3 HARE COURT

Travel & Aviation Quarterly

Issue 2 - Winter 2020/2021

Table of Contents

3 Hare Court Travel and Aviation Team

Members of our Travel and Aviation team are ranked as leading travel law and aviation specialists in the Legal 500 and Chambers & Partners.

We are ranked in the Legal 500 as a Tier 1 set for Travel law (including jurisdictional issues) and a top tier set for Aviation, and by Chambers and Partners as a Band 1 set in Travel.

We provide specialist advice and representation at all stages of the litigation process, including pre-action, drafting pleadings, skeleton arguments and schedules, undertaking ADR, and providing advocacy at interlocutory hearings, trials and inquests – from fast track cases to the most substantial and complex claims, from major commercial disputes to catastrophic and fatal accidents.

Claims in which we are involved frequently have a cross-border element; whether arising from an overseas accident or contractual dispute or involving foreign parties. We are uniquely placed to assist with such matters, where there are implications for the duty and standard of care, where jurisdiction and the choice of law are in issue and where direct actions are brought against overseas defendants or insurers.

The 3 Hare Court insolvency and commercial group and the travel and aviation group have both produced a number of articles, webinars and podcasts since the onset of the pandemic which discuss these and other issues in detail. For further information please view our website or contact Leanne Howes, our Marketing Manager, (LeanneHowes@3harecourt.com or 020 7415 7800) for further information.

Our Travel and Aviation Members

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Hannah Fry 2018

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Andrew Young 1977

Rupert Butler 1988

Navjot Atwal 2002

Richard Campbell 2007

Benjamin Channer 2008

Christopher Loxton 2009

Chloe Shuffrey 2014

Thomas Horton 2015

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Foreword

Astonishingly, given that time has ceased to have much meaning here in 3 Hare Court, as we enter what feels like our second decade of lockdown, here we are on our second Travel and Aviation Quarterly. And what treats we have in store, just the thing to take your mind off the fact it's still January.

In this edition:

- Samuel McNeill, our most recent new recruit, considers the long-awaited opinion of the Advocate General in *X v Kuoni*.

- Navjot Atwal considers discrimination claims in the context of the Montreal Convention.

- James Hawkins and Adam Riley (one of our new pupils) cover economic duress as considered recently by the Supreme Court in the *Pakistan International Airline v Times Travel*.

- Katherine Deal QC and Hannah Fry shamelessly publicise their recent victory before the Privy Council in *Airport Authority v Western Air*.

- Christopher Loxton has some carry-on news items to declare; and also provides a whistle stop tour through changes to travel arrangements since 1 January.

With a bang and a whimper, the transition period came to an end at 11pm on 31 December 2020. The next edition of the Quarterly, which we hope will be with you in early March, will be a no-holds barred rollercoaster ride through Brexit: where are we now?; the thrills of jurisdiction; the spills of applicable law; Green Cards; enforcement; service; the works. We can't wait.

In the meantime, we hope you enjoy this edition.

Katherine Deal QC, Christopher Loxton, and Michael Nkrumah
Co-editors

Contributors to Issue 2

Katherine Deal QC

Katherine Deal QC is renowned for her expertise in travel and aviation law. She has acted in many of the leading cases on jurisdiction (at all levels up to and including the Supreme Court and Court of Justice of the European Union), and is widely regarded as a specialist on Rome II and issues of choice of law. Most of her claims involve injuries of maximum severity or death. She also undertakes work concerning package travel, and is currently instructed in a reference to the CJEU concerning the statutory defences, as well as in the claim arising out of the Tunisia terrorist attack, amongst many others. Her aviation practice is largely focussed on personal injury claims but she has in addition considered ATOL renewals during the COVID-19 pandemic and has recently successfully defended an airline in a Privy Council appeal arising from the theft of one of its aircraft from an airport in The Bahamas. As a civil recorder, she has had to decide flight delay claims on numerous occasions, and has a particular interest in the 'extraordinary circumstances' defence. She is a firm believer in the advantages of alternative dispute resolution and has settled claims running into many millions of pounds over the last year alone.

Navjot Atwal

Navjot is regularly instructed on behalf of all the major tour operators, air, and cruise lines in respect of accidents abroad. He advises on jurisdictional questions, foreign law, and local standards, upon package travel claims and upon liability under the Athens and Montreal conventions. Many of his cases have been reported in the national press.

James Hawkins

In his personal injury practice, James represents both claimants and defendants, often in claims of substantial value and with complex medical causation issues. Recently, James has been involved in claims involving traumatic brain injuries and other serious physical injuries which have resulted in a need for significant treatment and care.

Christopher Loxton

Christopher undertakes court, drafting and advisory work in a wide variety of matters relating to aviation and travel law, including: Insurance disputes. Hull damage claims, carriage by air disputes involving EU regulations, Warsaw and Montreal Conventions, and associated passenger, cargo, baggage, delay and denied boarding claims. Personal injury, fatality, and discrimination claims. Regulatory and compliance issues. Package Holiday (including holiday sickness) claims, Regulation (EU) 1177/2010 claims. International carriage by road and sea claims, including under Athens Convention and the Convention on the Contract for the International Carriage of Goods by Road (CMR).

Hannah Fry

Hannah regularly acts in trials, interlocutory hearings and drafts pleadings in claims concerning travel law and the Package Travel Regulations. This includes personal injury suffered abroad, holiday sickness claims, misrepresentation claims, jurisdictional and conflict of law issues. She regularly represents various airlines in passenger claims for compensation under the EU Denied Boarding Regulations (EC Regulation 261/2004), the Montreal Convention and claims concerning discrimination.

Samuel McNeil

Samuel started pupillage in October 2019 and became a tenant in October 2020.

Samuel studied history at the School of Oriental and African Studies and St Antony's College, Oxford before studying the GDL and BPTC in London as a Lincoln's Inn scholar. He has an interest in all of Chambers' core practice areas.

Samuel worked with several pro bono initiatives during his studies, including assisting litigants in person with the City University Company Insolvency scheme and working as a representative with the Free Representation Unit.

Adam Riley

Adam commenced pupillage in October 2020. He studied history at the University of Sheffield, graduating at the top of his year, after which he worked in social policy and the charity sector. Adam then completed the GDL and BPTC at the University of Law.

During his legal studies he worked in civil liberties at Hodge, Jones and Allen LLP, in addition to volunteering with Liberty. Adam also represented numerous individuals pro bono at the First-tier (social security) Tribunal with the FRU, Z2K, and latterly as a legal advisor at the UCL Centre for Access to Justice. He also chaired the RebLaw conference 2017-18, then the largest student-led conference dedicated to public interest law.

After completing his legal studies Adam volunteered with a refugee charity in Athens. Prior to starting pupillage Adam was awarded a grant to undertake an Amicus placement with the Capital Post-Conviction Project of Louisiana, assisting attorneys in New Orleans working on capital appeals.

Carry-on news items

- The UK **Competition and Markets Authority (CMA)** imposed interim measures in September 2020 designed to protect competition on UK-US air routes while it investigates an agreement involving five European and one US carrier. The measures, brought in in light of the expiry in 2021 of the **Atlantic Joint Business Agreement (AJBA)**, will last three years to allow the aviation market to stabilise in response to the Covid-19 pandemic. Under the terms of the AJBA signed with the European Commission in 2010, **British Airways, Iberia, Aer Lingus, American Airlines and Finnair** agreed to release slots at Heathrow and Gatwick on 6 routes between the UK and the US to address anti-competition concerns. The CMA launched its own investigation in 2018 and hopes to complete it prior to the expiry of the interim measures in March 2024 with a long-term remedy.

