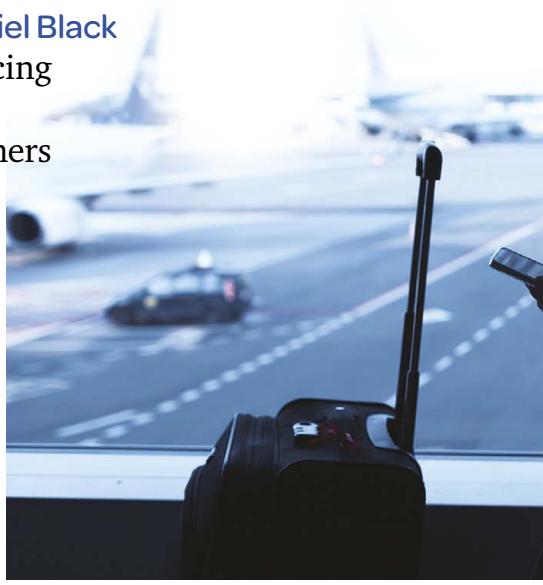
IN BRIEF

▶ *Lipton v BA City Flyer*: a misstep by the Court of Appeal on 'extraordinary circumstances' and flight compensation claims?

Turbulent times?

In the light of a recent case, Daniel Black discusses the approach to balancing the interests of airlines with compensation claims for consumers



Under Regulation (EC) 2547 No 261/2004 (the Regulation) passengers whose flight is cancelled or is sufficiently delayed are entitled to statutory compensation. It is a necessary but not sufficient (more on which later) condition for an airline to escape the default position of paying-out that the cancellation (or qualifying delay—being a delay amounting to at least three hours on arrival) was caused by 'extraordinary circumstances'. As well as considering this issue, the case of *Lipton v BA City Flyer* [2021] EWCA Civ 454, [2021] All ER (D) 129 (Mar) is additionally of importance in confirming that the Regulation is part of UK law after Brexit (albeit in an altered form), and because of Lord Justice Green's analysis of the operation and interpretation of EU derived Law post-Brexit at [51]-[84]. For all involved in the legal world, the judgment is essential reading.

The appellants suffered the misfortune of a cancelled flight. The only evidence for why this befell them was that the captain had 'an illness' and was declared not fit to fly. The respondent—victorious twice below—maintained that because he became ill off-duty then an extraordinary circumstance was made out. To this the appellants said simply: it can't matter when the captain became ill, his non-attendance on the basis of illness is not extraordinary.

For six reasons the Court of Appeal agreed with the respondents. A captain's illness is not an extraordinary circumstance. Respectfully, it is suggested that this conclusion is undesirable and not compelled by authority. Were it appealed to the Supreme Court, it should be overturned. Their lordships' reasoning, and the reasons for respectful disagreement, are set out below.

The Regulation

For present purposes, the critical parts of the Regulation are:

> 'Article 5
>
> Cancellation
>
> "1. In case of cancellation of a flight, the passengers concerned shall…(c) have the right to compensation by the operating air carrier in accordance with article 7, unless:
>
> […]
>
> "3. An operating air carrier shall not be obliged to pay compensation in accordance with article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

The burden of proving the matters set out in reg 7(3) is on the defendant. Additionally, consideration of two recitals is essential:

> '(14) …extraordinary 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.'

There is no definition—or further elaboration—of 'extraordinary circumstances' within the Regulation but it has been defined by the CJEU:

> 'the circumstances surrounding such an event can be characterised as 'extraordinary' within the meaning of article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital (14) in the Preamble to that Regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin' (*Wallentin-Hermann v Alitalia—Linee Aeree Italiane SpA* (Case C-549/07) [2009] Bus LR 1016, at para [23]).

The purpose of the Regulation is to provide a 'high' level of consumer protection and the Regulation is to be interpreted from the perspective of the consumer, not the carrier; *Wallentin-Hermann* at para 18 and *Sturgeon v Condor Flugdienst GmbH* (Joined Cases C-402/07 and C-432/07) [2010] Bus LR 1206, 1218, at para [44].

