3 HARE COURT

Travel & Aviation Quarterly

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3 Hare Court

We have a strong reputation in personal injury and travel litigation, as well as in civil fraud, commercial litigation, employment, insolvency, international work including arbitration, financial services, professional negligence, property and construction litigation and all manner of public, administrative, and constitutional law practice, incorporating civil liberties and human rights.

Members are ranked as leading specialists in the Legal 500, Chambers & Partners and Who's Who Legal in personal injury, travel, insolvency, civil fraud, administrative and commercial law, amongst others, and we are a top tier set for 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. Members of Chambers are admitted as barristers in overseas jurisdictions and are fluent in many languages including Dutch, French, German, Hindi, Italian, Punjabi, Spanish, Swahili and Urdu.

The 3 Hare Court insolvency and commercial group, the employment team and the travel and aviation group have produced a number of articles, webinars and podcasts since the onset of the pandemic which discuss numerous different 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.

Foreword

"*And so with the sunshine and the great bursts of leaves growing on the trees, just as things grow in fast movies, I had that familiar conviction that life was beginning over again with the summer.*" – F. Scott Fitzgerald, The Great Gatsby

The recent weather and the bloom of verdant growth indicates nature's mind has finally turned to the beginning of summer. By contrast, the continuation of the Covid-19-related restrictions has meant the season has yet to fully arrive for the travel and aviation industries.

Whilst you wait for the lights of international travel to change from red, to amber, to green, we provide you some 'light' summer reading in form of the fourth issue of 3 Hare Court's Travel & Aviation Quarterly in which:

- Daniel Black examines the Court of Appeal's recent foray into Regulation 261 and the definition of extraordinary circumstances in the context of crew sickness.

- Asela Wijeyaratne and Adam Riley analyse a recent decision of the High Court concerning the applicable law under Regulation (EC) 864/2007 ('Rome II') to issues of limitation.

- Natasha Jackson offers a practice note on inquests and inquiries into deaths that occur out of the jurisdiction.

- Mike Nkrumah critiques a recent High Court decision concerning the need for expert evidence on the meaning of "stolen" in EU law post-Brexit.

- Christopher Loxton considers the principle of frustration in the context of aircraft leases and recent High Court authority.

- Navjot Atwal provides a round of recent travel law cases concerning expert evidence in food poisoning cases and the requirements of pleadings in fundamental dishonesty cases.

We hope you enjoy!

Christopher Loxton and Mike Nkrumah
Co-Editors

Contributors to Issue 4

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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.

Asela Wijeyaratne

Asela has extensive experience in claims arising out of overseas accidents and illness and is ranked in Chambers & Partners and Legal 500 as a leading junior in the field of Travel Litigation. He is regularly instructed in respect of claims under the Package Travel Regulations, including advising as to the applicability of the Regulations (1992 and 2018), dynamic packaging, incidents which occur in the course of excursions and evidence as to standards of care abroad.

Mike Nkrumah

Mike has represented both claimants and defendants in travel litigation on all three tracks, from the small claims track to the multi-track. He has gained significant experience in dealing with road traffic accidents occurring in Europe, including in claims for hire / loss of use and fatal accidents. In addition, he has experience of dealing with package tour claims, holiday sickness claims and public liability claims.

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).

Natasha Jackson

Natasha has a public, commercial and civil law practice, with a focus on international and cross-border work. Natasha is regularly instructed in matters raising jurisdictional and conflict of law issues, particularly in relation to insurance jurisdiction. She is experienced in claims under the Athens and Montreal Conventions and the Package Travel Regulations and regularly represents major tour operators and insurer clients. She acts on behalf of families, individuals and organisations in a range of inquests, with a particular interest in those under Articles 2 and 3. She is currently instructed as counsel to the Iraq Fatality Investigations.

Daniel Black

Daniel frequently acts in personal injury cases for both Defendants and Claimants in respect of claims arising here and broad, often appearing at trial against significantly more experienced counsel. His court work additionally includes EU Denied Boarding Regulations (EC Regulation 261/2004) and Montreal Convention matters. His advisory practice has recently focussed on misrepresentation disputes, as well as jurisdictional and other conflict of laws issues.

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.

Carry-on news items by Christopher Loxton and Mike Nkrumah

On 11 March 2021, the Upper Tribunal's Lands Chamber ordered that London Southend Airport should pay a total of £86,500 in compensation to owners of nine neighbouring homes who contended that their house values were diminished by noise caused by a runway extension. The extension to the runway was opened in 2012, enabling the airport to attract low-cost commercial airlines operating larger aircraft. The Tribunal found that the value of the claimants' homes had depreciated by "physical factors caused by the use of the runway extension, and in particular by the increased noise they experience from the larger aircraft which now take off and land at the airport".

On 23 May 2021, Ryanair Flight FR4978 from Athens, Greece to Vilnius, Lithuania made an emergency landing in Minsk, Belarus after the flight crew were notified by Belarus air traffic controllers that a bomb may be on board the Boeing 737-800 aircraft. The flight was intercepted by a Belarusian Air Force MiG-29 fighter jet and escorted to Minsk National Airport. The aircraft was inspected by authorities on the ground and later cleared to continue on its way to Vilnius. However, 2 of the 171 passengers on board, Roman Protasevich (a 26-year-old journalist from Belarus living in exile in Lithuania), and his girlfriend Sofia Sapega (a Russian national), were forcibly removed from the aircraft by Belarusian officials at Minsk. Mr Protasevich is known for his criticism of Belarusian President Alexander Lukashenko.

In response to the forced landing of the Ryanair flight, the EU and UK announced sanctions against the Belarusian government and associated individuals. On 25 May 2021, the European Union Aviation Safety Agency (EASA) and the European Council banned the Belarusian state-owned airline Belavia from the EU's airspace and asked their airlines to avoid the overflight of Belarus. The UK and Ukraine issued a similar ban and directions, whilst the US Government announced it would suspend the bilateral air service agreement signed with Belarus in 2019.

On 27 May 2021, the Governing Body of International Civil Aviation Organization (ICAO) deciding to undertake a fact-finding investigation of the forced landing of the Ryanair flight pursuant to Article 55 (e) of the Convention on International Civil Aviation (the Chicago Convention). Under Article 3 of the Convention "States must refrain from resorting to the use of weapons against civil aircraft in flight and that,

in case of interception, the lives of the persons on board and the safety of aircraft must not be endangered".

The Belarusian Government announced in early June 2021 that it intended to appeal to the ICAO the ban on the state-owned Belarusian airline Belavia using the airspace of a number of state parties, including Ukraine, EU member states and the UK.

In June 2021, the US and EU, and the US and UK, agreed a five-year suspension in the long-running trade war over subsidies to aircraft manufacturers. The two deals suspend retaliatory trade measures for five years; establish a working group on large civil aircraft, ensure financing to large civil aircraft manufacturers is granted on market terms; confirm R&D funding is provided through an open and transparent process; and commits the parties to collaborating on tackling non-market practices of third countries that may impact on their aircraft industries.