- On 2 October 2020, **the High Court in Ireland** dismissed a judicial review claim brought by **Ryanair** in which the airline challenged the legality of the Government of Ireland's coronavirus travel advice not to travel outside of Ireland other than for essential purposes (***Ryanair DAC v An Taoiseach & ors*** [2020] IEHC 461). Mr Justice Simons held that the threshold which had to be met before the courts would intervene in a case of this kind was a very high one. He found, applying an objective test, that a person reading the advice would not be left with the impression that the travel advice was legally enforceable.

- On 16 October 2020, the UK **Information Commissioner (ICO)** re-issued its financial penalty against **British Airways** for a widespread **data breach** in 2018 (affecting an estimated 400,000 customers). The fine, for contraventions of the General Data Protection Regulation ("GDPR"), was reduced from an eye-watering £183.39m to £20m. According to the ICO, the adverse impact of the Covid-19 pandemic was only responsible for a £4m reduction in the overall figure. BA now faces one of the largest data breach class-action lawsuits in UK history with more than 16,000 potential claimants having joined the group action pre-action.

- On 17 November 2020, a new bilateral **Air Services Agreement** was agreed between **the UK** and **the US** to "safeguard the future of air travel past the end of the transition period", replacing the EU agreement covering air travel between the two countries.

- On 16 December 2020, the **UK Supreme Court** ruled in favour of the owners of **Heathrow** (HAL) in ***R (Friends of the Earth Ltd and others) v Heathrow Airport Ltd*** [2020] UKSC 52, concerning a dispute over the airport's proposed third runway. The appeal concerned the lawfulness of the Airports National Policy Statement (the "ANPS"), and its accompanying environmental report, and centred around the meaning of the term "Governmental Policy" within the Planning Act 2008. The Court unanimously allowed the appeal, dismissing arguments that the Secretary of State failed to have proper regard to the Climate Change Act 2008 or the Paris Agreement when designating the ANPS. However, the third runway is likely to face further hurdles, first, in the form of new legal challenges by the Good Law Project and Plan B Earth in light of the UK's 2019 net zero emissions commitment set out in the amended Climate Change Act (that post-dated the ANPS). The runway requires the granting of planning permission, including a Development Consent Order, which is also likely to be subject to challenge.

- On 20 November 2020, the US **Federal Aviation Administration** (FAA) recertified the **Boeing 737 Max** in the Federal Register. Just days later, the EU aviation regulator, **EASA**, issued a Proposed Airworthiness Directive and Preliminary Safety Directive with a 28-day consultation period. Subject to comments, a final Airworthiness Directive is expected by the end of January 2021 which will constitute the formal ungrounding decision for all 737 Max aircraft operated by EASA Member State carriers. Having also obtained re-certification in Brazil, a 737 Max performed the first revenue passenger flight (by Brazilian airline GOL) on 9 December 2020. The CAA is yet to make an announcement on re-certification though is likely to follow EASA's decision in the coming months.

- On 27 December 2020, President Donald Trump signed into law the **Consolidated Appropriations Act 2021** (H.R. 133), a $2.3 trillion spending bill that combines $900 billion in stimulus relief in response to the Covid-19 pandemic with a $1.4 trillion omnibus spending bill for the 2021 federal fiscal year. The Act contains a subordinate piece of legislation, cited as the **Aircraft Certification, Safety, and Accountability Act** (sections 101 to 137 of the consolidated Act), that strengthens the Federal Aviation Administration's (FAA) oversight of aircraft manufacturers, reforms the aircraft certification process, and increase Congress' oversight of the certification process, all in response to the **Boeing 737 Max** fiasco.

- At 11pm on 31 December 2021 the Brexit transition period came to an end.

- On 8 January 2021, the US **Department of Justice** announced that it had reached a $2.5 billion agreement to settle a criminal charge against **Boeing** that the manufacturer hid information from safety authorities about the design of the **737 Max**. As part of the deal, 737 Max airline customers will receive $1.77 billion as compensation for financial losses suffered from the grounding of the new generation aircraft. The agreement also involves Boeing paying a penalty of $243.6 million and $500 million in additional compensation to the families of those lost in the Lion Air and Ethiopian Airlines crashes in 2018 and 2019 which killed a total of 346 people. Boeing has taken a $743.6 million charge to earnings in connection with its commitments under the agreement.

- **Sriwijaya Air flight 182** crashed just four minutes after take-off from Jakarta on 9 January 2021, tragically killing all 62 people onboard. The aircraft reached 10,900 feet before quickly losing altitude and crashing into the Java Sea. SJ182 was operated by a **Boeing 737-524 aircraft** which Sriwijaya Air took delivery of in 2012 (having originally been delivered to Continental Airlines in 1994). Investigators from the Indonesian National Transportation Safety Committee (NTSC) have since retrieved the flight data recorder and are continuing to search for the cockpit voice recorder. Indonesian investigators are being assisted by the US National Transportation Safety Board (NTSB).

X v Kuoni (C-578/19) – Advocate General's Opinion

The extent of a commercial enterprise's liability for personal injury, and particularly deliberate harm, caused by employees and agents has been a thorny issue in English law for some time. It is an issue often fought on grounds of public policy. In such cases, a tort victim is generally left with few potential avenues for compensation and an employer or commercial principal presents an obvious source of compensation. On the other hand, there is force behind the argument that capacity to pay is not a just criterion for liability.

In the statutory regime of Directive 90/314/EEC, implemented in England by The Package Travel, Package Holidays and Package Tours Regulations 1992, the balance struck is between "organiser" package travel companies and their "consumers". The relationship between the two is contractual and heavily regulated.

In an opinion delivered recently in the case of ***X v Kuoni Travel Ltd*** (Case C-578/19), AG Szpunar of the Court of Justice of the European Union places his thumb firmly on the scale in favour of the consumer.

This is of particular interest in Chambers because Katherine Deal QC has acted for X since shortly before trial at first instance; and Howard Stevens QC and James Hawkins are instructed on behalf of ABTA, which got permission to intervene in the Supreme Court.

Facts

X v Kuoni concerns the events of a package holiday in Sri Lanka booked and taken in 2010 by Mr and Mrs X. During the holiday in the early hours of the morning Mrs X came across N, a uniformed on-duty electrician employed by the hotel, while trying to find the hotel reception. N offered to show Mrs X a shortcut to the reception building. After accepting this invitation, N lured Mrs X into a utility room where he raped and assaulted her.

Mrs X brought proceedings against the package holiday organiser, Kuoni, for damages in respect of that rape and assault for breach of contract and/or under the package travel regulations. The Claimant was unsuccessful at first instance in the High Court [[2016] EWHC 3090 (QB)] and at the Court of Appeal [[2018] EWCA Civ 938], however, appealed further to the Supreme Court.

An important feature of the statutory regime in this area is that Kuoni as the package holiday organiser was responsible for the proper performance of the terms of the holiday contract, even where

performance was agreed to be undertaken by a supplier of services and not Kuoni itself. It is well established that hotels, such as the one booked by Mrs X, are suppliers of services. X's claim was that the guiding services offered by N across the grounds to reception, whilst on duty and wearing his hotel uniform, were services provided under the holiday contract. Accordingly, X maintained, since those services were plainly not provided with reasonable skill and care, Kuoni was liable to Mrs X for the actions of N as a breach of the holiday contract. Mrs X's position at the Supreme Court was that a hotel employee should not generally be considered a supplier of services, but should be considered so where to do otherwise would deny the consumer the protection afforded by Article 5 of Directive 90/314.

Another key issue in dispute concerned whether Kuoni could rely on any of the defences available to an organiser in the 1992 Regulations, derived from Directive 90/314/EEC. The possible defences available to an organiser are found at regulation 15(2) of the 1992 Regulations:

"The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because—

> *(a)the failures which occur in the performance of the contract are attributable to the consumer;*
>
> *(b)such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or*
>
> *(c)such failures are due to—*
>
> > *(i)unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or*
> >
> > *(ii)an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall."*

These defences correspond to the defences detailed at of Article 5(2) of Directive 90/314.