Reasoning

The Court of Appeal agreed with the conclusion of Lord Justice Elias in *Huzar v Jet2.com Ltd* [2014] Bus LR 1324 in which his lordship concluded that the *Wallentin-Hermann* test was comprised of two limbs, but that the critical one was 'inherency':

> '47 The event causing the technical problem will be within the control of the carrier if it is part of the normal everyday activity which is being carried on and will be beyond the carrier's control if it is not…'
>
> '48 …[the second limb] helps identify the parameters of those acts which can properly be described as inherent in the carrier's normal activities and those which cannot; and it also chimes with the examples of events identified in recitals (14) and (15).'

Lord Justice Coulson, with whom the rest of the court agreed, next identified three types of case elucidating the scope of reg 5(3): mechanical defects with the aircraft; external or one-off events; and staff absence. All indicated a captain's absence was not extraordinary.

Mechanical defects

No cases of mechanical defects have ever been found to be extraordinary circumstances, the courts taking a view


© iStockphoto/kieferpix

that can fairly be summarised as being: they 'have their nature and origin in that activity; they are part of the wear and tear'.

External or one-off events

Here, Coulson LJ recorded that the authorities showed the fact that an event was an external one '(including an event perpetrated by a third party)' did not necessarily make it extraordinary. However, it was recognised that, on the application of the inherency test, 'other one-off events have been so categorised' (at [19]).

So, for example, mobile stairs are indispensable to air passenger transport and are inherent (*Siewart v Condor Flugdienst GmbH* (Case C-394/14)). By contrast, in *Pešková v Travel Service* (Case C-315/15) [2017] Bus LR 1134 the CJEU held in respect of a bird strike and any damage caused to an aircraft by such a collision that these 'are not intrinsically linked to the operating system of the aircraft, are not by their nature or origin inherent in the normal exercise of the activity of the air carrier concerned and are outside its actual control'.

Coulson LJ went on to identify as 'other examples of one off events' CJEU decisions that amounted to extraordinary circumstances; (i) a petrol spill on a runway where the petrol did not emanate from the airline which operated the flight (*Moens v Ryanair Ltd* (Case C-159/18) [2019] Bus LR 2041) ; (ii) tyre damage causing a diversion where the defendant did not contribute to the occurrence nor fail to take appropriate preventative measures (*LE v Transport Aéreos Portugueses SA* (Case C-74/19) [2020] Bus LR 1503).

Staff absence

There was no reported decision on staff illness cited before the court, with the reported staff absence cases focusing on strikes (although there is County Court authority that staff illness is exceptional). Here, even in the case of 'wild-cat' strikes the CJEU has found the same are not beyond carrier control, although in *Finnair Oyj v Lassooy* (Case C-22/11) [2013] 1 CMLR 18 a strike was deemed to be extraordinary. Coulson LJ deprecated the latter however, stating it was reached in the absence of reasoning (at [25]).

The six reasons

In paras [30]-[49] Coulson LJ set out six reasons which can be summarised as follows:

- The words 'Extraordinary circumstances' are to be given an ordinary meaning: they mean 'something out of the ordinary'. Staff illness is commonplace and its possibility part of the 'operating system' of the airline. Such an interpretation ensured a 'high level' of consumer protection.
- The same was consistent with previous authority. Recital 14 does not list staff absence and 'as a matter of course' air carriers have to take account of the potential absence of some of their staff at any given time due to illness, bereavement or the like in carrying on their activity (at [32]-[37]).
- So holding was consistent with the authorities in respect of 'external or one-off events'. While frequency is not determinative of exceptionality, it will not always be irrelevant. That said, Coulson LJ found *Siewert* authority for the proposition that an event may be external but still inherent, reasoning: 'captains are indispensable to air passenger transport and air carriers are regularly faced with situations arising from their non-attendance (for whatever reason)' (at [38]-[40]).
- The penultimate reason was inherency and the relevance of off-duty events: 'what I consider to be the obvious conclusion to the inherency analysis'. The pilot of an aircraft is critical to the air carrier's activity and operations. His attendance for work is an inherent part of the carrier's operating system. If he fails to attend work due to illness, that non-attendance is 'inherent in the normal exercise of the activity of the air carrier concerned' so that there is no relevant distinction between on and off-duty periods (at [41]-[44]).
- Finally, Coulson LJ found that in a small claims track case where the vast bulk of cases should be capable of resolution on the papers then such a detailed analysis was 'too granular' (but it is to be noted under the ECHR and CPR 27.10 both parties must agree to this).

