3 HARE COURT

Travel & Aviation Bulletin

Autumn 2022

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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. Chambers has established links to the travel industry and we are an ABTA partner. 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 us at Marketing@3harecourt.com or 020 7415 7800 for further information.

Chambers of the Year
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Legal Awards 2022

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Foreword

Some things in life are sacred, unchanging. Roadworks will begin as term starts. A hosepipe ban means rain is on the way. The wrong person will win SCD. And counsel's time estimates will prove unreliable. Thus, for fear of being done for trade descriptions, has our Travel Law Quarterly become our Travel Law Bulletin.

It's not as though much has changed over the last year. Well, except the Supreme Court's decision in X v Kuoni. And the CJEU finally getting the chance to consider the insurer as anchor defendant argument in BT v Seguros. And the Court of Appeal, at least temporarily, clarifying the law on uncontroverted evidence in Griffiths v TUI. Oh, and the opening up again of the world to tourism (and to overseas accidents) as covid starts to recede.

Anyway, onwards! In this bumper edition:

- Christopher Loxton gives an overview of some of the aviation finance decisions in the last year.
- Asela Wijeyaratne and Claire Errington consider the first instance decision in Lambert v MIB in advance of the appeal.
- Pierre Janusz looks at some of the jurisdictional issues raised in Simon v Taché.
- Samuel McNeil considers an entirely hypothetical <cough> flight delay claim.
- Katherine Deal KC shares an article on drivers' fault in Loi Badinter claims.
- Alexandra Sidossis considers solicitors' liens following the last (and final?) round in the Bott & Co v Ryanair litigation.
- Navjot Atwal updates on the latest developments in Griffiths v TUI.
- Christopher Loxton looks across Hadrian's Wall for an update on the Montreal Convention in Mather v easyJet.
- Anna Lancy considers the recent case on cross-border insolvency, Re Astora Women's Health LLC.
- Katherine Deal summarises last week's decision in flightright v American Airlines as the CJEU continues to expand the scope of the Denied Boarding Regulation.
- And Samuel McNeil updates on the PEOPIL conference in Copenhagen last month, which he and others from chambers attended.

We hope you enjoy this long-awaited bulletin. In the event that the arrival of the next edition is delayed by leaves on the line, we regularly provide training online and in person on cross-border issues. If this would be of interest to you, please do get in touch with us.

Katherine Deal KC
Editor

Contributors to this Issue

Katherine Deal QC

Katherine Deal KC is renowned for her expertise in cross-border accidents and aviation law. She has acted in many of the leading cases on jurisdiction (at all levels up to and including the Supreme Court and Court of Justice of the European Union), and is widely regarded as a specialist on jurisdiction and issues of choice of law. Most of her claims involve injuries of maximum severity or death. She also undertakes work concerning package travel, and acted in the leading case of X v Kuoni Travel concerning the statutory defences, as well as in the claim arising out of the Tunisia terrorist attack, amongst many others. She is a firm believer in the advantages of alternative dispute resolution and has settled claims running into many millions of pounds over the last year alone. She was named "Personal Injury Silk of the Year" at The Legal 500 UK Bar Awards 2022.

Pierre Janusz

Pierre's practice areas cover all aspects of general common law and commercial litigation, with a strong emphasis on real property, landlord and tenant matters and associated professional negligence claims, but he is also recognised as a leading junior in personal injury claims, where he regularly deals with catastrophic injury and high value fatal accident cases as well as clinical negligence matters.

Navjot Atwal

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

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.

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).

Alexandra Sidossis

Alexandra is dually-qualified as a barrister in England and Wales and as a New York attorney, and is a qualified commercial mediator and an Associate Member of the Chartered Institute of Arbitrators (ACIArb). Alexandra's practice focuses on commercial law, and particularly employment law and international arbitration. Alexandra is also a member of the Attorney General's Junior Junior Scheme.

Samuel McNeil

Samuel has experience in claims with a cross-border element, including claims that were issued before, during and after the Brexit transition period. During pupillage he assisted other members of chambers in the Supreme Court case X v Kuoni Travel Ltd [2019] UKSC 37. He has also appeared in numerous cases involving serious allegations of fundamental dishonesty. Samuel frequently appears in claims under EC Regulation 261/2004.

Claire Errington

Claire joined 3 Hare Court as a tenant in October 2021 following the successful completion of her pupillage. She possesses two First-Class degrees, an LLB from Durham University and an MA in Human Rights Studies from Columbia University, New York. Most recently she gained Distinction in the BTC. Claire has gained further work experience in the fields of personal injury, travel, commercial, EU and international law, and gained exposure to all of Chambers practice areas throughout pupillage.

Anna Lancy

Anna commenced pupillage in October 2021, Anna has accepted an offer of tenancy and subject to successful completion of pupillage will become a tenant from January 2023. Before being called to the Bar, she practised for over 5 years as a solicitor, in Melbourne and London. Anna advised on a range of high-profile and complex disputes for governments, leading corporates, and high-net worth individuals in international dispute resolution, commercial law, civil fraud and human rights. Anna remains an Australian Legal Practitioner.

Aviation finance case law update

AMRA Leasing Ltd v DAC Aviation (EA) Ltd [2022] EWHC 1718 (Comm), 16 June 2022, Jacobs J

The defendants applied to set aside a default judgment to pay the claimant £8 million under aircraft lease agreements (pursuant to CPR 13.3).

The claimant had entered into two aircraft lease agreements with the first defendant Kenyan company (D1). The second defendant (D2), a Canadian company, had provided the claimant with a corporate guarantee regarding D1's payment and performance obligations under the lease agreements. The third defendant (D3), who was a director of the first and second defendant companies and resident in Canada, had provided personal guarantees in respect of the same obligations.

The claimant commenced proceedings against D1 for breach of the aircraft lease agreements and against D2 and D3 for their failure to pay, on demand, sums owing under the guarantees. In December 2019, the claimant served its particulars of claim, seeking payment of US$11 million under the lease agreements and guarantees. Its case was that D1 had failed to pay rent and maintenance payments on the aircrafts, had failed to keep the aircrafts airworthy and in good repair and condition, or to redeliver the aircrafts in accordance with the return conditions.

The defendants served their acknowledgment of service indicating that they intended to defend the claim. The parties then agreed an extension of time for service of the defence. However, no defence was served. In March 2020, the Court therefore entered a default judgment against the defendants ordering them to pay the claimant £8 million.

Dismissing the set aside application, Jacobs J held that there was no good reason for the delay in issuing the application only in August 2020

(five months after default judgment). The defendants' reasons for not filing their set-aside application before August 2020 included the business difficulties D1 was facing in Kenya and the impact of the COVID-19 pandemic on the aviation industry. Their reasons for failing to serve a defence included that they were unable to fund the litigation because they were concentrating on saving their business and the livelihoods of more than 250 employees. The judge held that not prioritising other matters, rather than defending the litigation, was not good reason for the delay as they should have applied for an extension of time and explained about their financial constraints.

The Court also dismissed the application on the basis that the defendants did not have any real prospect of successfully defending the claim. The defendants had accepted that there were defaults in respect of certain obligations owed by D1 under the aircraft lease agreements, including in relation to unpaid rent.

In relation to the claimant's substantial claim for repair costs alleged to have been caused by D1's failure to maintain the aircrafts in a good condition, the defendants' case was that most of the costs had been caused by the claimant's failure to deliver the aircraft in a good condition. That defence was unsustainable as a matter of law and fact, taking into account the signed certificates of acceptance on delivery. The certificates were conclusive evidence that the condition of the aircraft had been satisfactory (following *ACG Acquisition XX LLC v Olympic Airlines SA (In Liquidation)* [2013] EWCA Civ 369).

The defendants' argument that the claimant had failed to mitigate its losses by failing to re-leased or sell the aircraft earlier lacked any detail. Further, the defendants' argument about the high costs of certain repairs undertaken on the first aircraft by an independent regional airline was speculative and inconsistent with the contemporaneous documents.

FTAI AirOpCo UK Ltd v Olympus Airways SA [2022] EWHC 1362 (Comm), 6 June 2022, HHJ Pearce

Following the termination of an aircraft lease, the lessor succeeded in recovering unpaid rent from the lessee. It also recovered damages representing the amount by which the value of the aircraft was diminished because, by reason of the lessee's failure properly to maintain it, it had not been returned in the condition specified by the lease.

The claimant lessor brought a claim against the defendant lessee (an aircraft operator) seeking unpaid rent and damages in respect of an aircraft.

The defendant had failed to pay rent under the lease, and in late 2018 the claimant served default and termination notices and sought the aircraft's return.

Subsequently the aircraft was detained at Athens airport in consequence of debts owed by the defendant to third parties. The claimant satisfied the debts in order to lift the detention. However, it contended that the aircraft was not in the "return condition" specified by the lease because the defendant had failed properly to maintain it.

The claimant sought to recover the unpaid "base rent" and "maintenance rent" (as defined by the lease) and damages representing the diminution in value of the aircraft from the return condition. The defendant put the claimant to proof of the effective time of the novation agreement and denied any liability to pay rent arising before that time.

The Court found that the lease agreement clearly obliged the defendant to maintain the aircraft and pay maintenance rent until the termination date. The aircraft had not been returned in condition on the termination date and therefore the works had been necessary to put it in return condition as identified by the jointly instructed expert.

The Court held that the lease entitled the claimant to base rent until the expiration of the lease agreement and thereafter default rent until the termination date, plus maintenance rent until the termination date. The sending of the default and termination notices, which terminated the defendant's right to use the aircraft and required its return, did not render the maintenance rent no longer payable.

The defendant's argument that the claimant had failed to mitigate its loss by re-letting the aircraft sooner was rejected by the Court; the claim for rent was a debt claim to which the duty to mitigate did not apply.