Kuoni sought to rely on the defence available at Regulation 15(2)(c)(ii), i.e. that the actions of N represented an event which Kuoni even with all due care, could not foresee or forestall.

The Claimant's current appeal in the Supreme Court concerns two issues:

i. Did the rape and assault of Mrs X constitute improper performance of the obligations of Kuoni under the contract?
ii. If so, is any liability of Kuoni in respect of N's conduct excluded by clause 5.10(b) of the contract and/or regulation 15(2)(c) of the 1992 Regulations?

The Supreme Court's reference questions

In deciding this appeal, by an interim judgment [2019] UKSC 37, the Supreme Court felt it necessary to refer the following questions to the CJEU:

"(1) *Where there has been a failure to perform or an improper performance of the obligations arising under the contract of an organizer or retailer with a consumer to provide a package holiday to which the Directive applies, and that failure to perform or improper performance is the result of the actions of an employee of a hotel*

company which is a provider of services to which that contract relates:

> *(a) is there scope for the application of the defence set out in the second part of the third alinea to article 5(2); and, if so,*
>
> *(b) by which criteria is the national court to assess whether that defence applies?*

(2) *Where an organizer or retailer enters into a contract with a consumer to provide a package holiday to which the Directive applies, and where a hotel company provides services to which that contract relates, is an employee of that hotel company himself to be considered a "supplier of services" for the purposes of the defence under article 5(2), third alinea of the Directive?*"

The Claimant can perhaps take comfort from the fact that the Supreme Court, in referring these questions to the CJEU, asked the CJEU to assume critical facts in her favour, namely:

"*For the purposes of this reference, the Court of Justice of the European Union is asked to assume that guidance by a member of the hotel's staff of Mrs X to the reception was a service within the "holiday arrangements" which Kuoni had contracted to provide and that the rape and assault constituted improper performance of the contract.*"

AG's Opinion

Following his analysis AG Szpunar came to the following conclusion:
"*In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Supreme Court of the United Kingdom as follows:*

> *(1) An employee of a supplier of services in the context of a package travel contract cannot be regarded per se as a supplier of services for the purposes of applying the second part of the third indent of Article 5(2) of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.*
>
> *(2) The organiser must be liable for acts and omissions of an employee of a supplier of services in the performance of the contractual obligations which are specified in the contract, as defined in Article 2(5) of that directive, as well as for the acts and omissions of that employee in the performance of the obligations which are regarded as being ancillary to the services referred to in Article 2(1)(b) of the Directive. Accordingly, the defence to liability provided for in the second part of the third indent of Article 5(2) of Directive 90/314 in relation to a package travel organiser cannot be applied where the failure to perform or the improper performance of the contract which that organiser has concluded with a consumer is the result of the acts of an employee of a supplier of services performing that contract."*

Analysis of Question 1

The answer to the Supreme Court's first question could not have been an easy task, given the paucity of any past guidance or authority on which to answer it. The English phrase "supplier of services" in the 1992 Regulations appears to be ambiguous as to whether it includes natural persons or is limited to organisations, such as hotels. Phrases used in the implementing domestic legislation of other member states are equally ambiguous on this point, such as the French *prestataires de services*, or the Slovenian *izvajalec storitev*. There are few authorities on the use of the defences of the third alinea of Article 5(2) of Directive 90/314 generally.
AG Szpunar's analysis of this question was correspondingly short. His construction of the phrase relied on the fact that an employee of a supplier of services is in a subordinate relationship to that supplier of services, which can be contrasted to the contractual relationship held by other suppliers of services, such as hotels

or tour guides. Furthermore, AG Szpunar noted that the Directive anticipated Organisers being able to pursue remedies against services providers, which they are unable to do directly against suppliers of services' employees.

Analysis of Question 2

AG Szpunar's analysis of the second question is predicated on what he sees as the defining purpose of Directive 90/314: "a high level of protection for consumers", a phrase he uses five times in his opinion. The AG relied on the third recital to Directive 90/314 and the proceeding body of caselaw on the directive for this interpretation of its purpose.

The most significant way in which this purpose informed AG Szpunar's answer to the second question was in his interpretation of the word "event" Regulation 15(2)(c)(ii):

"*The term 'event' contained in that provision cannot cover the acts or omissions of an employee, including wrongful acts committed intentionally, of a supplier of services in the performance of the obligations arising from the package travel contract.*"

In other words, as X had submitted from trial at first instance, it is not open to a tour operator to use the very event which puts it in breach of contract as the justification for why it should not be liable for that breach. It was clarified that such acts must be attributed to the supplier of services and that in order for Regulation 15(2)(c)(ii) to apply in such circumstances, there would have to be an event outside the organisational structure of the supplier of services. In AG Szpunar's view, this is the only interpretation that would adequately protect consumers.

This interpretation reflects the concerns expressed earlier in AG Szpunar's opinion at paragraphs [34-49] as to why such attention to consumer protection in Directive 90/314 is necessary. He notes that there is a complexity inherent in the contracts and relationships of package travel that can make it difficult for consumers to seek compensation for losses suffered, a situation that can be rectified by making a single party responsible for improper performance under the contract.

AG Szpunar's opinion gives a wide meaning to the defence in Regulation 15(2)(c)(ii) in one important respect. In his view, the defence at Regulation 15(2)(c)(ii) did not have to be read in conjunction with the defence at Regulation 15(2)(c)(i). This interpretation would effectively give the "event" at Regulation 15(2)(c)(ii) the meaning of an "*an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall that is not also a force majeure*". This gives organisers the opportunity to rely on a defence outside the limitations of the *force majeure* definition at second subparagraph of Article 4(6) of Directive 90/314.

Samuel McNeil

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Are discrimination claims still pie in the sky?

Introduction

In June 2020, it was reported in the media that Elgin Banks, a Black man from Arizona, and four other people had filed a race discrimination lawsuit against American Airlines after Mr Banks was removed from a flight from Los Angeles to Phoenix.

It was alleged that Mr Banks asked if he could change seats to enable him to safely socially distance. He was told by a flight attendant he would have to wait until after boarding had been completed. Once boarding was complete, Mr Banks noticed a number of white passengers were permitted to move seats. When Mr Banks asked whether he could take a seat towards the front of the plane, the white flight attendant told him to sit down and lower his voice. The situation escalated, security was called, and Mr Banks was ejected from the flight. Four fellow passengers objected to Mr Banks's removal and they were ordered off the plane as well. American Airlines has denied any discrimination took place.

The above facts give rise to considerations of whether an airline bears any legal liability for acts of discrimination that occur on board an aircraft under the Montreal Convention[1]. This question extends to allegations of race discrimination, as above, but equally to acts of sex or disability discrimination.

The somewhat surprising, arguably outrageous, answer is that the Montreal Convention provides Mr Banks and his fellow passengers (and others in a similar position) with no effective redress against the airline. Nor does it appear that any steps have been taken by the contracting parties to the Montreal Convention to amend its provisions so as to take account of the development of equality rights, whether in relation to race, sex or disability discrimination, or of human rights.

The Montreal Convention

The Montreal Convention was agreed at Montreal on

[1] The full title of the Montreal Convention is the Convention for the Unification of Certain Rules for International Carriage by Air.

28 May 1999. Its purpose according to the preamble was *"to modernize and consolidate the Warsaw Convention and related instruments"*.

Article 1 of the Convention defines its scope. It states that the Convention applies to *"all international carriage of persons, baggage or cargo performed by aircraft for reward"*.