In early June the EU rolled out its Digital COVID Certificate scheme providing a platform for travellers to obtain vaccination certificates. The UK has introduced a similar certification scheme through the NHS app, known as the NHS Covid Pass.

On 9 June 2021, the Competition and Markets Authority (CMA) announced the launch of an investigation into whether British Airways and Ryanair have breached consumer law by failing to offer refunds for flights customers could not take because of Covid-19 lockdown restrictions. The investigation is part of the CMA's ongoing work in relation to holiday refunds during the COVID-19 pandemic. The CMA's position regarding refunds for holidays cancelled because of the pandemic is set out in its Statement on coronavirus (COVID-19), consumer contracts, cancellation and refunds and the CAA's position is set out in its Covid guidance for passengers.

On 11 June 2021, Stobart Air announced it was terminating its franchise agreement with Aer Lingus as it had ceased trading and was in the process of appointing a liquidator after a takeover deal by start-up Ettyl collapsed. The Dublin-based airline's network connected a range of UK airports with points in Ireland across 12 routes. Stobart Air's parent company, Esken (formerly known as Stobart Group), stated it would continue to fund lease obligations on eight ATR aircraft operated by Stobart Air, through to the lease expiry in April 2023. Police in the Isle of Man subsequently announced they were launching a formal investigation into the proposed takeover of Stobart Air by Ettyl.

Ryanair and Manchester Airports Group have joined forces to seek a judicial review of the UK Government's travel traffic light system. The companies allege a lack of transparency and rationality about how the UK Government decides which countries qualify for the green list of safe places to visit at its three-week reviews.

On 23 June 2021, the European Commission informed the Swiss Federal Council (the depository of the Lugano Convention) that the European Union was not in a position to consent to the United Kingdom's accession to the Lugano Convention.

Case review: Lipton v BA City Flyer [2021] EWCA Civ 454

A misstep by the Court of Appeal on 'extraordinary circumstances' and flight compensation claims?[1]

Core facts and ratio

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)[2] was caused by 'extraordinary circumstances'.

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.[3] The respondent – victorious twice below – maintained that because he became ill off-duty[4] 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.

[1] The case is additionally of importance in confirming that the Regulation is part of UK law after Brexit (albiet in an altered form) and because of Green LJ'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.
[2] Being a delay amounting to at least 3 hours in arrival.
[3] At [6]
[4] Found as a fact at first instance, albeit he only reported feeling unwell while on-duty

For 6 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 regulation 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[5] with the conclusion of Elias LJ 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).'

Coulson LJ, with whom the rest of the court agreed, next identified 3 types of case elucidating the scope of Regulation 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 that can fairly be summarised as being: they 'have their nature and origin in that activity; they are part of the wear and tear.'[6]

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.[7] 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.'[8]

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 [9] ; (ii) aircraft tyre damage where the defendant did not contribute to the occurrence or fail to take appropriate preventative measures.[10]

Staff absence

1. There was no reported decision on staff absence cited before the Court,[11] with the

[5] At [15]
[6] Elias LJ at [36]
[7] *Siewart v Condor Flugdienst GmbH* (Case C-394/14)
[8] At [24], although his Lordship thought the decision under reasoned.
[9] *Moens v Ryanair Ltd* (Case C-159/18) [2019] Bus LR 2041
[10] *LE v Transport Aéreos Portugueses SA* (Case C-74/19) [2020] Bus LR 1503
[11] Although in 2015 the County Court at Manchester did decide such a case finding that a captain's illness

reported staff absence cases focussing on strikes. Here, even in the case of 'wild-cat' strikes the CJEU has found the same are not beyond carrier control[12] - 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.[13]

The 6 reasons

2. In paragraph [30]-[49] Coulson LJ sets out 6 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 [at 30-31].

    - 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 an analysis was 'too granular.'

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

The judgment thus further restricts the ambit of the concept of 'exceptional circumstances'. Respectfully, in this author's view it risks doing so

was an extraordinary circumstance; *Marchbank-Smith v Virgin Atlantic Airways Limited* (14 January 2015, before District Judge Hovington).

[12] *Krüsemann v TUIfly GmbH* (Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17) [2018] Bus LR 1191

[13] At [25].

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 – 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'[14] runs into the same issue.

- At [40], in drawing analogy with mobile stairs, Coulson LJ find 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'.[15]

Yet captains are generally not sick, nor absent. 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.

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

[14] At [46].

[15] At [41].

given time due to illness, bereavement or the like.' At [33]

Eglitis[16]

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 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.

This article first appeared in the New Law Journal, June 2021 edition.

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[16] *Andrejs Eglītis and Edvards Ratnieks v Latvijas Republikas Ekonomikas ministrija* C-294/10

Case Review: Johnson v Berentzen and Zurich Insurance PLC [2021] EWHC 1042 (QB)

Introduction

On 26 April 2021, the High Court of England and Wales handed down judgment in *Johnson v Berentzen and Zurich Insurance plc* [2021] EWHC 1042 (QB). The claimant, habitually resident in England, suffered life changing spinal injuries in the course of a road traffic accident whilst on holiday in Scotland on 15 June 2016. The case is of special significance for travel lawyers advising on accidents abroad for two reasons.

First, and more generally, the judgment confirms that in claims where the applicable law is determined by Regulation (EC) 864/2007 ('Rome II'), the question of when a limitation period is interrupted or expires is a matter to be determined in accordance with the applicable law of the *lex causae* ('the law of the cause') and is not a question of procedure subject to the rules of the *lex fori* ('the law of the forum').

Second, the judgment offers some useful guidance on how a Court will apply its discretion under section 19A of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act') to allow a claim to proceed which would otherwise be time-barred in Scots law.

Issues

The dispositive issues the court identified for consideration were threefold:

i) *"Pursuant to the Rome II Regulation, and if applicable… the Foreign Limitation Periods Act 1984, what are the relevant rules that govern the commencement of this action, in particular which stop time running for the purposes of limitation?"*

ii) *If the relevant rules identified in (i) are those of Scots law, was the claimant's action commenced outside the relevant limitation period?*

iii) *If the claimant was out of time when he commenced proceedings, whether the discretion available to the court under s.19A Prescription and Limitation (Scotland) Act 1973 'the 1973 Act') should be used so as to allow the claimant's action to continue"*

The parties' positions

The defendants took the point on limitation asserting that the claim was statute barred since the claim had only been served on 7 August 2019. It had therefore not been served on the defendants before the expiry of the applicable three-year limitation period for a claim for non-fatal personal injury, required under Scots law to stop time running.

The claimant, by contrast, asserted that service of the claim was a procedural matter and not a substantive law issue and was therefore to be governed by the procedural rules of England and Wales as the *lex fori*. Accordingly, it was argued that the claimant had a further period of four months in which to serve the claim and since the defendants had been served within that further period the claim had not been brought out of time. Alternatively, the claimant sought an extension of time pursuant to the discretion provided by s.19A of the 1973 Act.