Analysis: A judgment which does not allow 'reasonable measures' sufficient room

The judgment thus further restricts the ambit of the concept of 'extraordinary circumstances'. Respectfully, in this author's view it risks doing so from an incomplete consideration of the test which an airline must satisfy in order to escape the default circumstance of paying compensation. It is suggested that when the governing test is fully considered, the outcome is best viewed as undesirable and, critically, that the central consumer protective goal of the Regulation can more than satisfactorily—and more appropriately—be achieved at the 'all reasonable measures' stage. A CJEU decision not cited before the Court of Appeal forms the basis of this critique.

A necessary but not sufficient condition

It is perhaps of some importance that Coulson LJ opens judgment with the following proposition:

> 'The only way in which the air carrier can avoid paying such compensation is by demonstrating that the cancellation or significant delay was caused by "extraordinary circumstances"', at [1].

That is correct as far as it goes, but it does not go the whole way: for an airline must actually prove 'that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.

It may be that in so expressing matters Coulson LJ was addressing himself solely to the first part of the defence. Then again, there are other indications in the judgment that his lordship may have loaded too much of the defence's substantial content into the hold named 'extraordinary circumstances,' something which may have influenced the outcome.

- At [37] Coulson LJ describes as a matter of 'supreme indifference' to a consumer the question of whether a flight is cancelled due to a technical default or crew illness. That may be so, but given a consumer seeks compensation—effectively—for inconvenience it will always be so. That 'the consumer's right to compensation… cannot depend on when and where the member of staff ate

the suspect prawn sandwich' (at [46]) runs into the same issue.

- At [40], in drawing analogy with mobile stairs, Coulson LJ found that captains are indispensable to air passenger transport and carriers regularly have to deal with absence *'for whatever reason'* (emphasis added).

From these premises it is easy to see why Coulson LJ holds as 'the obvious conclusion to the inherency analysis' that pilots are critical to the air carrier's activity and operations and that non-attendance is 'inherent in the normal exercise of the activity of the air carrier concerned' (at [41]).

Yet captains are generally not sick, nor absent. Respectfully, infrequency is a factor that ought to tip the scales here. It is understandable that it didn't: the Regulation is a consumer protection instrument. But consumer protection neither begins nor ends at whether an event is extraordinary. The test goes on.

And it is here another observation of Coulson LJ becomes critical: 'air carriers have to take account of the potential absence of some of their staff at any given time due to illness, bereavement or the like' (at [33]).

Eglitis

It was central to *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* C-294/10) that captains and crew are only permitted to work certain hours at a time. When they exceed the same, they may not fly. *Eglitis* did not consider whether running out of such 'crew operating hours' was an extraordinary circumstance. This was because it was accepted that air traffic control decisions which caused the insufficiency of crew hours were exceptional and therefore the inquiry became a reasonable measures one. But what *Eglitis* did do was to hold that:

> '[27]...at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of extraordinary circumstances.
>
> 28. More particularly, to prevent any delay, even insignificant, to which extraordinary circumstances have given rise inevitably leading to cancellation of the flight, the reasonable air carrier must organise its resources in good time to provide for some reserve time so as to be able, if possible, to operate that flight… if, in such a situation, an air carrier does not, however, have any reserve time, it cannot be concluded that it has taken all reasonable measures…'

The application to a captain's illness is obvious.

Conclusion: a better way

The reasoning in *Lipton* is understandable. The problem is that, by loading too much of the consumer protective content of the Regulation into only one part of the defence, it avoids a more desirable outcome which would achieve a better balance of fairness between, on the one hand, airlines confronted with an infrequent and unusual event and, on the other, consumers seeking compensation for inconvenience.

As Coulson LJ states, crew absence may arise for 'whatever reason'. Some of these will be exceptional, and infrequency of occurrence suggests a captain's illness ought to be one. Authority enables the same.

That is not to remove consumer protection, rather to relocate it. If *Lipton* reaches the Supreme Court the justices ought to say: 'Yes, airlines, some illnesses may well be exceptional circumstances. But unless you have sufficient reserve crew then the default position applies and the consumer is put in funds.' NLJ

Daniel Black is a barrister at 3 Hare Court Chambers and accepts instructions in all areas of aviation law (*www.3harecourt.com*).