In chapter III of the Montreal Convention liability for death or bodily injury is dealt with in article 17.1 which states:

"The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

There are two significant limitations to liability built into the Convention. First, there are limits to the type of injury or damage which is compensable and the amount of compensation recoverable. It is long established that bodily injury does not extend to mental injury, such as post-traumatic stress disorder or depression: see ***King v Bristow Helicopters Ltd*** [2002] UKHL 7. The same would apply to injury to feelings. Secondly, there is an exclusivity provision.

The exclusivity provision in the Montreal Convention is contained in article 29:

"In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary [2]or any other non-compensatory damages shall not be recoverable."

The effect of article 29 was considered by the House of Lords in the well-known decision of ***Sidhu v British Airways Plc*** [1996] UKHL 5. In *Sidhu*, Lord Hope (giving the only speech) analysed the history, structure and text of the Montreal Convention's predecessor, the Warsaw Convention. He explained the Convention was a comprehensive package. It gave passengers significant rights but it also imposed limitations. He held that the whole purpose of article 17[3], read in its context, was to prescribe the only circumstances in which a carrier would be liable to passengers for claims arising out of the international carriage by air.

King v American Airlines[4]

On 25 April 1997, Mr and Mrs King purchased

[2] See also *El Al Israel Airlines Ltd v Tseng* 525 US 155 (1999) and *Eastern Airlines Inc v Floyd* 499 US 530 (1991)

[3] Which has virtually identical language to article 17.1 of the Montreal Convention.

[4] *King v American Airlines Inc* 284 F 3d 352 (2002)

two round-trip tickets for a flight from New York City to Freeport, Grand Bahamas via Miami. On arrival at Miami the Kings were informed the flight to Freeport was overbooked. They were '*bumped*' from the flight involuntarily. The Kings were the only African American passengers who were '*bumped*' with confirmed bookings. The other bumped passengers had voluntarily given up their seats. Moreover, all the white passengers, including those who did not have confirmed reservations were allowed to board the flight to Freeport. The Kings sued. They alleged race discrimination.

The matter came before the US Court of Appeal for the Second Circuit who considered the question of whether discrimination claims could properly be regarded as generically outside the Convention's substantive scope. The court held that the discrimination claim was excluded by the Warsaw Convention, which was materially similar in scope to the current Montreal Convention.

The argument on behalf of the Kings was that discrimination claims fell outside the scope of the Convention because of their qualitative nature. Sotomayor CJ (now Justice Sotomayor of the US Supreme Court), delivering the opinion of the court, emphasised that the scope of the Convention depends not on the qualitative nature of the act or omission giving rise to the claim but on the temporal issue of when and where the events took place:

"Article 17 directs us to consider when and where an event takes place in evaluating whether a claim for an injury to a passenger is pre-empted. Expanding upon the hypothetical posed by the Tseng Court, a passenger injured on an escalator at the entrance to the airport terminal would fall outside the scope of the Convention, while a passenger who suffers identical injuries on an escalator while embarking or disembarking a plane would be subject to the Convention's limitations. Tseng, 525 US at 171. It is evident that these injuries are not qualitatively different simply because they have been suffered while embarking an aircraft, and yet article 17 plainly distinguishes between these two situations.' [Original emphasis]

…

The aim of the Warsaw Convention is to provide a single rule of carrier liability for all injuries suffered in the course of the international carriage of passengers and baggage. As Tseng makes clear, the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered. See Tseng, 525 US at 171 (rejecting a construction of the Convention that would look to the type of harm suffered, because it would 'encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the treaty'); Cruz v Am Airlines, 338 US App DC 246, 193 F3d 526, 531 (DC Cir 1999) (determining that fraud claim was pre-empted by Article 18 , because the events that gave rise to the action were 'so closely related to the loss of [plaintiffs'] luggage … as to be, in a sense, indistinguishable from it')."

The judge further noted a number of cases US District Courts had addressed the issue of whether discrimination claims were excluded by the Convention and had all reached a similar view. Although acknowledging that private suits were an important vehicle for enforcing anti-discrimination laws, the judge went on to find that federal law provided other remedies (such as filing a complaint with the Secretary of State for Transportation).

Stott v Thomas Cook Tour Operators[5]

The position has been considered more recently in the UK, in the context of a disability discrimination claim, by the Supreme Court in ***Stott***.

Mr Stott was paralysed from the shoulders down and was a permanent wheelchair user. He had double incontinence and required the use of a catheter. When travelling by air, he depended on his wife to manage his incontinence as he could not move around the aircraft. Mr Stott was assured by airline staff that he would be seated with his wife shortly after making his booking. On the return flight from Zante, Mr Stott was informed he would not be seated with his wife. On boarding the aircraft, Mr Stott's wheelchair overturned. The seating arrangement caused Mr Stott considerable difficulties on the flight home. The cabin crew dealt with the situation badly and made no attempt to ease the Stotts' difficulties.

Mr Stott brought a claim under the UK Disability Regulations for a declaration that the airline's treatment of him was discriminatory and in breach of duty under those Regulations. The trial judge made a declaration to that effect, but considered he had no power to make a compensatory award since the scope of the Montreal Convention excluded liability. The Court of Appeal agreed with the trial judge, as did the Supreme Court.

Lord Toulson provided the lead judgment in Supreme Court. The essence of his decision appears at paragraph 59 to 61 of the judgment:

"59. To summarise, this case is not about the interpretation or application of a European regulation , and it does not in truth involve a question of European law, notwithstanding that the Montreal Convention has effect through the Montreal Regulation. The question at issue is whether the claim is outside the substantive scope and/or temporal scope of the Montreal Convention , and that depends entirely on the proper interpretation of the scope of that Convention. [….]

60. The temporal question can be answered by reference to the facts pleaded and found. The claim was for damages for the humiliation and distress which Mr Stott suffered in the course of embarkation and flight, as pleaded in his particulars of claim and set out in paras 6 to 8 of the recorder's judgment. The particulars of injury to Mr Stott's feelings and the particulars of aggravated damages related exclusively to events on the aircraft. In the course of argument it was suggested that Mr Stott had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage. If so, it would of course follow that such a pre-existing claim would not be barred by the Montreal Convention , but that was not the claim advanced.

[5] [2014] UKSC 15

Mr Stott's subjection to humiliating and disgraceful maltreatment which formed the gravamen of his claim was squarely within the temporal scope of the Montreal Convention . It is no answer to the application of the Convention that the operative causes began prior to embarkation. To hold otherwise would encourage deft pleading in order to circumvent the purpose of the Convention. Many if not most accidents or mishaps on an aircraft are capable of being traced back to earlier operative causes and it would distort the broad purpose of the Convention explained by Lord Hope in Sidhu to hold that it does not apply to an accident or occurrence in the course of international carriage by air if its cause can be traced back to an antecedent fault.

61. Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the Convention? As to the general question, my answer is no for the reasons given by Sotomayor CJ in King v American Airlines. I agree with her analysis that what matters is not the quality of the cause of action but the time and place of the accident or mishap. The Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation. The answer to that general question also covers the more specific question."

Lord Toulson acknowledged the temporal exclusion of liability for discriminatory acts was unfair. At paragraphs 63 and 64 of his judgment, he said:

"63. The underlying problem is that the Warsaw Convention long pre-dated equality laws which are common today. There is much to be said for the argument that it is time for the Montreal Convention to be amended to take account of the development of equality rights, whether in relation to race (as in King v American Airlines) or in relation to access for the disabled, but any amendment would be a matter for the contracting parties. It seems unfair that a person who suffers ill-treatment of the kind suffered by Mr Stott should be denied any compensation.