Issues 1 and 2

The Court noted there was considerable agreement between the parties. As to the relevant provisions of Rome II, the parties agreed:

(1) That pursuant to Article 4(1), the applicable law was that of Scotland;

(2) That the rules of procedure and evidence were those of the English and Welsh courts pursuant to Article 1(3); and

(3) That the limitation period fell to be determined in accordance with Scots law pursuant to Article 15(h).

The Scots law experts instructed by the parties agreed that the relevant limitation period to be applied was that contained in section 17 of the 1973 Act which imposes a three-year limitation period for non-fatal personal injury claims. It was also agreed that time ran from the day of the accident on 15 June 2016 and expired on the third anniversary of the accident.

The question whether limitation is a matter of procedure or substance was considered by Mrs Justice Tipples in *Pandya v Intersalonika General Insurance Co SA* [2020] EWHC 273 (QB). At paragraph [40] of her judgment, she held:

> *"There is no dispute between the parties that the law of limitation in this case is governed by Greek law. On the agreed expert evidence before me, it is clear that it is a rule of Greek law that, in order to interrupt or stop the period of limitation, the claim form must be both issued and served … Further, the experts agree that as a matter of Greek law, a claim that is served after the five-year period is time-barred. Therefore, service of the claim form is, as a matter of Greek law, an essential step which is necessary to interrupt the limitation period. Service of the claim cannot be severed, carved out or downgraded to a matter of mere procedure which falls to be dealt with under English Civil Procedural Rules. That, apart from anything else, would give rise to a different limitation period in England and Wales than in Greece. The clear intention of the Rome II Regulation is*

> *to promote the predictability of outcomes and, in that context, it seems to me that such an outcome is not what the Regulation intended to happen in these circumstances"*

In short, the points of crucial dispositive importance in *Pandya* were: (1) the policy goal of Rome II of promoting legal certainty and (2) reference to the expert evidence for the content of Greek law on limitation.

The claimant in *Pandya* had *issued* their claim before the expiry of the period, but had not *served* proceedings within the Greek limitation period (service being required to interrupt limitation under Greek law). The claim was therefore time-barred and it was accordingly dismissed.

The claimant in *Johnson* accepted that if *Pandya* was correctly decided then that would mean that the claimant's case that the limitation dispute was a matter of procedure subject to the *lex fori* would automatically fail. This was because the law as to issue and service of a claim in Scots law was materially identical to that in Greek law. The claimant accepted the doctrine of *stare decisis* as formulated by Lord Neuberger in Willers v Joyce and Another (No. 2) [2016] UKSC 44:

> *"So far as the High Court is concerned, puisne judges are not technically bound by the decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance Judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary; see Patel v Secretary of State for the Home Department [2013] 1 WLR 63, para 59" [emphasis supplied]*

The claimant's submissions that *Pandya* had been wrongly decided were dismissed. Further, the Judge held that the claimant had additionally failed to provide a '*powerful reason*' to depart from *Pandya* and she would, therefore, follow it. Accordingly, the Judge held in answer to issues 1 and 2 that it is Scots law which governs limitation and that the claimant's action had commenced outside the relevant three-year limitation period.

Discretion to disapply limitation period in Scots law

The Judge subsequently turned her attention to the third issue requiring resolution, whether the discretion available to the court under s.19A of the 1973 Act should be used so as to allow the claimant's action to continue.

The judgment repays close reading for practitioners representing litigants injured in accidents in Scotland. Of relevance to such cases, the Judge outlined the following general principles:

(1) s.19A of the 1973 Act confers an unfettered discretionary power;

(2) Since each case is fact sensitive and the court is considering the exercise of a discretion, the case-law is therefore of limited assistance.

(3) The burden is on the claimant to persuade the court to exercise this discretion;

(4) The availability and strength of an alternative remedy against a claimant's solicitor is a strong and important factor for the court to consider, but is not determinative;

(5) The court must consider and weigh in the balance all the facts and circumstances specific to the case to determine whether the claimant has established that equity lies in favour of exercising the discretion.

Ultimately, the Judge exercised her discretion to disapply the relevant limitation period. Although the claimant potentially had an alternative remedy open to him against his solicitors on *paper*, the Judge held that this route was not *practically* open to him to pursue as a consequence of the physical and mental health disabilities he had sustained in the course of the accident and his deteriorating condition.

Conclusion

The judgment in *Johnson* confirms the position outlined in *Pandya* with the consequence that any confusion or complexity which reigned pre-*Pandya* as to whether a court will apply the *lex causae* or *lex fori* to matters of limitation has now been cleared up. Following *Johnson*, matters of procedure which are governed by the substantive law of the *lex causae* will not fall to be decided in accordance with the *lex fori*. As was identified in *Pandya* this would compromise legal certainty, which was one of the policy goals intended to be achieved through Rome II.

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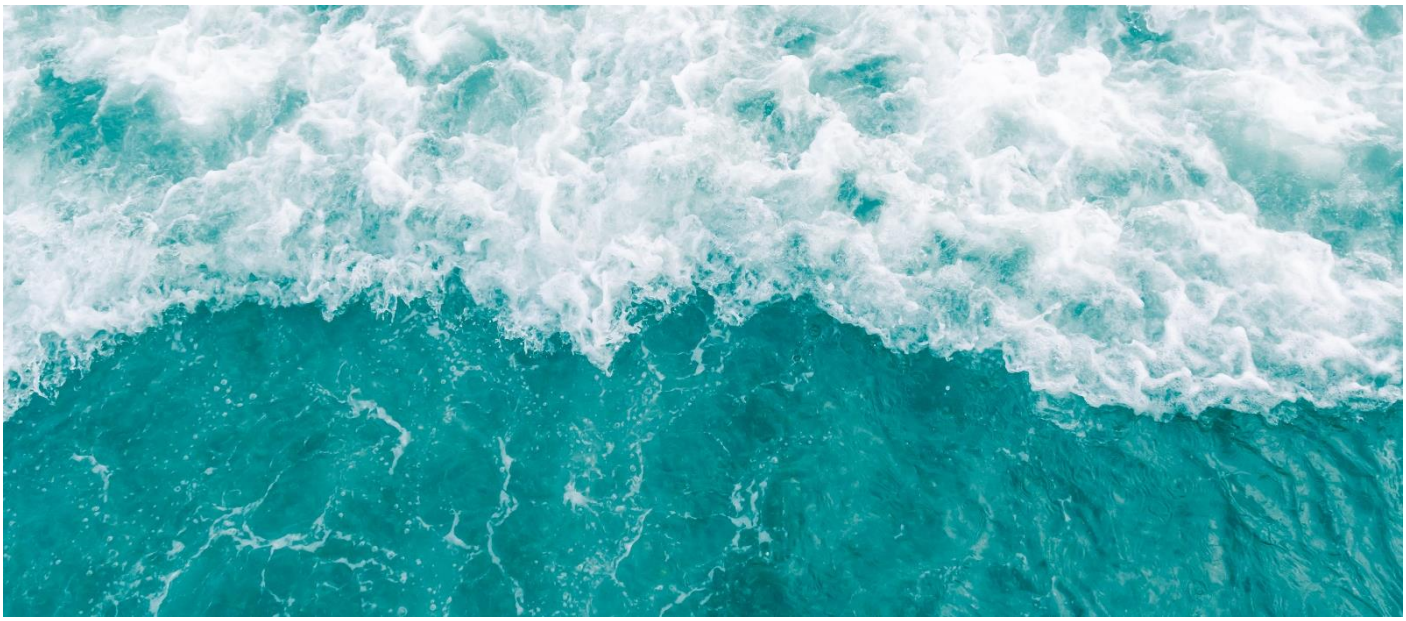

Inquests Overseas: Common issues and how to get around them

"Inevitably a coroner conducting an inquisition into a death abroad will be faced with difficulties of evidence and so on, but that must have been so ever since the statute of George II ... Coroners are well experienced [in] dealing with such problems."