It was also held that the claim for diminution in value was a claim under a contractual indemnity, and the claimant was entitled to be fully compensated for any diminution in value of the aircraft flowing from the defendant's failure to maintain it. Had the aircraft been properly maintained, it would have been in the return condition on the termination date. Thus, the claimant's loss was the value of the aircraft had it been in return condition on the termination date, less its actual value on the return date.

Lombard North Central Plc v European Skyjets Ltd [2022] EWHC 728 (QB), 30 March 2022, Foxton J

The claimant claimed the balance of debt ($5.78m) said to be owed by the defendant under a secured loan in respect of a Bombardier Learjet aircraft. The claimant said it had validly terminated the loan, and thereafter had validly enforced its security over the aircraft (the mortgage) by selling it for $3.1m.

The defendant counterclaimed stating that the claimant had no entitlement to terminate the loan agreement or sell the aircraft, that in any event the defendant breached its duties as mortgagee when selling the aircraft, counterclaiming £26m in damages for breach of contract and/or conversion.

After a week-long trial, the Court held that the clamant was entitled to terminate the loan agreement and repossess the aircraft following Events of Default arising from breach of representations in relation to maintenance agreements, a material adverse change clause, and a reduction of the asset cover percentage below the required level.

The Court further held that the clause entitling the claimant to repayment of the full outstanding balance following an Event of Default was not a penalty clause. Furthermore, the claimant had complied with its equitable duty in selling the aircraft following repossession for the best price reasonably obtainable.

Olympic Council of Asia v Novans Jets LLP [2022] EWHC 633 (Comm), 18 March 2022, Moulder J

A post-judgment worldwide freezing order (and disclosure order) was granted *ex parte* in relation to an aircraft where the defendant had failed to comply with court orders and engage with the proceedings.

At the conclusion of trial, the respondent was ordered to pay £8 million damages for the

wrongful termination of an aircraft lease agreement. The respondent did not pay the judgment sum or engage with the claim in any meaningful way other than to apply to the Court of Appeal for permission to appeal, which was refused.
The Court held that it was well placed to assess the likely conduct of the respondent's managing director and ultimate owner as the judge had conducted the trial and heard his oral evidence. It was clear that the respondent and its managing director had shown complete disregard for the court process and orders.

The respondent appeared to have no assets in the UK; it had insufficient assets to satisfy the judgment debt; the risk of dissipation was probable; and the aircraft was highly moveable and could be moved between jurisdictions. The freezing order was only sought in respect of one aircraft and was not intended to prevent the respondent from continuing its charter operations. The limited order would therefore assist the applicant and preserve the status quo until enforcement steps could be taken in other countries.

The Court continued the post-judgment worldwide freezing injunction on the return date of the application.

The respondent had provided some disclosure following the injunction, including a statement that said its only relevant asset was a receivable due under an asset purchase agreement. The respondent provided copies of the asset purchase agreement, a bill of sale for the aircraft, and a winding-up petition which had been issued in order to seek the voluntary winding-up of the respondent on the basis that it could not pay its debts.

The Court rejected the respondent's submission that the freezing injunction should be discharged because the winding-up petition would eliminate submitted any risk of dissipation. The risk of dissipation of assets might be eliminated when a winding-up order was made, but the risk remained in the interim.

The Court also rejected the respondent's submissions that if the injunction was continued, it should not cover the aircraft, which it claimed had been sold, and should not cover the receivable which had not been included in the original injunction. The injunction covered any assets (including debts) owed by the respondent at the time the injunction was made which would include both the aircraft and the receivable.

GASL Ireland Leasing A-1 Ltd v Spicejet Ltd [2022] EWHC 382 (Comm), 18 February 2022, Simon Salzedo KC

The Court granted the claimant lessor's application for summary judgment on its claims against the defendant lessee for unpaid rent, supplemental rent and contractual default interest under an aircraft operating sublease in respect of a Boeing 737-800 passenger aircraft.

In March 2020 the claimant had served an enforcement notice because the defendant had failed to pay the rent due. Thereafter the defendant made four payments to the claimant's account. A further enforcement notice was served in October 2020. The claimant said that the aircraft had been returned by the defendant in a non-contractual condition. It then applied for summary judgment on its claim for outstanding rent.
The Court rejected the defendant's submission that the enforcement notices were invalid. A reasonable person receiving the enforcement notices would have understood that they were intended to have the effect set out therein, even

if they did not state that the event of default was continuing. The defendant knew that the event of default was continuing because it had not paid the rent and all parties knew that.

The Court also accepted the claimant's argument that the defendant was estopped from challenging the validity of the enforcement notice because it had made payments of rent directly to it after the date of the notice. [The defendant's argument was only raised in oral submissions]

Nas Air Co v Genesis Ireland Aviation Trading 3 Ltd [2022] EWHC 176 (Comm), 31 January 2022, Nicholas Vineall KC

The claimant airline and lessee (trading as Flynas) brought a claim against the defendant lessor in order to determine which party should pay the costs of engine repairs on an aircraft (an Airbus A320-214) leased to it.

The defendant counterclaimed on the basis that when the claimant returned the aircraft, there were three defects in the engine requiring repairs.

The defendant had leased the aircraft under a 36-month lease which included repairing responsibilities. Under the lease, the claimant paid rent on the aircraft as well as an additional maintenance rent. If and when the lessee became obliged to carry out a particular class of repairs, the lessee was entitled to a credit in the amount of the maintenance rent paid to date in relation to that repairing obligation. If the repairs cost more than the relevant maintenance rent, the lessee had to fund the difference.

Just before the (extended) lease term was over, both engines were due for "performance restorations". The defendant required the claimant to carry out these repair works, but the claimant stated that it was entitled to use a substitute engine which did not require immediate maintenance, so that the defendant could keep the maintenance rent but the claimant would not have to pay additional sums for the performance restoration.

The defendant insisted on the claimant doing the performance restoration and under protest the claimant did at a cost of US$12.7 million. Given that the maintenance rent was $9.6 million, the claimant would have been approximately $3 million better off if the defendant had not insisted on the claimant carrying out the repairs.

Whilst the Court found that there was a common understanding that if the defendant agreed to the claimant providing a replacement engine then the performance restoration would not take place, there was no common understanding that if the defendant did not agree to the replacement engine, the defendant should lose its right to insist on performance restoration. Accordingly, the claim for rectification and damages was dismissed.

On the defendant's counterclaim for defects, the Court found, on the expert evidence, defects 1 and 2 made but not defect 3. As no repairs had been undertaken, the Court took the contemporaneous quotations as its starting point as to the likely cost of repairs, awarding a total of $350,000.

Various Airfinance Leasing Companies v Saudi Arabian Airlines Corp [2021] EWHC 2904 (Comm), 1 November 2021, Peter MacDonald Eggers KC

The claimants applied for an order for disclosure in a claim concerning a dispute relating to lease

agreements over 50 aircraft. The dispute concerned the escalation factors which influenced the basic rent payable under the leases, and included questions of interpretation of the lease agreements and estoppels allegedly based on statements or assumptions which were communicated between the parties.

The claimants sought disclosure of documents and data held on mobile telephones owned/used by A, who was the non-executive chairman of the defendant's board and had been director general of the defendant when the lease agreements had been entered into, and that of his senior aide (B). The claimants sought an order that the defendant use its "best endeavours" to request A and B to produce the documents or data held on the mobiles. The claimants' expert was of the opinion that under Saudi law the defendant had a right of possession, inspection and control of the documents on the mobile telephones. The defendant's expert disagreed.
In refusing the application, the Court held that, under Saudi law, a company did not have control over the documents and data on mobile telephones used by two of its officers for the purpose of ordering it to provide disclosure under CPR PD 51U. Where there was no control, the Court did not have the power to make an order that the company use its best endeavours to request the officers to produce those documents and data.

Iris Helicopter Leasing Ltd v Elitaliana Srl [2021] EWHC 2459 (Comm), 22 July 2021, Jacobs J

The Court granted the claimant's application for summary judgment on its claim for unpaid rent and interest due under the terms of a dry lease of a specialist helicopter to the first defendant (D1).

D1 had not paid any import tax when it brought the helicopter from Switzerland to Italy, stating that the helicopter, which was to be used exclusively for air ambulance and rescue activities for public authorities in Italy, qualified for exemption of import tax. The Italian tax authorities disagreed and began an investigation, which led to the arrest of the helicopter by the Finance Police in November 2019 for failure to pay import tax.

At the time of the arrest D1 was in arrears under the lease and paid no further rent thereafter. The claimant served notice of events of default, terminated the lease in May 2020 and made a demand on the guarantee of the second defendant (D2). The defendants argued that termination was ineffective because the lease had already been frustrated by the arrest.
The Court held that the law of frustration required not mere incidence of expense or delay or onerousness; there had to be something akin to a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

Clause 4.1(b) provided that after delivery the aircraft would be at the sole risk of the lessee in respect of loss, theft, damage or destruction from any cause whatsoever.

Clause 4.2(d) provided that, immediately after delivery, D1 would ferry the helicopter to Italy: that indicated that D1 was the importer of the helicopter and would be liable for the fiscal consequences.

Clause 5.5 provided that the lessee's obligations were absolute and unconditional irrespective of any contingency whatsoever, including but not limited to any right of set-off or counterclaim and any unavailability of the aircraft for any reason including but not limited to any interference or interruption or restriction on operation of the

aircraft. That meant that the risk of arrest which had occurred fell on D1.

Clause 6.2 provided that the lessee would pay tax on the helicopter in respect of the importation of it or indemnify the lessor for it, unless it fell within the definition of "lessor taxes". That definition would not include the import tax since it was not "imposed as a direct result of" the lessor's activities in Italy.

The Court therefore held that the lease placed the obligation to pay the import tax on D1 and, if it did not pay and the authorities seized the aircraft, the risk of that occurrence fell upon D1. If the contract provided for the risk of the events which had happened, it was unlikely that the contract would have been frustrated. The terms of the lease placed the risk for what had happened on D1 and if the doctrine of frustration was applied it would reverse the clear contractual allocation of that risk and produce an unjust result.

