day.

25. The Court held that a technical problem which occurred unexpectedly, which is not attributable to poor maintenance and which was not detected during routine maintenance checks, does not fall within the definition of 'extraordinary circumstances' for the purposes of Article 5(3) of the Regulation.

26. The ratio is set out from paragraphs 37 to 46 and bears quoting extensively:

> 37."*Since the functioning of aircraft inevitably gives rise to technical problems, air carriers are confronted as a matter of course in the exercise of their activity with such problems. In that connection, 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'…*
>
> *38. Nevertheless, certain technical problems may constitute extraordinary circumstances. That would be the case 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…*
>
> *41. …it is true that a breakdown, such as that at issue in the main proceedings, caused by the premature malfunction of certain components of an aircraft, constitutes an unexpected event. Nevertheless, such a breakdown remains intrinsically linked to the very complex operating system of the aircraft, which is operated by the air carrier in conditions, particularly meteorological conditions, which are often difficult or even extreme, it being understood moreover that no component of an aircraft lasts forever.*
>
> *42. Therefore it must be held that, in the course of the activities of an air carrier, that unexpected event is inherent in the normal exercise of an air carrier's activity, as air carriers are confronted as a matter of course with unexpected technical problems.*
>
> *43. Second the prevention of such a breakdown or the repairs occasioned by it, including the replacement of a prematurely defective component, is not beyond the actual control of that carrier, since the latter is required to ensure the maintenance and proper functioning of the aircraft that it operates for the purposes of its business.*
>
> *44. Lastly it must be stated that, even assuming that, depending on the circumstances, an air carrier takes the view that it may rely on the fault of the manufacturer of certain defective components, the main objective of*

> *Regulation no 261/2004, which aims to ensure a high level of protection for passengers, and the strict interpretation to be given to article 5(3) of that Regulation, preclude the air carrier from justifying any refusal to compensate passengers who have experienced serious trouble and inconvenience from relying, on that basis, on the existence of an 'extraordinary circumstance'".*

27. Mr Davidson in submissions seeks to distinguish Wallentin-Hermann, Huzar and van der Lans from the present case because they were cases involving delay caused by technical problems with the aircrafts' engines and operating systems, rather than physical damage to the aircraft, as in this case and Siewert.

28. To the extent that this submission seeks to suggest that different principles apply to delay caused by technical problems and delay caused by physical damage, I reject it. The Wallentin-Hermann test, which arose from a technical problems case and specifically refers to technical problems within the wording of the test, was applied by the CJEU in Siewert, which was a physical damage case. The CJEU in van der Lans gave examples of both technical problems and physical damage, without distinguishing between them, in describing what might fall within extraordinary circumstances, in paragraph 38. There is no suggestion in the case law or the legislation that they should be treated differently. This is understandable, as there is no reason to distinguish them – indeed one could argue without difficulty that physical damage is a technical problem, to the extent it grounds an aircraft and requires investigation and/or repair. The relevant issue in each case is whether the problem or damage by its nature or origin is inherent in the normal exercise of the activity of the carrier.

29. Mr Davidson also seeks to distinguish Siewert from the present case, as he says physical damage caused by a third party providing services which are

indispensible to the operation of the aircraft (as in Siewert) is different to physical damage caused by entirely extraneous sources, such as lightning strikes (as in this case).

30. At first glance, his submission appears to find some support in paragraph 19 of Siewert: "*…there is nothing to suggest that the damage suffered by the aircraft which was due to operate the flight at issue was caused by an act outside the category of normal airport services (such as an act of sabotage or terrorism) and would thus, [applying Wallentin-Hermann], be covered by the term 'extraordinary circumstances'…"* which could be read to suggest that acts outside the category of normal airport services would fall within 'extraordinary circumstances'. However, in order to reach that conclusion one must ignore: firstly the words in brackets referring to acts of sabotage and terrorism; and secondly the context of paragraph 15 within a discussion of the facts of this case; which, in my view, would be wrong. In my judgment, in this passage the court is attempting to illustrate circumstances whereby the collision by an airport operative of mobile stairs into an aircraft (as in the facts of this case) would be outside the normal provision of airport services and accordingly not inherent in the normal exercise of the activity of the carrier, namely where those stairs were deliberately collided for reasons of sabotage or terrorism. My attention has not been drawn to support elsewhere in the case law or in the legislation for this submission. Accordingly, I reject it.