R v West Yorkshire Coroner, ex parte Smith [1983] QB 335, per Lord Lane CJ

Inquests and inquiries into deaths that occurred out of the jurisdiction give rise to a number of particular complexities. This article looks at some of the issues that practitioners may want to consider when acting in an inquest involving a foreign death.

When will there be an inquest?

Since the decision of the Court of Appeal in *R v West Yorkshire Coroner, ex parte Smith* [1983] QB 335, coroners in England & Wales have been under a duty to investigate a death that occurred overseas if the body is repatriated and the circumstances require.

This duty is now reflected in s.1 of the Coroners and Justice Act 2009 ("CJA 2009"), which requires coroners to investigate deaths overseas which are reported to them if it appears that:

- The death was violent or unnatural
- The cause of death is unknown, or

- The person died in prison, police custody, or another type of state detention.

Coroners' investigations typically include a post-mortem examination, to help establish cause of death and potentially to gather forensic evidence. Depending on where the person died, the authorities in that country may have already carried out a post-mortem before the bodies are repatriated. But the standard of post-mortem reports and the time taken to produce them varies greatly from country to country. It is not unusual, therefore, for a coroner to request a further post-mortem examination upon repatriation for the purposes of the investigation.

Under s.6 CJA 2009, the coroner conducting the investigation is required to hold an inquest into the death unless this is no longer required after the post-mortem examination.

Although not the focus of this article, there are also circumstances where the State may be required to conduct an inquiry or investigation into a death abroad under Article 2 and / or 3 of the ECHR. The Iraq Fatality Investigations were established on the order of the High Court to conduct inquest-type investigations into the facts and circumstances of civilian fatalities in Iraq during the period of British occupation: *R (Ali Zaki Mousa and Ors) v Secretary of State for Defence* [2012] EWHC 1412 (Admin). These investigations are non-statutory and do not come under the CJA 2009, but give rise to similar issues outlined in this article and may be of interest to practitioners working in this field.

How to get evidence before the coroner?

Coroners have statutory powers, in addition to powers at common law, to compel evidence. But issues arise where the evidence or witnesses in question are located overseas.

Paragraph 1 of Schedule 5 to the CJA 2009 gives a coroner power to summon witnesses and to compel the production of evidence for the purposes of an investigation (paragraph 1(2)) or an inquest (paragraph 1(1)) by way of written notice. However, this power does not reach beyond the jurisdiction.

Coroners must therefore rely on other tools to obtain evidence from witnesses and organisations overseas relevant to the investigation or inquest.

Request to overseas authority

The primary tool at the coroner's disposal is to seek relevant information from the appropriate foreign authorities. Requests will usually be initiated by the coroner as part of her inquiries, but legal representatives should consider making submissions on evidence to be requested and the requesting process to ensure relevant documents are sought.

The information the coroner may request will of course vary from case to case, but typically might include copies of autopsy and toxicology reports, death certificates, CCTV footage, police reports and witness statements.

Requests for information for information from foreign authorities can be routed through the Foreign, Commonwealth & Development Office (FCDO)'s Consular Directorate's Coroners' Liaison Officer (CLO): s.9, *Memorandum of Understanding*. But coroners may also make formal requests directly to foreign authorities, or engage CPS prosecutors to assist in obtaining documents from abroad.

The level of compliance and the extent and rapidity of disclosure from overseas can vary greatly depending on the circumstances of the case. In *Dorish Shafi v HMC for East London* [2015] EWHC 2106 (Admin), Bean LJ and The

Chief Coroner (His Honour Judge Peter Thornton QC) sitting in the High Court considered coroners' obligations when evidence available abroad is not forthcoming.

In Shafi, a family member of the deceased challenged the adequacy of the coroner's approach to obtaining CCTV material that was not forthcoming from Dubai. The coroner had made a formal request and a further eight documented requests for the CCTV footage, before deciding that the inquest should proceed without.

Bean LJ refused to criticise the coroner's approach, holding that "*there is only so much that a coroner can do to obtain evidence from a foreign state, however friendly*" [26]. He emphasised that "*it is not in the public interest for requests by coroners for information or further information to remain outstanding for an indefinite period of time just in the hope that more information may be forthcoming"* [32].

The judgment sets out that that to satisfy the requirement to hold a sufficient inquest, the coroner must:

- First make "*all reasonable efforts to obtain sufficient relevant information*" [27];
- Then exercise her or his discretion to hold the inquest when there is either sufficient information available or further requests for information are not likely to be productive [28], [33];

When deciding whether to proceed, the coroner must exercise this discretion carefully and in light of all information available, giving consideration to any submissions made by interested persons and in particular the family of the deceased [31].

Written and oral evidence from overseas

The fact that the coroner does not have the power to *compel* evidence from overseas does not mean that evidence given voluntarily cannot be admitted. The coroner may invite evidence from witnesses overseas and it is not uncommon for foreign-located organisations and witnesses to participate in inquests.

In practical terms, attendance can be facilitated by Rule 17 of the Coroners (Inquests) Rules 2013 ("the 2013 Rules"), which permits the coroner to direct that a witness may give evidence via video link where appropriate.

If an overseas witness cannot or will not attend the inquest (either in person or via videolink), the coroner may be able to use Rule 23 of the 2013 Rules to admit evidence by way of written statements. However, to ensure that the requirement for sufficiency of inquiry within the meaning of s.13 of the Coroners Act 1988 is satisfied, Rule 23 can only be relied upon where all reasonable steps have been taken to try and secure the attendance of relevant witnesses: *Shafi* [36]-[51] (see also *R (Paul) v Assistant Deputy Coroner of Inner West London* [2007] EWCA Civ 1259, considering the position under the 1984 Rules).

Use of Interested Persons

The creative designation of Interested Persons (IPs) is another tool available to the coroner to secure evidence from overseas. This is particularly pertinent for inquests into the death of holiday-makers, where the deaths commonly involve a foreign hotel or activity provider.