There was no supervening event which rendered performance radically different where the contract clearly placed the obligation to pay the import tax on D1. That risk should not be reallocated to the lessor via the doctrine of frustration and therefore summary judgment was granted in the claimant's favour.

Doric Flugzeugfonds Vierte Gmbh v Hi Fly Transportes Aereos S.A. [2021] EWHC 2314 (Comm), 16 July 2021, Sir Nigel Teare

The claimant made an application for an interim payment in the sum of just over $3.9 million in respect of the lease of an aircraft and, in the language of the lease, for "fixed basic rent" and "maintenance reserves".

In its defence, the defendant challenged items of maintenance reserves in respect of months at the end of 2018 but, in respect of the balance, it simply put the claimant to proof.

The application was made under CPR 25.7 which provides that "*... if the claim went to trial, the claimant would obtain judgment for a substantial amount of money against the defendant...*". It also states that: "*The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment*".

The Court accepted that it was not enough that it thought it likely a substantial sum of money would be recovered; the court had to be satisfied that the claimant will obtain judgment for a substantial amount of money. The Court therefore awarded the claimant the lion's share of its claim, minus one sum in respect of maintenance reserves which, even though it was deeply sceptical of the defendant's arguments, it could not be sure that the claimant would obtain judgment at trial for that amount.

Helice Leasing SAS v PT Garuda Indonesia (Persero) TbK (Rev 1) [2021] EWHC 99 (Comm), 20 January 2021, Calver J

The claimant brought a claim against the defendant for non-payment of rent under an aircraft lease, as well as an indemnity.

The defendant did not dispute quantum, however, it applied to stay the proceedings under s.9 of the Arbitration Act 1996 in favour of arbitration, relying on an arbitration clause in the lease providing for "*any dispute arising out of or in connection with* [the Lease], *including any question regarding its existence, validity or termination*" to be resolved by arbitration with a

seat in London, England under the London Court of International Arbitration ("LCIA") Rules. The claimant argued that a different clause enabled it "*at its option*" to "*proceed by appropriate court action or actions to enforce performance of* [the Lease] *or to recover damages for the breach of* [the Lease]" "[i]*f an Event of Default occurs, and for as long as it shall continue*" (the "Event of Default Clause").

The Court concluded that the parties objectively intended to refer any dispute to arbitration, and the Event of Default Clause (although "*not happily worded*") simply set out the claimant's rights if an Event of Default occurred. It also held that due to non-payment by the defendant there was a "dispute" within the meaning of the arbitration clause, such that it was engaged in the circumstances. The Court therefore granted the stay.

Concluding observations

The frequent use of summary judgment applications, often deployed successfully if it concerns a relatively short point(s) of law.

The significance of narrowly or broadly defining default events depending on whether one is the lessor or the lessee. Whichever party one is though, clarity is importance given ambiguity almost always leads to litigation.

Whether a lessee or lessor, it is vital dispute resolution clauses are not ambiguous.

The importance of contracts reflecting the common intention of the parties is a lesson that unfortunately many of the cases reflect is one that is not being learnt.

If at the end of a lease, the lessee should consider whether onerous obligations are imposed.

Ensure enforcement notices are clearly worded!

Some of these cases illustrate the difficulty in establishing a contract has been frustrated.

Failure to mitigate defences are difficult to establish, given the onus on the defendant to present sufficient proof.

It is unsurprising to see the continued, frequent use of freezing and/or proprietary injunctions to secure assets, both pre- and post-judgment.

Don't delay in applying for relief – particularly in applying for freezing orders and setting aside default judgments.

Christopher Loxton

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Lambert v MIB [2022] EWHC 583 (QB)

Introduction

On 16 March 2022, judgment was handed down in Lambert v Motor Insurer's Bureau [2022] EWHC 583 (QB). In this determination on the preliminary issue of liability, the High Court provides a helpful restatement of the principles applicable to the treatment of evidence of foreign law.

Background to the accident

This case concerned a motorcycle accident during a track even at the Circuito de Jerez in Spain which ran from 5th-7th November 2017. The track event was organized by a UK based outfit called Track Sense. The Claimant, Mr Lambert, and a fellow participant, Mr Prentice, both paid fees to Track Sense pursuant to a contract whereby Track Sense would supply them accommodation and transport of their motorcycle equipment in return. They both travelled from the UK to Spain for the event. On the second of the three-day event, an accident occurred between the two riders at a point in the track known as Dry Sac, which was situated towards the end of the 612m long back straight of the track, which lay before a right-hand hairpin bend.

The facts of the accident were "largely uncontentious". In brief, three motorcyclists were accelerating along the back straight, attempting to reach speeds of around 150mph. One of the drivers, Mr Robertson, successfully overtook Mr Lambert at the front of the pack and pulled back in towards the left-hand side of the track. Mr Lambert immediately "re-took" Mr Robertson, who was the first of the three to decelerate in preparation for the oncoming turn. Mr Prentice, the third rider, then sought to overtake Mr Lambert, however while doing so he also started to break and the rear tyre of Mr Prentice's motorcycle came into contact with the front wheel of Mr Lambert's during the manoeuvre. Mr Lambert was unfortunately thrown off his motorcycle and suffered significant injuries, including brain damage, as a result of the accident.

Notably, neither motorcycle was insured in respect of third-party liability risks, a fact which the Judge was careful to highlight does not lead to criticism of either driver; such third-party motor insurance for motor sport is not commercially available in the UK.

Motor Insurers' Bureau

It is in the above unusual circumstances that the Motor Insurers' Bureau ("the MIB") became involved. At the time of the accident, the Motor Insurance (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003 ("the 2003 Regulations") were in force as part of the law of England and Wales, as required by the Fourth Motor Insurance Directive. In light of the decision of the UK Supreme Court in Moreno v MIB [2016] UKSC 52, it was common ground that a UK resident injured as a result of a motor accident in EEA Member States is entitled, in certain circumstances, to claim compensation from the MIB. Broadly speaking, such liability arises where the Guarantee Fund of the Member State in which the accident occurred would be liable to compensate the injured person, when applying the rules of local law which govern such actions. In this case, the scope of insurance obligations for the use of motor vehicles under Spanish law extended to cover track events, despite such events not being on a road or other public place.

Applicable Law

For the above reasons, for the purposes of the preliminary issue, it was necessary to have regard to Spanish law. Although Spanish law might not have been the applicable law had the question been determined by Rome II (as both parties were domiciled in England), the material scope of the applicable law was the same as it would have been under Rome II. In short, Spanish law applied to all substantive issues, whereas English law and procedural rules applied to all matters of evidence and procedure.

The Court adopted the principles set out by Simon J in Yukos Capital v Oil Company Rosneft [2014] 2 CLC 162 as to the appropriate treatment of foreign law:

a. The Court is required to determine foreign law as a question of fact on the basis of evidence deployed by the parties according to the usual civil standard.
b. It is not the Court's function to interpret codified provisions. Rather, the Court must determine how the foreign court would interpret such provisions.
c. The burden of providing the foreign law rests on the party seeking to establish that law and the task of the expert evidence is to interpret its legal effect, in order to convey to the English court the meaning and effect which the foreign court would attribute to it.
d. The degree to which the English Court can put its own construction on the foreign code arises out of and is measured by its right to criticise the evidence of the expert witnesses. The Court is free to scrutinise the witnesses of foreign law in the same way as it can with any other witness on a question of fact.
e. If there is a clear decision of the highest foreign court on the issues of foreign law, other evidence will carry little weight against it.
f. The Court is entitled and may be bound to look at source material on which the experts express their opinion.
g. Considerable weight is given to decisions of the foreign court as evidence of foreign law, but the Court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does

not accurately represent the foreign law. Where foreign decisions conflict, the Court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided.

Judgment

With this framework in mind, the Deputy High Court Judge addressed issues such as the quality of the expert evidence provided, various non-contractual obligations in sports activity accidents, the assumptions of risk by participants in motorcycle events and the 'norms' of overtaking.

In brief, it was found that the risk assumed by Mr. Lambert could be described as "unilateral" and would only extend so far as to cover the risk of injury arising out of his own acts and omissions; it did not include any assumption of risk of contact from other riders, because contact is deliberately avoided in such an activity. Indeed the decision of Mr. Prentice to overtake Mr. Lambert, which the Judge determined should have been aborted once Mr. Prentice noticed Mr. Lambert "re-take" Mr. Robertson, fell below the standard of a "good sportsperson", or in this instance a "good motorcycle track eventer". Mr. Prentice also "badly misjudged" the amount of space he should have allowed for his overtaking manoeuvre.

The apportionment of contributory negligence, as described by the Spanish law experts, is based on the extent to which each party's conduct "contributed to the damage". The Court considered this to be a test based on the familiar principle of "causative potency". While Mr. Prentice's overtaking was the overwhelming causative factor in this accident, Mr. Lambert's actions made a modest causative contribution to the accident, at 25%, due to a period of delay he took to apply active braking as he overtook Mr. Robertson himself.

The award for damages is yet to be determined.

Appeal

On 1 August 2022, the Court of Appeal granted permission to the MIB to appeal. The appeal has already been listed and is floating on either 6 or 7 December.

Summary

This recent judgment provides a helpful first instance restatement of (a) the principles relevant to the liability of the MIB for overseas accidents in cases to which the 2003 Regulations apply and (b) the principles applicable to the treatment of evidence of foreign law. There is also detailed discussion of Spanish law principles of liability in relation to sporting activities which carry a risk of injury. However practitioners will be keeping a keen eye on the approach the Court of Appeal will take, when it comes to revisit these issues later this year.

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Lis pendens – positively last appearance?