64. Under the law as it stands, a declaration that the carrier was in breach of the UK Regulations is likely to be small comfort to a passenger who has had Mr Stott's experience, but I draw attention as did Sotomayor CJ at the end of her opinion in King v American Airlines, to the fact that there are other possible means of enforcement. It is for the Civil Aviation Authority to decide what other methods of enforcement should be used, including possible criminal proceedings."

Lady Hale agreed with Lord Toulson. At paragraph 67 of the judgment she said:

"67. Mr and Mrs Stott have both been treated disgracefully by Thomas Cook and it is hardly less disgraceful that, for the reasons given by Lord Toulson, the law gives them no redress against the airline. The apparently adamant exclusion, in article 29 of the Montreal Convention , of any liability for damages other than that specifically provided for in the Convention, while perhaps unsurprising in a trade treaty, is more surprising when the fundamental rights of individuals are involved. Some treaties make express exception for anything which conflicts with the fundamental rights protected within a member state, but the Montreal Convention does not. Whatever may be the case for private carriers, can it really be the case that a State airline is absolved from any liability in damages for violating the fundamental human rights of the passengers it carries?"

At paragraph 70 of the judgment, Lady Hale echoed Lord Toulson's comment that the

unfairness of the present position ought to be addressed by the parties to the Convention.

Comment

It is now over 6 years since the Supreme Court's decision in *Stott*. Perhaps unsurprisingly, but no less regrettably, the signatories to the Convention have taken no steps whatsoever to amend the Convention so as to bring discrimination claims of the type alleged by Mr Banks within its scope.

The undeniable effect of that failure is to deny an adequate remedy to victims of discriminatory acts which take place during international carriage by air. The mere possibility of a complaint to the relevant civil aviation authority (the CAA, in the UK) being made or some negative press is unlikely, of itself, to properly incentivise airlines to take genuine and real steps forward to prevent acts of discrimination by its employees and agents. This will only truly happen if airlines are made answerable for the actions of their staff through the courts. For now, such a prospect regrettably continues to be pie in the sky.

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'An offer you can't refuse' – examining economic duress in *Pakistan International Airline Corporation v Times Travel (UK) Ltd*

Introduction

This article summarises some of the key arguments before the Supreme Court in *Pakistan International Airline Corporation v Times Travel (UK) Ltd*. The case concerns the question of what constitutes illegitimate pressure in the law of economic duress.[6] This question is not just of academic interest, but of serious practical concern in the commercial sphere. The parties' business relationship – a smaller business dependent on a larger partner – is found in all areas of commerce: a point illustrated by the intervention of the All-Party Parliamentary Group for Fair Business Banking ("the APPG") (represented in the appeal by Thomas Roe QC, Richard Samuel, Daniel Black and Hannah Fry of 3 Hare Court).

The involvement of two other intervenors in the case, the state of Ukraine and the Law Debenture Trust ("LDT"), demonstrates that the case will likely also have an impact on the governance of economic activities between states, as well as between state and non-state actors.

[6] It was common ground between the parties that a claim for economic duress requires:
(i) Illegitimate pressure applied to a duressee by a duressor to enter into a contract;
(ii) The illegitimate pressure to be a significant cause inducing the duressee to enter into a contract with the duressor; and
(iii) That the effect of the illegitimate pressure is such that there is a lack of practical choice but to enter the contract
The parties were agreed that the nature of limbs (ii) and (iii) were not in dispute. The court was therefore solely focussed on clarifying the meaning of the term 'illegitimate' in limb (i).

The Facts

Times Travel (UK) Ltd ("TT") entered into a contract with Pakistan International Airline Corporation ("PIAC") around 2008, pursuant to which TT would act as a ticketing agent for PIAC. By 2012 a large number of these agents had threatened or commenced litigation against PIAC to recover significant sums of unpaid commission.

In September 2012 PIAC gave lawful notice of the termination of its existing agency contracts. This notice was accompanied by a new contract which PIAC's agents were required to sign if they wished to continue to do business with PIAC. The new contract required the ticketing agents to waive their claims for unpaid commission under the prior arrangements.

In 2014 TT brought proceedings to recover the unpaid sums arguing, *inter alia*, that the new contract was void for duress. The High Court agreed that the new contract could not "*be seen as compensating TT in an adequate way for its forced waiver of existing claims*'. The pressure applied to induce TT to sign the new contract, though lawful, was declared illegitimate, and the contract was therefore voidable due to duress.

The High Court's decision was subsequently reversed by the Court of Appeal. The appellate court observed that there were two limbs to consider as to whether the pressure was illegitimate: (i) the nature of the threat; and (ii) the nature of the demand which the threat was intended to support. The Court found that the nature of the threat to TT – the reduction in ticket allocation and the notice of termination to pressure TT into signing the new contract – was, '*though harsh,… in all respects lawful*'.[7]

Given the lawful threat, the Court's attention turned to the nature of the demand. In a unanimous judgment the Court reasoned that economic duress would not be established where the threat of lawful pressure is used to make a demand '*to which the person exercising pressure believes in good faith it is entitled, and that is so whether or not, objectively speaking, it has reasonable grounds for that belief*'.[8] TT had therefore not established that PIAC had acted in bad faith, and so the contract was not voidable for duress.

The arguments before the Supreme Court

The main points of contention before the Supreme Court were, at their simplest, three-fold:

1. Whether illegitimate pressure can encompass lawful acts, or put another way: is there such a thing as lawful act duress?
2. If the doctrine exists, should it?
3. If the answer to both questions above is yes, how should the courts approach lawful act duress?

Is there such a thing as 'lawful act' duress?

PIAC and LDT contended that it was questionable whether lawful act duress exists at all. Both argued that there was no case where lawful act duress could be said to have been

[7] *Times Travel (UK) Limited v Pakistan International Airlines Corporation* [2019] EWCA Civ 828 [69]

[8] *Ibid.*

crucial to the outcome – PIAC quoted the New Zealand Court of Appeal in *Dold v Murphy* [2020] NZCA 31: '*to date, the concept of lawful act duress appears to reside more in dicta than in practice*'.

Further, LDT argued that Steyn LJ had erred in his judgment in *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 when he explained that there were three cases where English courts had found that a threat of lawful action could be said to amount to illegitimate pressure. In fact, argued LDT, these cases were illustrations of unlawful pressure.[9] It was asserted that a quarter of a century since the Court of Appeal in *CTN* had adopted a 'never say never' approach to ruling out lawful economic duress, it remained that no case had been decided on this basis, its abolition therefore would not leave a lacuna in the law.

Close scrutiny of this analysis reveals significant difficulties, not the least of which is failing to recognise that duress can arise without requiring any prior contractual history between the parties. TT additionally stressed that Steyn LJ in *CTN* – following the relevant authorities – had sought to deliberately leave the categories open whilst nevertheless observing that establishing lawful act duress might occur only rarely in a purely commercial context. Further, as Ukraine also observed, the doctrine had been endorsed by the most senior courts in a number of common-law jurisdictions.

Should there be such a doctrine as lawful act duress?

Assuming that the doctrine of lawful act duress exists, the question naturally arises as to whether it should continue to exist. Argument for its abolition stemmed in part from its uncertain relationship with the equitable doctrines of undue influence and unconscionability. Professor Burrows, as he then was, observed that: '*until the expansion of duress, undue influence was regarded as embracing threats or pressure that fell outside the then narrow doctrine of duress*'.[10] PIAC and LDT noted that the imprecision which has arisen since the expansion of economic duress had led to at least one jurisdiction jettisoning the doctrine of lawful act duress altogether, citing the Court of Appeal in New South Wales in *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344 which observed: '[t]*he vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct*'. This would also prevent the doctrine intruding on territory which is properly the preserve of Parliament, namely the regulation of monopoly power and laws regulating

[9] LDT and PIAC argued that: *Thorne v Motor Trade Association* [1937] AC 797 was a case in which the threat alleged constituted blackmail, and therefore involved unlawful pressure; in *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 legal proceedings were threatened on the basis of an ulterior purpose, which was itself unlawful; and *Universe Tankships Inc of Monrovia v International Transport Workers Federation* (*"the Universe Sentinel"*) [1983] 1 AC 366 involved the threat of unlawful conduct in that dock workers were threatening to breach their employment contracts which obliged them to tow a vessel out to sea. It was contended that the same argument could be made in respect of the case-law which followed *CTN*: in *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm) the chain of events included a repudiatory breach of contract by the party accused of duress; and in *Borrelli v Ting* [2010] UKPC 21 the lawful threat in that case was made against a background of unlawful activity, including forgery.