An IP is defined by list at s.47(2) of the CJA 2009. In addition to family members and those who may have caused or contributed to the death of the deceased, the definition includes any other person who the coroner thinks has a sufficient interest.

Although much will depend upon the type of holiday and the contractual arrangements between providers, it is common for tour operators to have powers to compel evidence from their foreign suppliers. Representatives may consider inviting the coroner to designate a tour operator as an IP to make use of these powers in appropriate cases.

Case management

A coroner may at any time hold a pre-inquest review (PIRH) during the course of an investigation and before an inquest hearing under Rule 6 of the 2013 Rules.

While the Rules do not prescribe the circumstances in which a PIRH should be held, deaths overseas are very likely to require one given the common issues relating to witnesses and disclosure from overseas and the timing of the inquest. A well-organised PIRH with brief reasoned decisions afterwards can provide an opportunity for IPs and their representatives to make submissions and aim to resolve such issues.

Reports to Prevent Future Deaths

Paragraph 7 of Schedule 5 of the CJA 2009, gives coroners a duty to make reports to a person, organisation, local authority or government department or agency where the coroner believes that action should be taken to prevent future deaths. The report is sent to whoever the coroner believes has the power to take such action and the recipient then has 56 days to respond: Regs. 28 and 29, 2013 Regulations.

The coroner's duties in this regard are not abrogated because a death occurred overseas, and PFD reports can be made to foreign-based IPs where appropriate. And of course, there may well be lessons to be learned for organisations and agencies at home arising out of such an inquest. But it goes without saying there are practical limits to the reach of PFD reports where the relevant recipients are not subject to the obligation to reply.

The leading example of a PFD report being addressed to a foreign IP is the Shepherd Inquest Shepherd-2015-0338.pdf (judiciary.uk), which touched upon the tragic deaths of two children from carbon monoxide poisoning in their hotel room in Corfu. The Greek hotel group was an IP to the proceedings, and PFD report was addressed to them alongside the British tour operator, travel industry bodies and government departments. The matters of concern outlined in the report were, however, focused primarily on actions that could be taken by the British recipients to ensure health and safety standards overseas, with only limited comment directed to the hotel's failings.

By contrast, the foreign hotel was not an IP in the Tunisia Sousse Inquest into the terrorist attack at the Imperial Marhaba Hotel. Despite a number of potential overseas failings coming to light, HHJ Loraine-Smith's PFD report was addressed only to British government authorities and travel industry organisations, and focused on changes required at home.

As for any inquest, representatives will want to have in mind potential PFD outcomes from a very early stage. Where there is a foreign dimension, practitioners will want to be particularly careful to consider strategically whether foreign parties should be added as IPs and the impact this may have on the inquest outcome.

Conclusion

Any inquest can be upsetting for those involved, and the heightened complexities that can arise where the death occurred abroad can give rise to

additional stress. Through building a familiarity with how to navigate these obstacles, practitioners can assist clients through the process and secure outcomes in their best interests.

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Greenaway & Rocks v Covea Insurance: Wrong turn, or expert decision?

The case of *Greenaway v Parrish & Covea Insurance* [2021] EWHC 1506 (QB) concerns claims made arising out of a road traffic accident in which the Claimants were seriously injured. The driver was a 16 year old who was, at the time of the accident, driving his friend's father's car (who also was a passenger). The motor insurer sought to escape any liability to compensate the Claimants as it would have to do so pursuant to section 151 of the Road Traffic Act 1988, as amended by seeking to argue that the that it that its potential liability was an "excluded liability" within the meaning of s.151(4) of the Road Traffic Act.

Section 151(4) of the Road Traffic provides that: "*In subsection (2)(b) above "excluded liability" means a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who–*

(a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and

(b) could not reasonably have been expected to have alighted from the vehicle."

The motor insurer's case is that their insured motor vehicle had been unlawfully taken by the driver as he did not have the permission of the owner. Additionally, the motor insurer asserted that the other elements of s.151(4) were made out, i.e. that the claimants had allowed themselves to be carried in the motor vehicle knowing or having reason to believe the vehicle had been unlawfully taken.

This potentially match winning point raised by the motor insurers was met with a very firm rebuttal by the Claimants. They said, in response, that s.151(4) went too far by allowing the motor insurers' potential liability to be excluded by virtue of the vehicle being unlawfully taken, the only circumstance where an exclusion was possible was where the vehicle was stolen and there was requisite knowledge of the same. In essence, they asserted that s.151(4) was not compliant with Article 13 of the Sixth Motor Insurance Directive (Directive 2009/103/EC). That provision allows for an exclusion when "the insurer can prove that they [the passengers] knew the vehicle was stolen" and they voluntarily entered the car anyway. Therefore, an issue arose as to the meaning of the words "they knew the vehicle was stolen".

Of course, as Martin Spencer J correctly points out, the reference to "unlawfully taken" in the Road Traffic Act 1988 results from the fact that domestic law tightly defines the term "to steal" in the Theft Act 1968. Indeed, in joyriding cases a conviction for theft would not result because it cannot be proved that there is an intention to permanent deprive the owner of the car. To deal with this issue an offence of taking without consent was created or TWOC, as it is referred to, by Parliament to fill an apparent gap in the law and deal with a pressing social problem.

At a CMC before Master McCloud an issue arose as to whether the motor insurer was permitted to rely on expert evidence to assist with the construction to be adopted as to the meaning of the word "stolen" in this context. The Master refused permission, holding that it was for the court to reach a view on the construction of the term informed possibly by consideration of the foreign language versions of the Directive. She stated that:

"*I am not persuaded that expert evidence of foreign law is reasonably required in this case. Rather I regard it as a question of law for the British judge, possibly assisted by translations of other states' implementing laws, if it becomes necessary at all to look at other countries' interpretations, but more likely I suspect to be assisted by being given copies of the foreign language versions of the actual Directive itself, if argument were to be made about linguistic differences, and from that information it would be for the UK court to carry out the exercise the CJEU might have carried out if the case became suitable for a reference which otherwise would have gone to the CJEU.*"

The decision was appealed, and the appeal came on before Martin Spencer J.

Martin Spencer J considered s.6 of the European Union (Withdrawal) Act 2018. In so doing he held that the same requires that the court "stands in the shoes of the [CJEU]" in order to determine the meaning of the word "stolen" within the retained general principles of EU law. It is no longer possible to make a reference to the CJEU, therefore, the court effectively has to carry out the task that would have been expected to have been carried out by the CJEU on a reference. This includes, following the decision in *CILFIT Srl v Ministero della Sanita [1982] ECR 3415*, the court, in this instance, considering different language versions of the translation of the Directive to ascertain the true meaning of the word "stolen". His Lordship noted the "nightmare" that could lead to.

The decision makes clear exactly what the court is without, where his Lordship set out:

"*Whilst the European Court of Justice, with the assistance of the Advocate General, might have useful information about the various language versions, and the member states are invited to*

make submissions as to the issue of the interpretation of the directive which encompasses the translations of the particular countries in question, none of that information is readily available to an English domestic court now faced with the same issue to determine. Effectively what the English court is being asked to do is put itself in the position of the European Court of Justice with one or both hands tied behind its back in not having the access which the European Court of Justice uniquely has by virtue of its now twenty-seven members."