31. From the legislation and case law, therefore, the following principles can be discerned when determining whether an event giving rise to a delay, cancellation or denial of boarding (which for the purposes of convenience I

shall refer to as a “relevant event”), falls within ‘extraordinary circumstances which could not have been avoided even if reasonable measures had been taken’ for the purposes of Article 5(3):

(1) the burden of proof is on the air carrier who seeks to rely on the exemption;

(2) 'extraordinary circumstances' has its usual meaning in everyday language (Wallentin-Hermann), namely circumstances which are out of the ordinary (Huzar);

(3) in determining whether the relevant event is caused by ‘extraordinary circumstances’ the court must take into account:

   a) the context in which that phrase is used, namely within Article 5(3) which provides an exemption or derogation from consumers’ rights to compensation; and

   b) the purpose of the Regulations, which include strengthening the rights of passengers (recital 4) to ensure a high level of consumer protection (recital 1) and to compensate them for the serious trouble and inconvenience caused by long delays, cancellation and denial of boarding (recital 2) (Wallentin-Hermann);

(4) accordingly it must be interpreted strictly (Wallentin-Hermann);

(5) a problem with an aircraft does not fall within the concept of 'extraordinary circumstances' unless it stems from a relevant event which by its nature or origin is not inherent in the normal exercise of the activity of the carrier and is beyond its control (Wallentin-Hermann);

(6) a relevant event will be within the control of the carrier if it is inherent in the normal exercise of the activity which is carried on by it, and it will be beyond the control of the carrier if it is not (obiter, Huzar; Siewert);

(7) this is true whether or not the relevant event is caused by the extraneous acts of third parties (Siewert);

(8) relevant events which fall within one of the categories in the non-exhaustive list in recital 14 will, accordingly, not be 'extraordinary circumstances' if by their nature or origin they are inherent in the normal exercise of the activity of the carrier (Wallentin-Hermann);

(9) whether or not a relevant event is foreseeable or unexpected is not a deciding factor (Wallantin-Herman; Siewert; van der Lans);

(10) the frequency of a relevant event is also not a deciding factor (Wallantin-Hermann);

(11) fault, whether of the air carrier (Huzar) or third party (Siewert, van der Lans) is not the test;

(12) carriers are confronted as a matter of course with the occurrence of unexpected problems which are inherent in the normal exercise of their activity (Wallentin-Hermann, van der Lans);

(13) both prevention and the carrying out of repairs to such problems, which are required to ensure the maintenance and proper functioning of the aircraft that it operates for the purposes of its business, are similarly inherent in the normal exercise of their activity (van der Lans).

Submissions

32. In the hearing before me, Mr Mawdsley for the Respondents accepted, in my view correctly, that the District Judge wrongly directed himself in paragraph 12 and that accordingly Ground 1 is made out. He contends, however, that it makes no difference. He submits that the District Judge had previously identified the correct issue in paragraph 11, and despite then misdirecting himself, went on to make findings in accordance with that correctly identified issue, namely that a lightning strike was not a freak weather condition and inherent in the normal exercise of the activity of the air carrier.

33. Mr Davidson for the Appellant submits that the District Judge's misdirection caused him to apply the wrong test and in so doing, reach a conclusion which is wrong in law. He submits that if the District Judge had applied the right test, which he accepts was correctly set out in paragraph 11 of his judgment, then he would not have come to the conclusion that a lightning strike was inherent in the normal activity of an air carrier. He submits that if the District Judge had given 'extraordinary circumstances' its everyday meaning then he would have found as a matter of fact that a lightning strike is out of the ordinary.