The recent decision of HHJ Cawson QC sitting as a High Court Judge in the case of *Simon* v. *Taché and Others* [2022] EWHC 1674 (Comm) draws attention to the fact that the effect of Article 67 of the Withdrawal Agreement is to preserve the applicability of Regulation (EU) No 1215/2012 ("Brussels Recast") to actions commenced in England after the end of the transition period on 31st December 2020 if those actions are related to actions which were commenced in a Member State before the end of the transition period.

The case involved proceedings commenced in Belgium before the end of the transition period and English proceedings commenced after the end of the transition period. The result was that the later, post-Brexit English proceedings were caught by Article 29 of Brussels Recast even though the general position is that Brussels Recast is no longer in force in England.

Background

In the English proceedings, the Claimant, Dr Simon, is a collector of artworks, the Third Defendant, Twig SRL (Twig"), is a Belgian company which offers consultancy services in relation to artworks, and the First and Second Defendants, Ms Taché and Ms Lévy, both Belgian nationals, are the individuals behind Twig. Between 2016 and 2018 Twig was involved in the purchase by Dr Simon of 17 artworks which were delivered to an address in Paris.

These artworks were either purchased by Dr Simon from Twig (which had in turn purchased them from the original seller and included its profit or commission in the sale price to Dr Simon) or directly from a seller (in which case Twig invoiced Dr Simon for its commission). Two of these purchases are in particular the subject of dispute between the parties, namely a sculpture by Franz West and a work by George Condo. The relationship between the parties broke down in early 2019 when the Defendants informed Dr

Simon that they would accept no further assignments from her.

Chronology

On 26th October 2020 the Defendants commenced proceedings in Belgium against Dr Simon in which claims of harassment and defamation were made and relief by way of damages and an injunction was sought. Dr Simon responded by submissions filed on 10th March 2021 in which she disputed the jurisdiction of the Belgian court over her, disputed liability, made allegations of wrongdoing on the part of the Defendants and indicated an intention to commence proceedings in England, specifically mentioning the Franz West sculpture and the George Condo work.

On 30th March 2021 Dr Simon made a 'without notice' application in the High Court in England seeking permission to serve proceedings on the Defendants in Belgium, relying on a number of grounds in paragraph 3.1 of CPR PD 6B (i.e. common law bases of jurisdiction rather than any regulation gateway).

The Particulars of Claim submitted in support of this application advanced claims for (i) damages based on allegations that in breach of contractual and tortious duties owed to her by the Defendants they had caused her to buy the Franz West sculpture and the George Condo work at an overvalue and (ii) an account based on a contention that the Defendants had received commissions of 10% when they were entitled to only 5%. In the evidence in support of the application reference was made to the proceedings in Belgium, but it was said that Dr Simon had disputed the Belgian court's jurisdiction over her and it was asserted that those proceedings concerned distinct issues from those raised in her English claim. On the same day HHJ Pelling QC dealt with the application on paper and made an order granting the Claimant permission to serve the proceedings. Copies of the application and the order of HHJ Pelling QC were sent to the Defendants' Belgian lawyers on 1st April 2021.

However the Claim Form was not issued until 10th May 2021, and in the meantime, on 3rd May 2021, the Defendants had filed further submissions in the Belgian proceedings. By these submissions the Defendants expanded on their allegations of harassment and defamation and made a positive assertion that Dr Simon's allegations of wrongdoing on their part were incorrect. In what would appear to be the equivalent of the prayer the Defendants added a request for relief for a ruling that "*Ms Simon does not prove any fault on the part of the claimants*".

Following the issue of the Claim Form in the English proceedings, it was served on the Defendants in Belgium on 11th June 2021. On 5th July 2021 Dr Simon filed further submissions in the Belgian proceedings, relying on further evidence, asserting that this evidence further justified the acts of which she was accused and asserting that what she had said was not slanderous because she had overpaid for the George Condo work. On 30th July 2021 the Defendants made an application in the English proceedings challenging jurisdiction.

The Defendants asked the court (i) to decline to hear, or to stay, the proceedings, in accordance with Article 29 and Article 30 of Brussels Recast (respectively "Article 29" and "Article 30") and (ii) to set aside (a) the order granting permission to serve the proceedings out of the jurisdiction and (b) the service of the Claim Form. Shortly after this application was made, on 5th August 2021, the Defendants filed further submissions in the Belgian proceedings, relying on further evidence and argument and amending the claim for relief added by the amendment of 3rd May 2021 to

read "*The court declares that the claimants did not fail in their obligations in their relationship with Ms Simon and they are not liable to Ms Simon*".

On 22nd October 2021 the Belgian court gave judgment in the Belgian proceedings. Although it held that it had jurisdiction over Dr Simon, it dismissed the claim for damages for harassment and defamation and the claim for an injunction on the grounds that, although it found Dr Simon guilty of "*misconduct*", there was insufficient evidence of loss to the Defendants. It declined to rule on the Defendants' claim for a declaration of non-liability, saying that the dispute in question was "*Currently the subject of a lawsuit in London*".

The experts who produced reports in connection with the Defendants' challenge to the jurisdiction in the English proceedings were agreed (no doubt respectfully) that the reasoning of the Belgian court was deficient because the court failed to engage with whether it was seised of the Defendants' claim for a negative declaration before the English court was seised of Dr Simon's claim in the English proceedings and whether Article 29 and Article 30 were engaged.

On 2nd December 2021 the Defendants lodged an appeal against the ruling of the Belgian court, and Dr Simon also launched a cross-appeal. In the meantime Dr Simon applied on 16th November 2021 for permission to amend her Claim Form and Particulars of Claim to add, as against the Second and Third Defendants, a claim of dishonest assistance and for permission to serve the amended claim out of the jurisdiction.

Article 67

The Defendants challenged jurisdiction on the basis that Articles 29 and 30 of the recast Judgments Regulation continued to apply. Readers will recall that these are the lis pendens provisions, the first involving proceedings with the same cause of action and the same parties; the second involving related proceedings, in both cases where two or more claims are pending in more than one Member State.

The Defendants maintained that, by virtue of Article 67 of the Withdrawal Agreement ("Article 67"), Articles 29 and 30 were engaged because the Belgian proceedings had been commenced before the end of the transition period). Accordingly it was said that the English proceedings should be stayed or jurisdiction declined. Dr Simon disputed that Article 67 applied, that the Belgian court was first seised and that a stay should be granted.

With regard to the applicability of Article 67, Dr Simon submitted that it could apply only if both sets of proceedings were related before the end of the transition period, which was clearly not the case here as (a) the English proceedings were not commenced until after the end of the transition period and (b) even on the Defendants' case they cannot have been related for the purposes of Article 29 and/or Article 30 until the amendments to the Belgian proceedings seeking a negative declaration were made on 3rd May 2021.

The Judge rejected Dr Simon's submissions in this regard. First, he looked at the language of Article 67. He noted that there were two concepts, legal proceedings commenced before the end of the transition period; and proceedings which are related to the former. He thought that if the latter had to have been commenced before the end of the transition period so as to give rise to that relationship before that point in time, Article 67 would have said so. He thought it was perhaps more fundamental that, if the relevant relationship was required to exist before the end of the transition period, Article 67 would be redundant because the recast Regulation would

have applied to both actions in any event. Secondly he referred to the European Commission's "*Notice to Stakeholders*" dated 27th August 2020 which at paragraph 1.1 said that Article 67 addresses situations where actions are brought before the courts of a Member State and the UK before and after the end of the transition period.

Thirdly he noted that in *On the Beach* v. *Ryanair UK Ltd* [2022] EWHC 861 (Ch) Nugee LJ (sitting at first instance) accepted that Article 30 applied to a case where proceedings in Ireland had been commenced before the end of the transition period and English proceedings had been commenced after (albeit on the basis of the parties in the case being agreed on the point).

The Judge accepted the Defendants' submission that in the case of proceedings commenced before the end of the transition period, Brussels Recast will continue to apply to new claims added to such proceedings after that date; as well as to claims against new defendants joined to such proceedings after that date. He noted that this was consistent with the approach of Morgan J in *Benkel* v. *East-West German Real Estate Holding* [2021] EWHC 188 (Ch), although this was again on the basis of an agreed position on the law, and was supported by the commentary in *Briggs, Civil Jurisdiction and Judgments* (7th Ed. 2021).

Articles 29 and 30

Having decided that by virtue of Article 67 the provisions of Article 29 and Article 30 could apply, the Judge considered first whether Article 29 required the English court to stay its proceedings. This would depend on whether both sets of proceedings involved the same cause of actions, and if so which court was first seised of that cause of action.. It was not in dispute that a claim for a negative declaration in relation to Dr Simon's allegations of wrongdoing on the part of the Defendants mirrored her claim for positive relief such that the two actions did from some point in time involve the same cause of action.

The issue was when that point in time occurred and whether that was before or after the English court was seised of the cause of action. Did the English court become seised when the application for permission to serve out of the jurisdiction was made on 30th March 2021 or only later when the Claim Form was issued on 10th May 2021? If the former, the English court would be the court first seised, but if the latter there was the addition question of whether the Belgian court became seised when the Defendants filed their further submissions on 3rd May 2021 (in which case it would be the court first seised) or only when the later submissions were filed on 5th August 2021 (which would make the English court the court first seised).

Dr Simon argued that the English court became seised of the cause of action when the application for permission to serve out of the jurisdiction was made. It was submitted that Dr Simon had an option of making the application before or after issuing the Claim Form, that the Claim Form, when issued, had been allocated the same claim number as the prior application, that it was anomalous that an intended defendant could "torpedo" a claim in any interval between obtaining permission to serve out of the jurisdiction and the issuing of a claim form and relied on a case in the ECJ *(Purrucker* v. *Vallés Pérez (No 2)* [2011] Fam 312) where, in the context of family proceedings, an application for interim relief and substantive proceedings subsequently brought constituted "*one procedural unit*".