Therefore, Martin Spencer J determined that there ought to be expert evidence available to the court. He ruled out the possibility of a report from a lawyer of each of the 27 Member States. He gave permission for four experts. The evidence envisaged is not limited to a simple translation, there is permission that goes much further than this. Indeed, it is said that the evidence will be directed to how the word "stolen" is used and interpreted in the particular member state as well as "*evidence of how the Directive has been implemented in order to illustrate and explain the use of the translation, the word used, in the particular jurisdiction to convey the concept of the word 'stolen'.*"

There is a powerful argument that this decision has gone too far and the need for expert evidence is not justified. With respect, there is nothing in s.6 that says the court interpretating a question of retained EU law has to approach the matter as the CJEU would and in the same manner. Parliament could, had it intended such an approach, have said so in clear words or made clear that where a question of interpretation arose then it was permissible for the court to receive expert evidence.

Schedule 5 of the European Union (Withdrawal) Act 2018, the second part of which is entitled "[r]ules of evidence" appears not to have been cited in Greenaway, nevertheless it appears relevant. Paragraph 3 of that Schedule provides that, "*[w]here it is necessary, for the purpose of interpreting retained EU law in legal proceedings, to decide a question as to the… meaning or effect in EU law of any EU instrument, the question is to be treated for that purpose as a question of law*". To avoid confusion, it is worth making explicit that retained EU law includes EU-derived domestic legislation pursuant to s.2. There can be little doubt that s.151(4) is a piece of EU-derived domestic legislation. The Sixth Motor Insurance Directive is clearly an EU instrument. Therefore, the meaning of "stolen" for these purposes is clearly a matter of law, it is suggested that there can be little controversy in this respect.

Whilst it would be helpful to have before the court foreign language versions of the Directive that, it is suggested, is all that is required. Admitting expert evidence of the type for which permission has been given in this case goes too far. Approaching it from the perspective of CPR 35.1, such evidence being is just not reasonably required.

It also seems that Parliament, in enacting paragraph 3 of Schedule of 5, was intending that the question of interpretation of retained EU law and the meaning of EU instruments would be treated unlike the question of foreign law, which is treated as a matter of fact. This provides a useful clue as to the lack of any intention on the part of Parliament that expert evidence would be introduced to determine matters of interpretation touching upon matters of EU law.

Aside from that, even if Martin Spencer J is right that the court must take on the weighty role of the CJEU, then does it follow that the court really needs to know about how the word "stolen" is used, interpreted and how the Directive has been implemented? No, is the simple answer. The

CJEU's approach is to start by considering the wording of the provision under examination, including the differing language version, however the overall outcome is driven by the aims, objectives and purpose of the Directive. It might receive evidence as to implementation, but this is given little importance unless it can be demonstrated that the implementation is consonant with the aims, objectives and purpose.

To be clear, if the CJEU conclude that implementation, no matter how efficient and desirable in the circumstances, is not in keeping with the aims, objectives and purpose of a given directive it will not "approve" it in reaching its conclusions as to interpretation

Whilst this is an early decision at case management level, it appears that the approach adopted is incorrect, one might be tempted to say the law has taken a wrong turn! It appears that the Master's instinct that this was a question of law and a matter for the trial judge is wholly correct. Expert evidence is simply not "reasonably required".

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Frustration in the context of aircraft leasing - *Wilmington v SpiceJet*

The recent case of *Wilmington Trust SP Services (Dublin) Limited & Others v SpiceJet Limited* [2021] EWHC 1117 (Comm) demonstrates the difficulty parties face in convincing English courts that they should be permitted to escape their payment obligations on the basis that a contract has been frustrated.

The case concerned three 10-year aircraft leases entered into between the Indian low-cost carrier, SpiceJet, and a number of leasing entities connected to Goshawk Aviation ('the Lessors'). The first lease related a Boeing 737-800 aircraft which SpiceJet had had significantly restricted use of due to the Covid-19 pandemic. The second and third leases related to Boeing MAX 8 aircraft which had been grounded in India following two fatal accidents involving similar type aircraft operated by Lion Air and Ethiopian Airlines respectively.

The Lessors applied for summary judgment on amounts outstanding from SpiceJet, including basic rent and maintenance reserves. SpiceJet in turn counter-claimed for the return of a security deposit that it alleged had been wrongfully drawn down by the Lessors.

The Lessors relied upon on the 'hell or highwater' provisions in clause 4(c) of the leases, which provided:

> "*Lessee's obligation to pay all Rent hereunder shall be absolute and unconditional and shall not be affected or reduced by any circumstances, including, without limitation: … (ii) any defect in the title, airworthiness or eligibility for registration under Applicable Law, or any condition, design, operation, merchantability or fitness for use of, or any damage to or loss or destruction of, the Aircraft.*"

In respect of the first aircraft, SpiceJet argued that the restrictions imposed by the Indian Government in light of the Covid-19 pandemic made it illegal to operate the aircraft and that the payments under the lease should be suspended for the duration of the illegality.

The illegality defence was given short shrift by Julia Dias QC (sitting as a Deputy High Court Judge), firstly, because SpiceJet had actually operated the aircraft at times during the pandemic, and secondly, because all risks and maintenance under the dry lease had been assumed by the airline given the clear terms of the 'hell or high water' clause and therefore it was "impossible" to interpret the lease terms such as to suspend rent during the period of the pandemic.

In relation to the second and third aircrafts, SpiceJet ran a frustration defence based on the two aircraft having been grounded since early 2019 by decree of the Indian Directorate General of Civil Aviation (DGCA) following the two fatal accidents in 2018 and 2019.

If the lease agreements were found to have been frustrated then they would come to an end, with the parties' obligations discharged, and any sums paid over after the contract's frustration becoming repayable under the Law Reform (Frustrated Contracts) Act 1943.

SpiceJet's frustration defence was put on the basis that the purpose of the leases were for the commercial use of the aircraft to provide passenger transport, and the grounding of the aircraft frustrated that purpose.

The Judge began by reciting the commonly adopted test set out in *In The Sea Angel* [2007] 2 Lloyd's Rep 517, namely whether, through no fault of either party, performance of the contract has been rendered 'radically different' from the obligation undertaken. In *The Sea Angel*, the Court of Appeal held that this required the application of a multi-factorial approach:

> "*Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as ''the contemplation of the parties'', the application of the doctrine can often be a difficult one. In such circumstances, the test of ''radically different'' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstance*."

The Judge stated that she was prepared to assume that the 'hell or highwater' clause did not necessarily operate to exclude the possibility of frustration, however, the clause's language made it clear that SpiceJet had assumed all the commercial risk relating to the airworthiness of the leased aircraft.

The Judge further held that in the context of a 10-year lease the grounding of the aircraft for appropriately 10% of the term (at the time of counting) did not amount to a change of circumstances which renders performance of the leases 'radically different'.