[10] Professor Andrew Burrows, *The Law of Restitution* (3rd ed., 2011), p.283

commercial parties' conduct in situations of unequal bargaining power.

LDT argued further that if there were to be some wider common law doctrine of duress that allows contracts to be set aside because of improper, unreasonable or unacceptable pressure which is otherwise lawful, it is difficult to see how equitable doctrines of undue influence or unconscionability, which had developed to supplement the common law, would continue to have any ongoing relevance. Finally, LDT argued that the position of the Court of Appeal was fundamentally flawed given that if a defendant held out to a claimant that it believed itself entitled to make a particular demand, when in fact it had no such belief, then this would amount to fraud, and there would be no need to have recourse to the doctrine of lawful act duress.

TT countered that the different path taken by the NSW court in *Karam* actually represented a divergent approach to categorisation, rather than a disagreement as to whether a weaker party should be able to set aside a contract procured by lawful threats in certain limited circumstances. TT's starting point was that voluntary contractual agreement and coercion are antithetical. This policy basis was given expression in part in Lord Diplock's speech in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* (*"the Universe Sentinel"*) [1981] UKHL 9; [1983] 1 AC 366 that the doctrine of duress was concerned with situations where apparent consent is induced as a result of pressure which '*the law does not regard as legitimate*'. In doing so, TT contends, Lord Diplock elevated the rationale underpinning duress – the protection of consent and party autonomy – to the highest level of dispositive importance. Jettisoning the doctrine of "lawful act" duress due to abstract concerns about its relationship with equity, or privileging certainty over consent, would subvert the purpose for which duress was conceived in the first place. Indeed, TT averred that in this context the search for certainty amounts to little more than a rhetorical device, deployed by those who insist on an extreme approach to contract enforcement, which would shield those that behave badly in commercial dealings from being called out for their conduct.

How should courts approach lawful act duress?

Unsurprisingly, PIAC's primary argument endorsed the Court of Appeal's approach, arguing it had been correct to limit the scope of economic duress due to lawful pressure to situations in which a defendant had attempted to obtain a result to which he knew he was not legally entitled. PIAC contended that this approach was consistent with the criminal law of blackmail, which provided the conceptual foundation to civil duress, and which had shifted from requiring an objective test in s.29(1) of the Larceny Act 1916 to a subjective test in s.21 Theft Act 1968 regarding a defendant's state of mind.

LDT contended there was no need to incorporate blackmail or similar concepts into duress, because blackmail is concerned with unlawful actions, and so necessarily beyond the ambit of any lawful act duress doctrine.[11] However,

[11] Ukraine made similar observations orally that inserting the law of blackmail into civil duress would overcomplicate the issue but not because the scope of the doctrine should be limited only to unlawful pressure. Ukraine instead argued that the legal test is quite simple and quite capable of encompassing lawful acts: did the illegitimate pressure induce the apparent consent? The legal test is disarmingly simple, but as the question of pressure was ultimately a question of fact, it followed – conceded Ukraine - that leaving such a question as a 'jury question' might result in

allowing for the argument that elements of the criminal offence of blackmail could be transposed, there was every reason to retain blackmail's subjective test, as it was argued that to do otherwise would undermine contractual certainty, intrude on commercial bargaining process, and extend the doctrine far beyond the scope of existing established equitable doctrines of undue influence and unconscionability.

By contrast, TT forcefully argued that the Court of Appeal's approach would result in the potential defendant becoming the arbiter of his own conduct. Requiring a complainant to prove that a defendant had not only acted in bad faith, but had in fact done so according to their own estimation, would make duress impossible to prove. Not only that, but where the defendant is a large organisation or government the question naturally arises: whose knowledge of bad faith is relevant, and when and how so? The fact this question admits no easy answer suggests it carries its own uncertainties in train.

Instead, TT argued that the Supreme Court should consider whether a defendant had manipulated their rights to create a "no-choice" situation for the innocent party, as these were factors the courts could assess, as opposed to attempting to deduce what truly motivates a defendant in any given case. If the Court considered that this approach required further refinement, TT endorsed the approach of Leggatt LJ in *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216 which suggested transposing an objective approach to blackmail into the law of duress. As Ukraine put it, divergence from the criminal law test for blackmail, which requires a subjective test in relation to the *mens rea* of the offence, was justified given that more serious consequences flow from criminal conviction (loss of liberty) as compared with duress (voidability of contract). Given this inconsistency of consequence, there was no reason logically to propose that the civil law follow rigidly the same test as the criminal law.

The APPG joined TT in endorsing the approach of Leggatt LJ, but their approach differed in emphasis regarding how the courts should approach lawful act duress in practice. The APPG argued that a demand, coupled with a threat to commit a lawful act, should be regarded as illegitimate if (a) the defendant has no reasonable grounds for making the demand and (b) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand. It was contended that the nature of good faith conduct is well-settled in the relevant case law as requiring: (1) conduct that is honest; and which (2) conforms to relevant norms of behaviour. This would preserve the doctrine whilst providing crucial guidance and structure to first instance judges when approaching cases.

The APPG anticipated objections that this might cause uncertainty by noting: (1) that many commercial sectors, including the banking sector, are supplied with regulatory standards, practices and customs from which a court may discern minimum standards against which a defendant's conduct falls to be measured; and (2) that, in any event, as Mance J put it in *Huyton SA v Peter Cremer GmbH & Co*, it is the law's function

different judges arriving at different conclusions, as it was accepted that this is a risk the law accepts in setting a jury question.

not only to form judgments which give effect to the reasonable expectations of honest persons, but also to discriminate, where appropriate, between different factual situations.[12]

The suggestion that introducing an objective element in duress would open the floodgates to a wave of specious claims was met by analogy to the relative rarity, in public law, of findings of irrationality. Merely having the doctrine available had not opened the floodgates to vast numbers of unmeritorious claims. The same might be said of a doctrine of duress which, regardless of approach, would remain difficult to prove factually, where various procedural obstacles exist to prevent unjustifiable civil claims reaching court in any event.

Conclusion

This article has sketched some of the main arguments advanced by the parties as to whether lawful act duress exists as a legal doctrine at all and, if it does, whether it is desirable that it remain; its policy foundations; its relationship to equity and the criminal offence of blackmail; and how courts of first instance ought to approach duress in future. The Supreme Court's judgment presents an opportunity to restate and consolidate this fascinating and complex area of law, impacting on commercial and non-commercial entities alike, whichever way it is decided.

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[12] [1999] 1 Lloyd's Rep 620

The Airport Authority v Western Air Ltd (The Bahamas) [2020] UKPC 29

On 9 November 2020 the Judicial Board of the Privy Council[13] ("the Board") handed down judgment in [2020] UKPC 29 which considered numerous interesting questions surrounding the theft of an aircraft from an airport in The Bahamas.

Western Air, the Respondent ("the Airline"), owned and operated an aircraft which it paid to park overnight in the restricted zone at Lynden Pindling International Airport, Nassau, The Bahamas.