The Defendants pointed to the fact that the permission was granted to serve out of the jurisdiction *if issued*, that before the proceedings

were issued they could not have applied to challenge jurisdiction and any limitation period would have continued to run and that the analysis in *Purrucker* of there being "*one procedural unit*" was inapplicable because there one was concerned with an application for interim relief connected with a claim but here what was granted was purely a permissive order.

The Judge again preferred the Defendants' analysis. He considered that Article 32 of Brussels Recast, which governs when a court becomes seised of proceedings, when it refers to the lodging of a document instituting the proceedings, means the issue of a claim form rather than a preliminary step such as obtaining permission to serve out of the jurisdiction, and he did not accept that the obtaining of permission to serve out of the jurisdiction and the issuing of a claim form could be seen as "*one procedural unit*". With regard to the argument about an intended defendant being given a charter to "torpedo" the proceedings which a claimant wanted to bring, he observed that it was open to such a claimant to issue proceedings without delay, and noted that in the present case the delay between being granted permission and issuing the Claim Form had not really been explained.

This meant that the question of whether the court was required to stay its proceedings under Article 29 turned on the question of whether the amendment to the relief sought in the Belgian proceedings by the further submissions of 3rd May 2021 amounted in essence to a new claim for a negative declaration. Dr Simon submitted that the new plea was no more than asking for a ruling on the defence which she had pleaded in the Belgian proceedings. She said that there was a clear difference between asking the court to say she had not proved her complaints and asking the court to say that the Defendants had not failed in their obligations and were not liable to her. Relying on well-established authority, the Defendants submitted that the question of whether the two proceedings involved the same cause of action was to be approached broadly, requiring the court to look at the substance of each claim. On this basis they said that there was no substantive difference between asking for a ruling that Dr Simon had not proved any wrongdoing and asking for a declaration that there was no wrongdoing.

The Judge once again accepted the Defendants' submissions on this question. He acknowledged that the prayer in the submissions of 5th August 2021 was more clearly expressed, but, asking himself the question of what the Belgian court would have had to have determined on the basis of the 5th May 2021 prayer, he concluded that it would have had to have considered whether, on the evidence, Dr Simon's allegations of wrongdoing were made out so as to provide her with a defence and to rule whether Dr Simon could prove fault on the Defendants' part. He saw these as the very issues which the English court was being asked to determine in the English proceedings.

He therefore ruled that it was from 3rd May 2021 that the Belgian proceedings involved the same cause of action as that subsequently raised by the English proceedings when the latter were issued and thereby instituted on 10th May 2021. Accordingly, it followed that he was bound by the provisions of Article 29 to stay the English proceedings until such time as the jurisdiction of the Belgian court is established, and to declare that if jurisdiction should be established, the English court is required to decline jurisdiction.

The Judge noted that, in view of his finding in relation to Article 29, it was strictly unnecessary for him to determine the position in relation to the application under Article 30. Nevertheless, having referred to the fact that in relation to the

operation of Article 30 it is purely a question of which action commenced first, irrespective of whether the two actions became "related actions" immediately upon the second action being commenced or only as a consequence of amendments subsequently made, he considered that his discretion to stay the English proceedings arose.

Having regard to a number of factors, including his assessment that the causes of action had a significantly close connection with Belgium than with England, that the applicable law of the contractual relationship between the parties was likely to be Belgian law and that it was only in Belgium that all the issues could be dealt with together, he said that he would have granted the stay sought under Article 30.

Final word

At the consequential matters hearing a couple of weeks later on 19 July 2022 the Judge in fact proceeded to set aside the order for service out rather than merely staying the claim (on the basis that the Claimant had only relied on the common law rules and had not relied on the Brussels regime; indeed a large part of the judgment is a careful analysis of the applicable common law gateways, which repays consideration outside the scope of this article). The English proceedings are therefore at an end. Interesting times ahead if the Belgian Court of Appeal were to find that it too lacks jurisdiction!

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Flight Delays

Sophie Smith from London has had a rough week of flight delays and cancellation. What began as a holiday to Reykjavik, with a stop in Dublin to visit family, descended into chaos. Inclement weather, loose airline peanuts and lukewarm buffet shellfish conspired to cause Sophie considerable inconvenience.

Fortunately, Sophie knows a thing or two about aviation law and fully understands what she is entitled to in these circumstances.

Sophie's First Flight

Sophie has a ticket with airline, ThinAir, for a flight from Heathrow to Reykjavik, leaving at 1:00pm.

Sophie arrives at Heathrow in good time for her flight. She checks in and waits at the gate for her flight. However, Sophie's first flight quickly goes downhill from here. One of the aircraft's cabin doors won't close properly, requiring ThinAir to send engineers to investigate the fault. They arrive at 2:00pm and fix the fault-a rogue peanut jammed in the locking mechanism-by 3:00pm. This delay has caused the flight to miss its take-off slot. The flight is cancelled.

ThinAir offer to re-route Sophie on an alternative flight from Heathrow to Reykjavik at 4:00pm the next day, which Sophie accepts. Sophie again arrives at her gate on time. After Sophie and the other passengers have boarded the new flight, this aircraft also experiences trouble: the loading ramp being used to load check-in luggage is faulty and the flight is waiting for a new ramp to be delivered. The new ramp arrives at 8:00pm and the flight departs shortly afterwards.

The rest of Sophie's alternative flight takes place without incident. The alternative flight arrives at Reykjavik with a delay of 4 hours.

Sophie's Second Flight

Two days later, Sophie has a flight with ThinAir from Reykjavik, leaving at 10:00am to visit family in Dublin.

Again, Sophie arrives at the airport in good time for her flight. She checks in and boards without incident. Sitting on the aircraft at the runway Sophie's plans for an easy flight unravel again.

The captain and co-pilot are completing their final pre-flight checks. However, the flight's captain risked a room-temperature shrimp cocktail at his hotel buffet the night before the flight. He suddenly starts to feel quite poorly and exits the aircraft to seek medical attention. The flight, left without a captain, must wait for ThinAir to arrange for a replacement captain. Four hours later, a shiny new captain in the pink of health arrives at the aircraft to operate the flight.

During this four hour wait, the cabin staff wheel a trolley down the isle with refreshments for purchase. Sophie buys a sandwich, a coffee and a packet of crisps.

The rest of Sophie's flight takes off without incident. she arrives at Dublin with a delay of 4 hours.

Sophie's Third Flight

Two days later, Sophie prepares for her flight home from Dublin to Heathrow, leaving at 5:00pm.
Sophie, as usual, arrives at Dublin airport to check in and board well in-time for her flight. However, trouble strikes as she's waiting at her gate to board the flight.
A sudden storm approaches the Dublin area, causing high wind speeds and poor visibility. This storm was not predicted the previous day, and Air Traffic Control in Dublin consider it unsafe to take-off in such weather. Sophie hears an announcement at 5:00pm stating that due to these conditions, the flight will be cancelled.

This was the last flight from Dublin to London that day. ThinAir email Sophie to say that they are arranging hotel accommodation for Sophie in the local area. However, by 8:00pm Sophie has still not received any details of hotel arrangements. She attempts to call ThinAir to ask about hotel arrangements, but ThinAir does not pick up the phone. She decides to call a local hotel and arrange a room herself. In the taxi ride to her hotel, Sophie receives a second email from ThinAir stating that they have now booked her a hotel at Dublin airport. Sophie ignores this email and continues on to the hotel that she booked.

The storm passes the following afternoon. Sophie books her own alternative flight home, arriving at Heathrow 24 hours late.

Sophie's Compensation

On arriving home Sophie contacts ThinAir to ask what compensation is due to her for the delays and cancelation that she experienced over the previous week. ThinAir state that the delays and cancellation were caused by extraordinary circumstances and, as such, no compensation is payable. ThinAir also refuse to reimburse Sophie for the refreshments bought on her second flight, her hotel stay and her alternative flight from Dublin to Heathrow.

Sophie knows that ThinAir's position on this is inconsistent with English law, Regulation (EC) No 261/2004 (as amended by The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019) ("the Regulation"). In particular, Sophie understands the following:

1. As a passenger leaving from the UK and/or EU, Sophie has a prima facie right to compensation where she arrives at her flight's destination 3 hours late due to delay
2. Sophie understands that in order to rely upon the Regulation in these cases she must have a valid reservation, checked in

on time and provided all required travel documents upon request from the ThinAir.

Sophie's First Flight

3. A jammed aircraft door is highly unlikely to constitute "extraordinary circumstances" for the purposes of the Regulation.
4. Where a passenger has been transferred by an air carrier following the cancellation of a booked flight, on a re-routing flight to their final destination and that re-routed flight is itself delayed by more than 3 hours or cancelled, the passenger may recover compensation for delay or cancellation for each flight, provided that the Regulation applies (case C-832/18 *A and Others v Finnair*). Sophie therefore understands that she is prima facie entitled to two sets of compensation in respect of her trip to Reykjavik.

Sophie's Second Flight

1. A pilot becoming ill immediately before take-off is highly unlikely to constitute "extraordinary circumstances" for the purposes of the Regulation (*Lipton v BA City Flyer Limited* [2021] EWCA Civ 454).
2. Sophie is prima facie entitled to compensation for her 4-hour delay at Reykjavik.
3. Under Article 9 of the Regulation, ThinAir had an obligation to offer her free of charge meals and refreshments in a reasonable relation to the waiting time. Accordingly, Sophie should be reimbursed for the sandwich, coffee and crisps bought on the plane during the 4-hour delay.

Sophie's Third Flight

4. Decisions taken by Air Traffic Control to prevent a flight from leaving an airport are highly likely to constitute "extraordinary circumstances" for the purposes of the Regulation (*Blanche v EasyJet Airline Company Limited* [2019] EWCA Civ 69).
5. Under Article 9 of the Regulation, ThinAir had an obligation to offer her free of charge hotel accommodation and transport between the hotel and the airport. Sophie knows that she was not obliged to wait for ThinAir to organise this in these circumstances.