Interestingly, the Judge left open the prospect that if the DGCA's grounding decree became permanent, or even if the ban remained for a further three years or so, SpiceJet might be able to successfully argue at that later point that the leasing agreements had been frustrated.

The Court therefore awarded the Lessors summary judgment for c.US$25 million. This amount did not include the claim of US$4.2 million for restoration of the security deposit in respect of the first aircraft as the Judge held that SpiceJet's counter-claim could proceed to trial on the basis that it had a reasonable argument that the Lessors' drawdown of this deposit was "impermissible and unjustified" in accordance with the terms of the lease agreements.

Of particular note, and of interest to distressed airlines, was the Judge's decision to order a stay of execution of the summary judgment for 16 months for the parties to undertake ADR. The rationale for the stay being principally that of SpiceJet's the precarious financial position meaning any requirement to pay the judgment sum promptly might result in its insolvency which would be contrary to the Lessors' interests.

Points to note

The decision in *Wilmington v SpiceJet* will come as little surprise to those familiar with the earlier case of *SalamAir SAOC v LATAM Airlines Group SA* [2020] EWHC 2414 (Comm). In that case Foxton J dismissed an injunction application made by the SalamAir to restrain LATAM from making demand under three letters of credit. The letters of credit had been given by the airline by way of deposit to secure the performance by SalamAir of its obligations under the three aircraft leases.

SalamAir v LATAM also involved 'hell or highwater' clauses in the leases. Foxton J observed that in such a case, the lessee effectively assumed all commercial risks and rewards of operating the aircraft in return for fairly limited obligations on the part of the lessor; namely, to ensure quiet possession of the aircraft. He noted that there were three years left to run on the leases in question, at the time the Omani government imposed the travel restrictions, meaning the aircraft would likely be operated again during the leases' term, and therefore the effect of the restrictions had not frustrated the leases.

Also of note is the recent case of *Bank of New York Mellon (International) Ltd & Ors v Cine-UK Ltd & Ors* [2021] EWHC 1013 (QB) in which Master Dagnall gave summary judgments to the landlords of commercial premises in their claims for payment of rent due since the outbreak of the Covid-19 pandemic and imposition of restrictions in March 2020.

Among other arguments raised, the Master rejected the tenants' contention that their leases had been "temporarily frustrated" during the periods in which the premises were forced to close. In doing so, he set out a distillation of the principles of frustration as they relate to property leases which will be of particular use to aviation practitioners in circumstances where an aircraft lease does not contain a 'hell or highwater' clause, and therefore the principles repeated here for reference[17]:

"*a. In principle, the doctrine of frustration*

[17] Found at paragraph 209 of the judgment.

applies to leases – see the majority in Panalpina[18];

b. An enforced closure of the premises arising from matters outside the control of the parties is such a supervening event as is capable in principle as giving rise to the frustration of commercial leases such as these and especially where, as here, the user clauses only permit in practice what have become impossible uses – see Panalpina itself;

c. However, it is only in a "rare" or "very rare" case that such a supervening event will have such a consequence (see Panalpina and the Sea Angel above). As to this:

i. Has the situation become so "radically different" that the present situation is so outside what was the reasonable contemplation of the parties as to render it "unjust" for the contract to continue (see Panalpina per Lord Wilberforce, The Sea Angel and Canary Wharf);

ii. There are relevant to this: the original term of each Lease, the likely period of the disruption and the likely remaining term of the Lease once the disruption has ended (Panalpina per Lord Wilberforce and Lord Roskill), and:

1. This should be considered at each relevant point in time looking prospectively forward as to what reasonable commercial people would conclude was the likely length of the disruption (see Embriacos and the other cases cited by Treitel);

2. The court must consider this first quantitatively but then qualitatively as to whether there is such a "radical difference" (see Lord Wilberforce in Panalpina);

3. The court must also consider all this in terms of whether this new situation justifies a departure from the agreed allocations of risk, and where in the context of a lease the essential agreement is that the Tenant has agreed to pay the rent except in defined circumstances. This is where the parties have allocated the risks of disruption e.g. by reason of fire, generally to the Tenant (Lord Wilberforce in Panalpina)."

As these cases all illustrate, frustration remains incredibly difficult for defaulting parties to successfully rely on. Whilst *Wilmington v SpiceJet* did not rule out the possibility of frustration occurring in future, for example in a scenario where an operational ban continue for a significant portion of a lease's term, it is a warning to airlines and other operators of the strict obligations contained in such leases, particularly those with 'hell or high water' clause (these being the norm).

[18] The case of *National Carriers v Panalpina* [1981] AC 675 ("Panalpina") concerned. a road closure that prevented commercial premises which had been let for 15 years for being used after 10 years for some 18-20 months after which the lease would still have another 3 years to run. The tenant contended that the lease had been frustrated but this contention was rejected by way of summary judgment by a Master which was eventually upheld by the House of Lords.

Whilst lessors will welcome the recent decisions of the High Court, it will be interesting to see whether airlines and other struggling operators seek to rely on the *Wilmington v SpiceJet* decision to apply for stays execution in similar cases where they are found to be liable to pay debts due.

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Travel law case round-up

This article summarises two recent cases of relevance to those practicing in travel litigation.

Expert evidence in food poisoning claims: *Taylor v TUI UK Limited* (unreported) – Newcastle County Court (HHJ Freedman)

The tactical and procedural battle between claimants and tour operators continues to rage in holiday sickness claims.

In this unreported decision, on appeal from a case management decision of a deputy district judge, the Claimant successfully appealed the judge's decision granting TUI permission to cross-examine the Claimant's medical expert at trial.

The case was a standard fast track claim for gastric illness allegedly sustained during a package holiday in Egypt. The Claimant relied on an expert report which supported her case that the illness was caused by contaminated food at the Hotel.

As is common in these cases, particularly following the recent decision of Mr Justice Martin Spencer in *Griffiths v TUI UK Limited* [2020] EWHC 2268 (QB) – which is itself subject to an appeal to the Court of Appeal, TUI applied for permission to cross examine the Claimant's expert at trial.

In the course of his extempore judgment, HHJ Freedman noted it was implicit in CPR 35.5(2) that the court can direct an expert to attend a hearing but nevertheless expressed reservations on whether there was actually an express power within the Civil Procedure Rules requiring a claimant to call the expert to enable him to be cross-examined19:

"What I am very clear about is that the application itself was flawed because there is no power

[19] CPR 35.5(2) provides: 'If a claim is on the small claims track or the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice."

conferred by CPR 28.4 which permits the court, on the application by one party, to compel an expert, instructed by the opposing party, to attend at Trial. Nor was the application, in reality, an application that the respondent be asked to be permitted to call the appellant's expert to give oral evidence at trial. What was being sought was permission to cross-examine the appellant's expert. Plainly, however, for the respondent to be permitted to cross-examine the appellant's expert, the order had to direct that the appellant call his expert to give evidence at trial. I say no more about the court's powers and I am not intending to decide this appeal on the basis that says the court did not have the requisite jurisdiction to make the order; I simply observe that there does not appear to be any express rule permitting the court to make the order sought."