The Appellant, the Airport Authority ("the Authority"), is the statutory body in The Bahamas with the responsibility entrusted to it under local and international legislation to operate the Airport. This included responsibility for controlling access to the restricted zone including via a secure perimeter around the airport, patrols and designated entry points manned by security guards in booths. In the early hours of 26 April 2007 the aircraft took off from the Airport. Western Air had not authorised any flight and the aircraft was therefore reported as stolen. It was later found abandoned in Venezuela.

After the police investigation, a pilot of Western Air was identified as the likely suspect. He had sought authorised absence before the theft and did not return to work afterwards, having apparently left the country. However, neither the identity of the person who stole the plane, nor the manner in which such person gained access to it, was ever firmly established.

The Airline brought a claim against the Authority for breach of statutory duty and negligence. The former cause of action was dropped at trial,

[13] Lord Kerr, Lord Wilson, Lord Carnwath, Lord Briggs and Lady Arden.

which proceeded on the basis of a claim for common law negligence. The trial judge held that the Authority owed the Airline a common law duty of care and that the doctrine of res ipsa loquitur applied. The Authority was therefore held liable to the Airline for increased insurance premiums and interest charges, although the Airline's claim for damages for loss of revenue was dismissed. The Court of Appeal of The Bahamas upheld all parts of the first instance decision. The Authority appealed to the Privy Council.

The issue in the appeal before the Privy Council was whether the Authority owed the Airline a duty of care in respect of theft of the aircraft. This turned on a number of issues of fact and law. The Authority contended that a number of the key findings made by the trial judge were insupportable, in particular, that the Airline had not been allowed to provide its own private security; and that the aircraft had been stolen by a person whose identity was unknown. It contended that as a question of law it did not owe a duty of care to prevent the theft of aircraft left in the restricted zone overnight; and in any event it maintained that the doctrine of res ipsa loquitur was neither properly applied nor correct on the facts.

In one of his final judgments before his untimely death Lord Kerr gave the judgment of the Board. It is, as ever, a masterclass in how to deal with complex matters in straightforward terms. The challenges to the trial judge's findings of fact were untenable. It is only in limited circumstances that it is appropriate for an appellate court (still less, a second appellate court) to interfere with findings of fact made by a judge at first instance. The Board held that the challenge to the two key findings of fact was untenable. It therefore determined the appeal on the basis that the aircraft *was* stolen by an unknown thief and that only the Authority could provide security for aircraft when parked in its restricted zones.

The Board acknowledged that there was a strong line of authority which established that a common law duty is unlikely to be accepted where the duty is asserted on the basis of a claimed breach of statutory obligation where no liability for the tort of breach of statutory duty had been created: *Stovin v Wise* [1996] A.C. 923; [1996] UKHL 15 and *Gorringe v Calderdale MBC* [2004] UKHL 15. In both of those cases, the complaint was that although the authority had the legal competence to act, it had done nothing. However, different considerations arose where the public authority had chosen to act but had done so in a negligent way, and in such circumstances one reverts to the well-established principles laid down in *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605; [1990] UKHL 2.

In this case, the relevant Bahamian statute stated that a function of the Authority was to provide airport security. It did not define the duty on the Authority, it merely provided the framework within which the relationship of proximity was established. The Airline's common law claim for negligence was based on the deficiencies in the way the security was concluded. The Privy Council held that there was ample evidence to conclude that the *Caparo* test was satisfied, namely that it was fair and reasonable to impose a duty of care and to hold the Authority liable.

The Board rejected the Authority's contention that the Airline's claim was a case of "pure economic loss". The Airline lost a valuable asset and there was nothing in the authorities to exclude recovery for this type of loss.

The Board also held that, although the trial judge only referred to the first two elements of res ipsa loquitur, it was to be assumed that he had all

three elements in mind, and all three elements of the doctrine were plainly present in this case.

This appeal clarifies and reinforces the test for establishing a duty of care at common law associated with statutory obligations. Where the complaint is that, although an authority had the legal competence to act, it had done nothing (as in *Stovin* and *Gorringe*), this will be deemed an inappropriate foundation on which to base a claim in negligence. However, where an authority has chosen to act but has done so in a negligent way, a duty of care at common law may arise.

Whether the law will impose such a duty will depend on an intense focus on the particular facts and the particular statutory background: *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289. So this case leaves the door open for parties to argue that a public authority has a duty of care at common law, even where the actual loss was as a result of the criminal activity of a third party.

This case also provides a helpful illustration of when the doctrine of res ipsa loquitur may apply. It was held that the theft of the aeroplane was an unexplained occurrence; it would not have happened in the ordinary course of things without negligence on the part of someone other than the Authority; and the circumstances pointed unmistakably to the negligence in question being that of the Authority, rather than any other person or agency. Whilst the Airline was perhaps fortune that the Board was prepared to overlook the deficiencies of the first instance judgment as regards the res ipsa loquitur test, the weight of the evidence would have established fault on the part of the Authority had the trial judge gone on to consider the fault stage.

Finally, this case is a reminder to parties that an appellate court will only overturn the findings of fact made by a trial judge in very limited circumstances.

Katherine Deal QC and Hannah Fry were instructed by Sinclair Gibson LLP on behalf of the Airline.

(A slightly different version of this article appeared on LexisPSL in December)

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The impact of Brexit on travel arrangements between the UK and EU

This article sets out what impact the EU–UK Trade and Cooperation Agreement ('the TCA') will have, along with Brexit more generally, on travel between the UK and the EU. An article on the TCA's impact on aviation between the UK and the EU, including flight routes between the two territories, can be found here.

Very little of the TCA itself concerns travel between the UK and EU. The section of the TCA entitled 'Heading Two: Aviation[14]' runs to just 25 pages out of a total of 1246, with most of the section of little interest to passengers. A short section on visas (Heading Four, Title II: Visas for short-term visits) amounts to just one page. Other parts concern the transportation of passengers by road and the rights of UK/EU travel agents, tour operators and guides to operate and travel in the two respective territories, however, these latter parts are beyond the scope of this article.

Entry requirements

The TCA provides visa-free travel for short-term visits for travel between the UK and EU in accordance with the domestic law of each particular country. The UK and EU are both obligated to notify the other of any intention to impose a visa requirement for short-term visits "*in good time and, if possible, at least three months before such a requirement takes effect*"[15].

At the time of writing, UK tourists, business travellers and students can stay for up to 90 days in any 180-day period in all EU countries that are

[14] Found in Part Two: Heading Two, p.221 onwards.

[15] Heading Four, Title II: Visas For Short-Term Visits, Article VSTV.1: Visas for short-term visits.

in the Schengen area without a visa, however, visits to more than one country in the area within the previous 180 days count towards the 90-day total. Different rules apply to Bulgaria, Croatia, Cyprus, and Romania where visits to other EU countries do not count towards the 90-day total.

Travel to, and work in, Ireland is unaffected by the TCA.

Compliance with laws and regulations

Article AIRTRN.10[16] obliges carriers and passengers, crew, baggage, cargo, and mail carried by the carriers to comply with the laws and regulations (including entry, clearance, immigration, passports, customs, quarantine, and postal regulations) of the party they are entering, operating within, or leaving, respectively. This includes the continuation on the part of carriers to ensure only passengers with the correct travel documents for entry into, or transit through, the territory of the other party are carried to that territory.

Passenger rights

Article AIRTRAN.22(2) stipulates that the EU and the UK shall each "*ensure that effective and non-discriminatory measures are taken to protect the interests of consumers in air transport. Such measures shall include the appropriate access to information, assistance including for persons with disabilities and reduced mobility, reimbursement and, if applicable, compensation in case of denied boarding, cancellation or delays, and efficient complaint handling procedures*".