Since flight delay claims are not capped at the price paid for the ticket or leg of the flight, Sophie may end up considerably better off by the end of her trip than she was when she set off!

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Fault in French road traffic law

A recent case pursued on behalf of an English national, who suffered life-changing spinal injuries as a result of a road traffic collision in France, gave rise to any interesting question - how is 'fault' assessed under the French Law of 5th July 1985 No. 85-677 (colloquially known, in homage to the politician associated with its introduction, as 'Loi Badinter').

Facts

The Claimant was an English national injured during the course of a holiday in France. He was riding his motorcycle along a country road when there was a collision between his motorcycle and a large French registered lorry.

The Claimant, due to the nature of his injuries, had no recollection of the accident or the build up to it. There were no independent witnesses, only the account of the lorry driver, who says he saw the Claimant riding toward him on the wrong side of the road, neither braking nor swerving. No medical explanation was forthcoming which might have provided a reason inconsistent with fault on the Claimant's fault.

Accident reconstruction evidence commissioned by both parties found that the most likely cause of the accident was that the Claimant was riding on the wrong side of the road and as he came around a bend in the road collided head on with the lorry.

The forensic evidence suggested the lorry driver had applied his brakes and sought to avoid the collision by pulling over to the right-hand side, however the topography of the road was such that he was only able to move a little to his right. There was no scenario under which the lorry could have steered out of the motorcycle's path. Safe to say the evidence was such that, had this been a case subject to the laws of England & Wales the Claimant's case would not have met the threshold for CFA funding.

Loi Badinter – strict liability

However, as most readers of this bulletin will be aware, Loi Badinter gives rise to a form of qualified strict liability in road traffic cases.

In order to establish a prima facie right to recovery, all a Claimant need show is that he was injured in a road traffic collision and he can then pursue a claim against the driver, keeper or insurer of any vehicle which was 'involved' (*'impliqué')* in the accident.

As the Court of Cassation put it, a vehicle shall be considered to be involved in an accident if it participates 'in any way whatsoever.' (a concept explored by the English High Court by Dingemans J. (as he then was) in Marshall v MIB and others **[**2015] EWHC 3421 (QB).

The reductio ad absurdum (at least to English eyes) of this principle appeared to have been reached in 2014, when the Court of Cassation found that a parked car, which was struck by a falling kitesurfer was *'impliqué'* for the purposes of Loi Badinter (Case no.: Cass. Civ. 2ème No. 13-13265 of 6th February 2014).

Such a wide application of 'impliqué' would seem to give a presumptive right of compensation to anyone involved in a road traffic collision against any other involved vehicles.

This includes drivers, who also have a presumptive right to compensation from any other driver involved in an accident. This would seem to suggest that in French Law, even if you as a driver are at fault for an accident, you can recover compensation from the insurer of the other vehicles involved, even if they were innocent parties (as they can from you).

Limiting or excluding liability

However, French law tempers these provisions by including exceptions which state that the faults committed by a victim can be invoked against him to limit or exclude his presumptive right to compensation (Articles 3 in respect of non-driver victims & article 4 in respect of driver victims).

The burden of proof is on the party asserting that the presumptive right should be reduced/extinguished.
When carrying out the 'article 4 exercise' the court must look at the driver victim's conduct in isolation. In other words his cause cannot be aided by pointing to faults made by the other driver(s); it is not a question of *exclusive* fault, it is about evaluating the responsibility of the driver victim for his own misfortune.

The question that arose in our case was how would the French courts (and therefore by extension an English Judge) assess the nature of the fault which our motorcyclist was alleged to have committed. This became finessed as the accident reconstruction evidence became clearer that the Claimant must have been on the wrong side of the road for a tolerably protracted period) into one simple question: is it a subjective or an objective test?

If approached subjectively, there was nothing to show any conscious appreciation of risk on the part of the Claimant. It was unlikely he would be found to have deliberately driven into a cement lorry, after all. This was not a case of a young 'boy racer', but a middle aged husband and father. The almost complete lack of response to the lorry's presence suggested that there was very little conscious element in his manoeuvre until right at the end.

On the other hand, if approached objectively, the Claimant drove into a head on collision with the lorry on the lorry's side of the road, without any justification or possible explanation for his actions. Although he braked right before impact, it was far too late. In short, there was no reason why the vehicles should have come into collision with each other except for the standard of the Claimant's driving.

French law advice suggested that:

- Based on the likely circumstances, a French court deciding the case would likely not fully extinguish the claimant's right to compensation, but would in fact just reduce it (albeit significantly).
- This was because the claimant, in driving on the wrong side of the road had really only committed 'one' fault (albeit a big one) and there had been ''no intentional assumption of risk''. He was not, for example, over the drink drive limit, or speeding, or carrying out a reckless overtaking manoeuvre.
- Significant weight was placed on the likelihood that, from the Claimant's perspective, at the time of the collision he was not subjectively doing anything wrong i.e. for whatever reason he did not appreciate that he was on the wrong side of the road at the time. Even though from an English perspective this might amount to rewarding those who fail to cross the fairly low bar of remembering which country they are driving in, French law placed weight on the lack of conscious risk taking.

In support of this 'subjective' approach, the Claimant's expert quoted a Court of Appeal of Paris decision of7th October 2019, no. 17/15956. In this case the Court approved the decision of the lower court not to extinguish the right to compensation(and in fact increased the % recovery for the Claimant driver on appeal) on the grounds that *'this fault, which did not reflect **intentionall**y dangerous or hazardous conduct and was not particularly serious…' (emphasis added)*

This subjective approach seems to make sense when you consider that conduct could be objectively extremely dangerous but subjectively not (for example a driver who suffers a seizure causing his vehicle to swerve onto the wrong side of the road). Compensating such unfortunate individuals would appear to consistent with the guiding principle of Loi Badinter (i.e. that of full compensation for victims).

However, there is also considerable force in the counter argument especially when one looks at the wording (in English translation below) of Articles 3 & 4 of Loi Badinter, which concern, respectively, the potential liability of non-driver & driver victims

Article 3

*The victims, apart from the drivers of motorized land vehicles, are compensated for the damage resulting from the attacks on their person that they have suffered, without their own fault being able to be invoked against them, **except for their inexcusable fault if it was the sole cause of the accident.** (emphasis added)*

Article 4

*A **fault** committed by the vehicle's driver shall bring about a reduction or exclusion of his right to compensation. (emphasis added).*

The fact that there appears to be a deliberate distinction between 'inexcusable fault' in the context of non-drivers and merely 'fault' in the context of drivers, suggest that in the case of driver victims their conduct is much more likely to be assessed objectively (i.e. through the eyes of the man on the Paris Omnibus…)

Further support for this view comes when one considers the definition of 'inexcusable fault' that was provided by the Court of Cassation in 1987; *Inexcusable within the meaning of Article 3 of the Act of 5 July 1985 is intentional misconduct of an*

unusual degree of severity which without an acceptable reason exposed its originator to a danger which he must have known. (emphasis added)

Ultimately it seems that the test is nuanced, with both subjective and objective elements coming into play to enable the court properly to evaluate the 'blameworthiness' of the victim driver claiming compensation. Given the extreme discretion given to French courts to take into account virtually whatever they consider relevant and appropriate in deciding cases at first instance (the so-called sovereign power of appreciation) this is probably right. Accordingly there may well be cases where the lack of subjective fault is particularly relevant (and others where it simply does not come into play).

Our case was settled just over a week before the liability trial, with both sides appreciating the substantial litigation risks posed to each of them, as well as costs exposure and the likely size of the Claimant's claim. The issue was therefore not ventilated before the Court. However it remains an interesting point which could assist in other cases where the driver-victim appears to bear a heavy responsibility for what happened to him.

Katherine was instructed in this case by Mike Hagan of Fletchers LLP and an earlier version of this article appeared on Fletchers website.

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The 'solicitors' equitable lien' in the modern legal world. Where does the boundary lie?

The solicitors' equitable lien for their costs is a remedy which entitles a solicitor who assists a client to recover money through litigation to recoup the costs of doing so out of the money recovered. It has been recognised by the courts for over two hundred years and, until recently, it was confined within the context of litigation and arbitration. The case of *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8 has confirmed that it may arise in a wide range of situations, bringing this legal concept within the setting of modern dispute resolution mechanisms.

The question raised by the appeal in *Bott & Co* (the latest round of the long running dispute between the firm and Ryanair over flight delay claims) was where the boundary of the equitable lien lies, and whether the lien covers costs charged to clients by solicitors for claiming compensation for flight cancellations or delays from airline companies.

The facts

An air passenger whose flight is cancelled or delayed has rights to compensation under Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004. The air carrier is not obliged to pay compensation if it can prove that the cancellation or delay was caused by 'extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.

Bott & Co began handling flight delay compensation claims on a "no win, no fee" basis in February 2013. The firm developed an on-line tool which operated without human intervention. A client would enter his affected flight's data on the tool, which would check the details against a database of weather reports and then indicate whether the airline was likely to contest a claim for compensation by relying on 'extraordinary

circumstances'. If the claim was likely not to be disputed, the prospective client would be asked to confirm through the online tool that they wished to instruct Bott & Co, who would charge 25% of the total compensation awarded to the client plus VAT plus an administration fee of £25 per passenger, to be deducted from the compensation by Bott & Co prior to paying the award to the client.

Following the retainer, Bott & Co would send a letter before action to the airline. If the airline accepted the claim and made payment, Bott & Co would check the amount to confirm the right amount had been received. It would then deduct its fees and pay the balance to the client. If the claim was disputed, Bott & Co would issue proceedings if it assessed that the claim had merit.