Findings and conclusion

34. I find that the District Judge did misdirect himself in the last sentence of paragraph 12 of his judgment in stating the issue as being "*whether [the aircraft] is reasonably likely to be struck by lightning*". This forms no part of the relevant test and is wrong in law. Ground 1 of the appeal is therefore made out.

35. However I find that despite this misdirection, the conclusion that the District Judge reached was the correct one. In my judgment, damage caused to an aircraft by a lightning strike is inherent in the normal exercise of the activity of the carrier, and so not exceptional circumstances, for the following reasons:

    (1) Taking the wording of paragraph 37 of van der Lans, I find that lightning strikes are "*one of the problems that air carriers are confronted with as a matter of course in the normal exercise of their activity*". A lightning strike is, in my judgment and using the wording of paragraph 41 of van der Lans, "*intrinsically linked*" to operating an aircraft, which is a large metal object, in varying meteorological conditions, which include thunderstorms and highly charged atmospheric conditions. Those meteorological conditions, as van der Lans recognises, "*may often be difficult or extreme*" (although in fact in this case there is no evidence that the weather the Respondents' flight went through was particularly difficult or extreme). Those meteorological conditions may cause technical problems (which, for the reasons already explained, I interpret to include physical damage), which paragraph 42 of van der Lans makes clear are nonetheless inherent in the normal exercise of their activity and not 'extraordinary circumstances'.

(2) In reaching this conclusion, I remind myself of Lord Elias's warning in Huzar against construing Article 5(3) in such a way to make "*an event extraordinary which in common sense terms is perfectly ordinary*". I reject Mr Davidson's submission that a lightning strike is an event which, as a matter of fact, is out of the ordinary, or extraordinary, and so cannot be inherent in the normal exercise of an air carrier's activity. I find in the sphere of aviation, a lightning strike is not out of the ordinary. The fact that aircraft manufacturers design their aircraft to minimise the risks arising from them and provide air carriers with inspection and repair protocols to deal with lightning strikes gives support to this finding, and to the finding that such strikes are inherent in the normal exercise of a carrier's activity. As Mr Mawdsley put it in submissions, "Aircraft fly through the skies. On occasion they are struck by lightning. They are designed to withstand such lightning strikes, continue flying, reach their destination and then be investigated and repaired according to the manufacturer's instructions. This is not extraordinary. It is entirely inherent in the normal exercise of a carrier's activity and that is exactly what happened in this case". I accept that submission.

(3) In reaching that finding I also interpret Article 5(3) strictly, bearing in mind the purposes of the Regulations (set out above) and the context of the use of the phrase 'exceptional circumstances' in what is an exemption from air carriers' obligations to pay compensation to inconvenienced passengers.

(4) Despite Mr Davidson's submission that I should have regard to the Civil Aviation Authority's "List of Extraordinary Circumstances" dated 3 July 2014, which is in evidence in this case, I give no weight to it. It is not legally binding. It is clear from its long list of deletions and amendments, arising from changes forced upon it by decided cases, that the Civil Aviation Authority's view on what should be considered to be extraordinary circumstances for the purposes of Article 5(3) has often been at odds with that of the courts. I cannot see that it helps me at all.

(5) Finally, Mr Davidson asks me to give consideration to Article 14 and asks "if damage caused by a lightning strike is not an unexpected flight safety shortcoming then what is? Only sabotage or terrorism?" With respect, this is the wrong question. Damage caused by a lightning strike may well be an unexpected flight safety shortcoming, but that does not make it an exceptional circumstance. The case law makes clear that an unexpected flight safety shortcoming is only an exceptional circumstance if it is not inherent within the normal exercise of the carrier's activity. An unexpected flight safety shortcoming which is inherent within the normal exercise of the carrier's activity is not an exceptional circumstance and will not exempt the carrier from its obligation to pay damages under Article 7.

36. For those reasons, I dismiss the appeal. No costs are sought or ordered, as the small claims track costs rules apply.