The UK has retained the following EU Regulations concerning air passengers, with necessary amendments to reflect their changing regulatory scope[17]:

(1) Council Regulation (EC) No 2027/97 on air carrier liability in respect of the [domestic] carriage of passengers and their baggage by air;

(2) Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights ('Regulation 261'); and

(3) Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air is amended as follows ('the PRM Regulation').

Strangely the civil enforcement regime contained in the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014, which built on the provisions of the PRM Regulation, have been largely gutted by the Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020. The explanation in the Explanatory Notes to the 2020 Regulations explains that this was done because the repealed provisions "*are redundant following the listing in Schedule 13 to the Enterprise Act 2002 of the EU Regulations implemented by those instruments*", however, this makes little sense given the retained PRM Regulation does not itself specify, for example, how the CAA is to take enforcement action against carriers or airport authorities who flout

[16] Under Heading Two: Aviation, Title I: Air Transport.

[17] Through the Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019.

their obligations under that Regulation. Whether this lacuna was intentional or an oversight remains to be seen.

So far as Regulation 261 is concerned, it now applies as a matter of UK law (under an amended article 3) to:

(1) Passengers departing from a UK airport [regardless of the operating air carrier's flag country];

(2) Passengers departing from an airport located in a country other than the UK to an airport situated in –

(i) the UK if the operating air carrier of the flight concerned is a Community carrier or a UK air carrier; or

(ii) the territory of an EU Member State if the operating air carrier of the flight concerned is a UK air carrier,

unless the passengers received benefits or compensation and were given assistance in that other country.

Following the decision in Court of Appeal's decision in *Gahan and Buckley v Emirates* [2017] EWCA Civ 1530, and the CJEU's in *CS And Others v České aerolinie a.s.* (Case C-502/18) and *flightright GmbH v Iberia LAE SA Operadora Unipersonal* (Case C-606/19), all connecting flights need to be considered for the purposes of deciding whether the Regulation applies, even if the flights are provided by different operating carriers.

Given the amended article 3, Regulation 261 will now apply in both the UK and in the EU in respect of flights from an EU or third country to the UK, if the operating carrier is an EU carrier. A passenger with a confirmed reservation on such a flight, who suffers denied boarding, a cancellation or long delay, will therefore have the choice of whether to bring the claim in the UK or the relevant EU country. As the European Small Claims Procedure[18] has been revoked[19], the potential for forum shopping between the UK and EU will now only be confined to those flights.

The UK has also retained the following EU Regulations, again, with necessary amendments to reflect their changing regulatory scope:

(1) Regulation (EC) No 1371/2007 on rail passengers' rights and obligations[20];

(2) Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents[21];

(3) Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004[22]; and

(4) Regulation (EU) No 181/2011 concerning

[18] As contained in Regulation (EC) No. 861/2007).

[19] By the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendments etc.) (EU Exit) Regulations 2018 (SI 2018/1311).

[20] By virtue of the Rail Passengers' Rights and Obligations (Amendment) (EU Exit) Regulations 2018/1165.

[21] By means of the Merchant Shipping (Passengers' Rights) (Amendment etc.) (EU Exit) Regulations 2019/649.

[22] *Ibid.*

the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004[23].

Pursuant to section 6 of the European Union (Withdrawal) Act 2018, any decision from the Court of Justice of the European Union (CJEU), handed down before 31 December 2020, will continue to apply to the interpretation of the EU Regulations by UK courts, tribunals, and ADR providers, save that the UK Supreme Court and the Court of Appeal[24] are not bound to follow such decisions.

From 1 January 2021 onwards, UK courts, tribunals or ADR providers are not bound to follow any new decisions of the CJEU, though they can "*have regard to*" such decisions so far as they are relevant to matters in dispute in any given case[25]. Similarly, the CAA will not be required to follow any guidance from the European Commission on passenger rights (or any other subject matter). UK courts are also unable to make references to the CJEU from 1 January, meaning the Supreme Court is now the final arbiter when it comes to interpreting EU law retained in the UK.

Article AIRTRAN.21 of the TCA reaffirms the UK's and EU's obligations under the Montreal Convention, though this is considered otiose unless, in the extremely unlikely event, the EU (or a member thereof) or the UK decide to withdraw from the Convention.

Package travel

The Package Travel and Linked Travel Arrangements Regulations 2018 ('2018 Regulations'), which implemented the 2015 EU Package Travel Directive, remains in force in the UK through the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 ('the 2018 EU Exit Regulations'). Accordingly, the duties imposed upon organisers of package holidays and those selling or facilitating linked travel arrangements (LTAs), remain the same in UK law.

However, the effect of Brexit, and the 2018 EU Exit Regulations, is to remove the obligation on EU Member States to recognise the insolvency protection of UK organisers that sell to European consumers. The government protection scheme operated by the CAA, ATOL[26], will continue to protect bookings that were made prior to 1 January 2021, however, any sales made by UK traders into EU countries after that date will need to meet national requirements for insolvency protection in those EU countries. Conversely, the UK (through the CAA) is no longer obliged to recognise EU insolvency protection schemes for EU-based traders which sell to UK customers.

The 2018 EU Exit Regulations requires EU traders who actively sell package holidays or LTAs to UK customers to comply with UK insolvency protection rules, in other words, to obtain an ATOL. This requirement does not apply to EU traders that are not targeting sales in the UK.

[23] By virtue of the Rights of Passengers in Bus and Coach Transport (Amendment etc.) (EU Exit) Regulations 2019/141.

[24] As well as the Inner House of the Court of Session in Scotland and other courts set out in reg.3 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

[25] Section 6(2), European Union (Withdrawal) Act 2018.

[26] Air Travel Organiser's Licence.

For UK travel agents selling packages organised by EU-established organisers, it will no longer be possible to sell such packages in the UK solely as an agent of that organiser. travel agents will need either to ensure that the organiser holds its own ATOL, or the agent itself will need to obtain an ATOL to cover those sales.

Motor travel

From 1 January 2021, the Consolidated Motor Insurance Directive, which enabled cross-border claims to be brought directly against foreign motor insurers, and claimants to serve local proceedings on insurers' locally appointed claims representatives, cease to apply to the UK.

The European Communities (Rights against Insurers) Regulations 2002 made under the Directive has been retained in UK law, pursuant to section 2 of the European Union (Withdrawal) Act 2018, though as the TCA provides no cross-border extension of the 2002 Regulations, the retained regulation 3 still permits a direct claim against the insurer only where the accident occurs in the UK and where the vehicle is registered in the UK.

As the UK is no longer a member of the European Economic Area (EEA), and the TCA made no provision for a driving certificate exemption, it is necessary for UK-based drivers to now carry green cards when visiting any EEA (including EU) Member State; a green card being an international certificate of insurance evidencing a visiting motorist has the minimum compulsory motor insurance cover.

Health cards

The TCA contains no agreement as to the extension of the European Health Insurance Card (EHIC) scheme and therefore UK nationals cannot renew or apply for new EHICs, though cards still valid will be honoured in EU Members States.

UK nationals can now apply for the UK Global Health Insurance Card (GHIC) which is exempted in all EU Member States (though as with the EHIC, is not accepted in Monaco, San Marino, or the Vatican). It should be well-known that neither the EHIC or GHIC are substitutes for comprehensive travel insurance whatever, the travel destination.

Conclusion

There can be little argument that travel between the UK and EU post-Brexit will become more restricted, and passenger and travel claims with cross-border elements more complicated. Whether greater convergence in travel arrangements will occur, including by the UK joining the 2007 Lugano Convention, or further divergence, with the Supreme Court or Court of Appeal departing from CJEU case law, remains to be seen. Only time will tell. One thing has not changed though – the continuation of clichéd conclusions.

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