Until early 2016 Ryanair would pay compensation into Bott & Co's client account. From early 2016, Ryanair changed its practice, enabling its customers to issue a flight cancellation or delay compensation complaint through its website. It began to communicate with, and to pay compensation directly to, Bott & Co's clients. Bott & Co lost the opportunity to deduct its fees from the compensation. It asserted that only 70% of the clients would pay in response to a direct request.

Bott & Co claimed an equitable lien over sums payable by Ryanair to its clients. It sought an injunction to restrain the airline from paying compensation other than to its client account when on notice that the firm had been retained, and it claimed an indemnity for the costs which it had not been able to recover from its clients.

The legal test

The case of *Bott & Co* is the second case of solicitors' equitable liens to fall for consideration before the Supreme Court in the last four years. The case of *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21, a case under the Pre-Action Protocol for Law Value Personal Injury Claims in Road Traffic Accidents, brought the principle into the modern legal world. *Bott & Co* interpreted the test for the lien discussed in *Gavin Edmondson* as follows:

1. The solicitor must provide services within the scope of the retainer with its client;
2. Such services must be provided in relation to the making of a client's claim with or without legal proceedings having been commenced; and
3. The solicitor's services must significantly contribute to the successful recovery of a fund by the client (a low threshold).

The solicitor's equitable lien in matters where the services provided by the solicitors are mainly automated

The Court of Appeal in *Bott & Co* held that, even if it was not necessary for formal proceedings to have been issued before an equitable lien could arise, the claim was rejected on the basis that an equitable lien did not arise unless the airline disputed a claim for compensation. Bott & Co appealed.

The Supreme Court considered the case of *Gavin Edmondson*, and distilled two important principles: 1. An equitable lien can arise where no litigation had been, or may never be, commenced; and 2. There is a clear link between the lien and access to justice, as it provides the solicitor with a security interest in the fruits of the litigation, enabling the solicitor to act on credit for clients who lack the financial resources to pay their fees upfront.

Lord Leggatt and Lady Rose, dissenting, held that the test did not apply to afford Bott & Co an equitable lien because there is no real prospect of a dispute in flight cancellation and delay claims, as the quantum in such claims is fixed. As such, Bott & Co's role in flight cancellation and delay claims did not act to further access to justice, and therefore no equitable lien could arise.

It was this issue, of whether it matters that there is an actual or reasonably anticipated dispute at the time when the solicitors agree to act, which divided the court.

Lord Burrows, Lady Arden and Lord Briggs gave different judgments (the latter of whom gave the leading judgment in *Gavin Edmondson*) and disagreed with this analysis. They supported a claim-based test rather than a dispute-based test. In the words of Lord Briggs "*The pursuit by solicitors of a client's claim by the provision of professional services on credit will generally provide the client with access to justice, even though it may be less closely focused upon the achievement of that animating principle than a test based on the existence of an actual or reasonably anticipated dispute. But the claim-based test has the commanding advantage of simplicity and predictability. It is not in dispute that the other conditions for the existence of the lien, laid down in the Edmondson case, are all satisfied*" [180]. To hold that the principle of equitable lien only applied to cases of a prospective dispute would have a chilling effect on access to justice.

The majority held that Bott & Co had assisted its clients, within the scope of the retainer, in the making of a claim, which was the essence of the services provided by litigation and dispute resolution solicitors. The last element of the test to be satisfied was whether the firm's contribution was significant to the recovery of the compensation. Given that the threshold was a low one, and looking at the context of Bott & Co's services generally, the Court answered this question in the affirmative. Bott & Co's appeal was allowed.

A positive development for solicitors who act on behalf of clients in matters which may not give rise to a 'dispute'

As the Supreme Court rejected the opportunity to affirm a dispute-based test, solicitors around the country may breathe easy in the confirmation that they can assert an equitable lien over compensation in matters which utilise dispute resolution mechanisms with highly automated processes. The solicitors must contribute significantly in the recovery of such compensation, however this threshold is low, pushing the boundary of the lien to services offered that are just short of a transactional nature.

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Griffiths v TUI – the saga continues

Introduction

Mr Justice Spencer's first instance judgment in Peter Griffiths v TUI UK Limited [2020] EWHC 2268 (QB) raised an issue about the need for a party who disagrees with the evidence of another party's expert to challenge that evidence by obtaining its own expert evidence or by cross-examining the expert.

The outcome of the case led to many months of costly satellite litigation, mostly in relatively low value claims concerning food poisoning contracted during package holidays, whereby parties who had not previously sought permission to rely on expert evidence sought to do so, or at the very least applied for permission to call the opposing party's expert to give oral evidence at trial.

The first instance decision was reversed by the Court of Appeal last year [2021] EWCA Civ 1442 but permission to appeal has recently been sought and granted by the Supreme Court. The outcome of the appeal is likely to have an impact not just on the food poisoning cases but all cases concerning the use of expert evidence.

The first instance judgment

The facts of the case were unremarkable. Mr Griffiths had fallen ill, he alleged, as a result of consuming contaminated food during a package holiday in Turkey in August 2014. He relied on the report of a well-respected microbiologist (Professor Pennington) who provided a brief report in support of Mr Griffith's case. Unusually, there was no challenge to the underlying factual basis of the claim. No application was made to cross examine Professor Pennington and there was no other attempt made to undermine the factual basis of his conclusions.

The Defendant tour operator had previously obtained permission from the court to obtain evidence from its own expert but chosen not to do so (presumably on the basis that it felt that Professor Pennington's report was so inadequately reasoned that no court would accept his conclusions).

The judge at first instance (HHJ Truman) found in favour of the Defendant tour operator. She applied the *obiter* reasoning of the Court of Appeal in Wood v TUI [2018] QB 927 and went

on to make a number of criticisms of Professor Pennington's report and his approach to the issue of causation – broadly, that he had failed to properly consider and exclude other non-food related means by which Mr Griffiths may have contracted his illness.

Judgment of Spencer J

In his judgment, Spencer J disagreed with the HHJ Truman's approach to the evidence and concluded that where a party obtains expert evidence which is 'uncontroverted' and complies with the basic requirements of CPR Part 35 and its Practice Direction, then a court, when asked to weigh that evidence in the round, is not entitled to reject that evidence or subject it to any form of analysis so long as it did not constitute mere *ipse dixit* (or to put it in a more modern way, mere assertion without proof).

As set out above, this decision led to much satellite litigation. Parties (usually defendants) who had not obtained expert evidence to support their case on causation or loss scrambled to obtain permission to rely on their own evidence. Others sought leave to call the opposing party's expert to give oral evidence so that the expert's opinion could be challenged, so it could not be said that such evidence was 'uncontroverted'. In cases where permission was granted, relatively simple low value disputes were elevated to multi-track status. Cases which could previously be disposed of in a day were given multi-day listings.

Decision of the Court of Appeal

The Court of Appeal in Peter Griffiths v TUI UK Limited [2021] EWCA Civ 1442, by a majority but with a strong dissenting judgment from Bean LJ, disagreed with the judge.

The majority found, in summary:

(1) The authorities do not support the bright line approach adopted by the judge. There is no rule that an expert's report which is 'uncontroverted' and which complies with CPR Practice Direction 35 cannot be impugned on submissions and ultimately rejected by the judge. It all depends upon the circumstances of the case, the nature of the report and the purpose for which it is being used.

(2) There is nothing inherently unfair in seeking to challenge expert evidence in closing submissions. It might be risky not to adduce contrary evidence nor to cross examine the expert but there is nothing impermissible about it.

(3) The fact the tour operator chose not to call expert evidence itself, despite being given permission to do so, does not alter that basic principle.

(4) As long as the expert's veracity is not challenged, a party may reserve its criticisms of a report until closing submissions if it chooses to do so. The defendant is entitled to submit that the case or an essential aspect of it has not been proved to the requisite standard. The defendant is not prevented from doing so because some of the evidence is contained in an uncontroverted expert's report.

(5) A trial judge cannot therefore be prevented from considering the quality of such evidence that is adduced in order to determine whether the burden of proof is satisfied just because it is uncontroverted. The court is not there to rubber stamp such evidence. Otherwise, the court would be bound by an

uncontroverted report even if the conclusion was supported by nonsense.

(6) Nor is the expert or commissioning party entitled to require the opposing party to pose further questions or cross examine the expert to make good deficiencies in their evidence. It is for the party who files the evidence in support of his case to make sure that all relevant matters are covered and that the contents of the report are sufficient to satisfy the burden of proof on the issue to which it is directed.

In his dissenting opinion, Bean LJ stated, in summary, that it was profoundly unfair for the defendant to have criticised Professor Pennington's in closing submissions without having sought to cross examine him or to adduce expert evidence to the contrary.

Supreme Court

How the Supreme Court will deal with this difficult point of principle remains open to question. For what it is worth, this writer considers the majority decision to be the correct one. No doubt, the majority in the Court of Appeal had in mind the chaos and costly satellite litigation that ensued from Spencer J's judgment. Bean LJ's viewpoint, if correct, would simply re-open the floodgates to more satellite litigation with every party seeking permission to rely on its own expert evidence or to have the opposing party's expert attend for cross-examination for fear of having their case dismissed on the grounds the other party has presented 'uncontroverted; evidence in support of their case. That would be a wholly unnecessary and disproportionate approach to adopt in the vast majority of cases.

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Agency, negligence and contribution under the Montreal Convention

In *Mather v easyJet Airline Co Ltd* [2022] CSOH 40; S.L.T. 631 (2022), Lord Uist, sitting in the Scottish Court of Session (Outer House), recently had to decide a number of issues in a personal injury claim against an airline and an organisation providing mobility assistance to passengers.

Facts

Mr Mather raised an action of damages against easyJet Airline Co Ltd ("easyJet") and DRK Hamburg Mediservice GmbH ("DRK") for injuries sustained while disembarking an aircraft at Hamburg Airport in May 2017.