HHJ Freedman then considered the substance of the application, namely whether it was in the interests of justice for the expert to attend the hearing.

In this respect, the judge made reference to the decision in *Griffiths* but considered it relevant that TUI's application had not highlighted any material criticisms of the expert's report:

"…in none of those documents is there any reference, at any point, to anything in Dr Al-Shamas' report which could be said to give rise to some deficiency in reasoning. There is no suggestion of any incorrect assumptions, or misrepresentations of fact, or lack of detail, or lack of consideration of other causes for the gastroenteritis. Indeed, no criticism at all is levelled against Dr Al-Shamas' report."

Against this background, having referred to the requirement under CPR 35.1 to restrict expert evidence to that which is reasonably required to resolve the proceedings, the judge considered it was not in the interests of justice to require the Claimant's expert to attend:

"*…It is not enough in the context of a fast track claim, with a value limited to £3,000, merely to assert that unless a defendant is given the opportunity to try and shake or displace the conclusion reached by an expert instructed on behalf of the claimant the judicial process is somehow rendered unfair.*

In my judgment there must be something much more specific than that. In other words, if, most exceptionally and unusually, a court is to grant permission for a defendant to be given the opportunity to cross-examine the claimant's expert in these circumstances, it must be demonstrated that there is some flawed or deficient reasoning within the expert's report or some factual inaccuracy which needs to be exposed and need to be clarified before the judge so that the judge can have an opportunity to evaluate the conclusion reached by the expert and reject it, if appropriate"

Comment

The decision potentially leaves tour operators in a difficult position. The issue of causation is central to gastric illness claims. Following the decision in *Griffiths,* the primary means by which tour operators have sought to challenge the issue of factual causation is by cross examination of the Claimant's experts.

It is somewhat surprising that no criticisms at all were identified of the expert's reasoning in this case – not even the methodology behind the expert's reasoning. This is, however, unlikely to be the position in many other cases where deficiencies and inconsistencies in the expert's report may be readily identified.

This decision suggests that permission to cross examine such experts should only be granted in exceptional or unusual cases where there are clearly identified deficiencies in the expert's conclusions. However, it is respectfully suggested this sets the bar too high. The key issue is whether cross examination is required in the '*interests of justice*' (as per CPR 35.5(2)). There are likely to be a whole host of considerations in determining whether that threshold is met in any particular case. Whether this decision has much of an impact in other similar cases therefore remains to be seen.

Pleading fundamental dishonesty: *Mustard v Flowers* [2021] EWHC 846 (QB) – Master Davison

It is an unfortunate fact that many package travel cases give rise to issues of exaggeration and fundamental dishonesty in the presentation of such claims.

This recent decision from Master Davison provides some helpful guidance on the appropriateness of a speculative pleading of fundamental dishonesty in a defence.

The case concerned a road traffic accident. Liability was admitted although causation of the Claimant's injuries was very much disputed.

The Defendant's insurer made an application to amend their defence to plead as follows:

"*[…] In the event that the Court finds that the Claimant has consciously exaggerated the nature and/or consequences of her symptoms and losses, the Third Defendant reserves the right to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanctions including the disapplication of QOCS) is appropriate."*

The Claimant objected to the proposed amendment. It was said said the proposed amendment amounted to an allegation of fraud which was not properly particularised and for which there was no basis in the evidence. This was said to be contrary to Rule 9 of the Bar Standards Board Code of Conduct which requires credible material establishing an arguable case of fraud before such a case can be pleaded.

The Defendant's position was that it was not making a positive averment of dishonesty but was simply alerting the Claimant to the nature of its case at trial – the detail was to be left to cross examination. In essence, the Defendant was saying it was giving the Claimant advance notice of these issues so that she was not ambushed at trial.

At paragraph 19 of his judgment, the Master, having referred to the Court of Appeal's decision in *Howlett v Davis* [2017] EWCA Civ 1696 and the High Court case of *Pinkus v Direct Line* [2018] EWHC 1671 summarised the relevant principles as follows:

"*…it is open to the trial judge to make a finding of fundamental dishonesty whether that has specifically been pleaded or not. To put that another way, an "application by the defendant for the dismissal of the claim" pursuant to section 57(1) of the 2015 Act does not require any particular formality. In an appropriate case it could, for example, be made orally and perhaps at as late stage as the defendant's closing submissions. But the factors governing whether the trial judge would then entertain it would be as set out by Newey LJ in Howlett, namely whether the claimant had been "given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than*

whether the insurer had positively alleged fraud in its

defence". Or, to adopt the language of HHJ Coe's judgment in Pinkus, whether the claimant had had "sufficient notice" of the issues raised and the opportunity to deal with those issues by way of additional evidence, if necessary, including from his experts."

The Master further noted (at paragraph 20):

"A factor underlying these decisions is that (as was explicitly raised in Pinkus) neither the defendant nor the judge may be in a position to make any conclusions about a party's honesty until that party has given evidence and been cross-examined. That will especially be the case where honesty or dishonesty turns on the distinction between conscious and unconscious exaggeration. It would also not be professionally proper for a defendant's legal representatives to allege fraud or fundamental dishonesty based upon mere suspicion, or upon a mere prospect that that is how the evidence might turn out. So there will be many cases where it would not be practical or proper to require a defendant to have made such an allegation prior to the trial in order to make an application under section 57."

The Master refused permission to rely on the proposed amendment. The Master provided three substantive reasons. First, the proposed amendment served no purpose – the s.57 application could be made without foreshadowing it in the pleading. Secondly, the proposed amendment had no real prospect of success – the expert evidence did not say the Claimant was being dishonest. Thirdly, permitting the amendment would prejudice the Claimant as a plea of fundamental dishonesty would have to be reported to her legal expenses insurers and open up the possibility of avoiding the policy *ab initio*.

At paragraph 24 of his judgment, the Master said this:

"I emphasise that nothing in the foregoing is intended to detract from the modern "cards on the table" approach. Where the defendant does have a proper basis for a plea of fundamental and intends to apply under section 57, then, subject to the direction of the judge dealing with case management or the trial judge, that should ordinarily be set out in a statement of case or a written application and that should be done at the earliest opportunity. What I am intending to discourage are pleas of fundamental dishonesty which are merely speculative or contingent."

Comment

This decision provides a helpful and important clarification on when a pleading of fundamental dishonesty should be made. As set out above, issues of fundamental dishonesty are frequently encountered in package travel cases (particularly those involving complaints of gastric illness).

Contingent and speculative pleas of fundamental dishonesty have been commonly encountered in personal injury cases (including those relating to accidents abroad) – no doubt with a view to raising the stakes and exerting maximum pressure on claimants.

This decision suggests those practices should now stop. However, where there is sufficient evidence to raise the issue of fundamental dishonesty then this should be set out in the pleading at the earliest opportunity.

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