Following an easyJet flight from Edinburgh, Mr Mather disembarked the aircraft with the assistance of two personnel employed by DRK. Mr Mather was being pushed in his own wheelchair by one of the DRK personnel, Mr Heinz.

At the point where the air bridge joined the Hamburg Airport building, there was a narrow metal ramp. Lord Uist found that Mr Mather had been thrown from his wheelchair, leading him to suffer compound fractures to both legs below the knees, when the front wheels of the wheelchair had come into contact with the ramp. The fact that the wheelchair had stopped "very abruptly" was found to have been caused by Mr Heinz pushing the wheelchair "briskly" up the air bridge.

Having heard live evidence from Mr Mather, and none from Mr Heinz, the judge found that Mr Heinz had failed in his duty to keep a lookout for obstacles or dangers in its path whilst pushing the wheelchair, and to have pushed the wheelchair too quickly so as to impede or prevent his seeing any obstacles or dangers. The judge found that had Mr Heinz been keeping a proper lookout he could and should have seen the ridge of the ramp ahead of him and manoeuvred the wheelchair safely over it.

The judge went on to find that there was no contractual relationship between easyJet and

DRK as the latter was a non-profit organisation that provided services to the operator of Hamburg Airport under a framework agreement; the terms of that agreement according with the obligations set out in Regulation (EC) 1107/2006 on passengers with reduced mobility ("the PRM Regulation"), retained under Scots and English law by the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019. easyJet was simply charged a levy by the airport operator for passenger provided with mobility assistance, and there was no suggestion that easyJet had any say in the choice of the airport's contractors (including DRK).

easyJet sought to argue, *inter alia*, that (a) DRK was not its agent or servant; (b) any damages owned to Mr Mather were capped as neither it, nor its agents or servants had been negligent in causing the accident; and (c) alternatively, DRK was liable to pay a contribution pursuant to the Civil Liability (Contribution) Act 1978 and/or German law.

Relevant parts of the Montreal Convention

The Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999 ("the Montreal Convention") was incorporated into the law of Scotland [and England] by the Carriage by Air Act 1961 as amended by the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002/263.

The relevant articles of the Convention are as follows:

Article 17 – Death and Injury of Passengers – Damage to Baggage

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

Article 21 – Compensation in case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 128,821 Special Drawing Rights [currently approx. £146,000] for each passenger the carrier shall not be able to limit or exclude its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 128,821 Special Drawing Rights if the carrier proves that:

(a) Such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) Such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 30 – Servants, Agents – Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention .

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

Article 37 – Right of Recourse against Third Parties

"Nothing in this Convention shall prejudice the question of whether a person liable for damage in accordance with its provisions has a right of recourse against any other person."

(1) Was DRK a servant or agent of easyJet within the meaning of article 21?

Having examined nine decisions from the US courts and the English High Court's decision in *Phillips v Air New Zealand Ltd* [2002] EWHC 800 (Comm), [2002] 1 All E.R. (Comm) 801, the judge held that the test for determining whether a party was an agent of the carrier is whether the task the party was undertaking was executed 'in furtherance of the contract of carriage' between the carrier and the passenger.

The judge found that the services provided by DRK (indirectly) to easyJet were in furtherance of the contract of carriage because, whilst there was no contractual connection between easyJet and DRK, the services provided to easyJet were in furtherance of the contract of carriage by assisting Mr Mather to disembark the flight. If the services had not been provided by DRK, easyJet would itself have had to Mr Mather's with those services as part of the process of disembarkation.

(2) Had DRK been negligent in causing the accident such that the cap on damages in article 21 did not apply?

Given the judge's findings that DRK's employee, Mr Heinz, had failed in his duty to keep a lookout for obstacles or dangers in its path whilst pushing Mr Mather's wheelchair, and pushed the wheelchair too quickly so as to impede or prevent his seeing any obstacles or dangers, the judge had no issue in holding that DRK had been negligent in causing Mr Mather's accident, both as a matter of the Scottish common law and German law.

It followed that, pursuant to article 21(2)(a) of the Convention, easyJet was liable for unlimited damages as it has not proved that the injury to Mr Mather was not due to its own negligence or other wrongful act or omission or that of its servants or agents. Indeed, Mr Mather has proved that the accident was due to the negligence of easyJet's agent, DRK.

(3) Could easyJet claim a contribution against DRK?

As the Convention was silent on which law applies to the claim for contribution, the judge held that pursuant to the Rome II Regulation (EC) 864/2007, and Scottish conflicts of law provisions (found in section 23A (1) and (4) of the Prescription and Limitation (Scotland) Act 1973), the applicable law to easyJet's claim for contribution was German law.

Mr Mather's German law expert (Mr Hohagen) gave unchallenged evidence that easyJet's claim for contribution against DRK had to be brought by 31 December 2020, as the standard limitation period under section 199 of the German Civil Code was three years from the end of the year in which the claim arose. Under German law the claim for contribution arose on the date that the accident occurred.

As no contribution or apportionment claim had been made by easyJet against DRK until 24 November 2021, the judge faced no difficulty in holding that easyJet's claim for contribution against DRK was time-barred.

Comment

This case is an important development given the absence of UK cases on the meaning of "servant or agent" in article 21. For the first time, a UK court has adopted the jurisprudence from the USA. As is typical in cases of this kind, little or no case law from other jurisdictions appears to have been before the Court.

For carriers this case provides an important reminder of the need to obtain direct evidence from those involved in the provision of services to passengers, whether that is through a contractual relationship with the carrier, or more widely in the context of services provided 'in furtherance of the contract of carriage'. Had Mr Heinz been able to give live evidence the judge's findings as to his negligence may well have been different.

The case also represents a reminder of the importance of limitation periods, with the claim for contribution made nearly a year after the expiry of the applicable limitation period.

Lastly, the case represents only the second reported case (further to *Silverman v Ryanair DAC* (Rev1) [2021] EWHC 2955 (QB)) to confirm that in the absence of any conflicts of law provisions in the Montreal Convention itself, Rome II provides the basis for deciding which domestic law applies.

Michael Nkrumah appeared in *Mather v easyJet Airline Co Ltd* as an expert in aviation and travel law.

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Application of the Cross Border Insolvency Regulations 2006: Astora Women's Health LLC, Re [2022] EWHC 2412 (ChD)

Summary

In Astora Women's Health LLC, Re [2022] EWHC 2412, Insolvency and Companies Court Judge Burton recently allowed the application brought by the former Chief Financing Officer of the company, Mark Bradley, to stay proceedings regarding the recognition of U.S. bankruptcy proceedings under Chapter Eleven of the U.S. Bankruptcy Code (the "Chapter 11 Proceedings") in respect of Astora Women's Health LLC. The judgment provides a useful recap of the relevant principles which apply in cross-border insolvency litigation.

Background

Astora is a Delaware limited liability company which is operated and managed from Wilmington, Delaware, USA. Astora has no on-going business operations or assets. Since 2008, it has been subject to over 30,000 litigation claims brought by patients who received implantable surgical mesh products for the treatment of conditions including urinary incontinence and pelvic organ prolapse, such implants having been manufactured and distributed by Astora or its predecessor entities. The vast majority of the claims were brought in the United States, with some additional claims having also been brought in Australia, Canada, Ireland and the Netherlands, and of relevance to this case, 13 claims were brought in the courts of England and Wales and 56 in Scotland, which the Judge collectively termed 'the GB claims'.

On 16 August 2022, Astora, Endo and 76 members of the Endo group filed petitions in the United States Bankruptcy Court for the Southern District of New York to commence bankruptcy proceedings under Chapter 11 of title 11 of the United States Code. No order has been made for substantive consolidation of each of the Chapter 11 cases, but for procedural convenience Judge Burton noted that they are being jointly administered under Docket Number 22-22549.

By Mr Bradley's Recognition Application, he sought to stay the GB claims with a view to the claimants in such cases pursuing their claims, instead, against Astora in the Chapter 11 Proceedings. To the date of judgment, Astora had paid more than US$3 billion by way of

settlement payments funded from the proceeds of a sale of its men's health business and credit provided to the Endo group. Following the commencement of the Chapter 11 Proceedings, the Endo group was not under any further obligation to continue to fund Astora. The Chapter 11 Proceedings contemplate a sale of Endo group's remaining business pursuant to section 363 of the US Bankruptcy Code, in which the group's first lien secured lenders will provide a stalking horse credit bid.

Mr Bradley's first affidavit explained that he considered that a stay of the proceedings in GB would reduce the time and cost burden of Astora defending litigation in these jurisdictions, thus helping to preserve the value of its business for the benefit of those of its stakeholders who may ultimately be entitled to a distribution.

The Decision

The court after applying the legal principles pursuant to the Cross Border Insolvency Regulations 2006 ("CBIR") held, among other things, that Astora's Chapter 11 Proceedings comprised a 'foreign proceeding' and Mr Bradley was a 'foreign representative' entitled to apply to the court for those proceedings to be recognised. Once satisfied that (i) there were no public policy grounds to refuse to grant such recognition; and (ii) the evidential and procedural requirements of Article 15 of Schedule One to the CBIR had been met, the court was bound to recognise the Chapter 11 Proceedings pursuant to Article 17.

At paragraph 37 and 38 of the judgment, Judge Burton with reference to Mr Bradley's explanation as to the purpose of staying Astora's ongoing litigation in GB, likened the purpose of the Chapter 11 Proceedings in this case to a liquidation in England and Wales,

> *"where the business and assets of a company are realised for the benefit of creditors whose claims take the priority afforded to them by statute".*

Accordingly, in relation to the claims being pursued against Astora in GB and Australia (where Mr Bradley also intends to seek a recognition order), Judge Burton found that the Chapter 11 Proceedings were proceedings for reorganisation or liquidation within the meaning of Article 2(i) of the Model Law.

As to Article 6 and the public policy consideration, Judge Burton reminded herself that the burden of proof in respect of a recognition application rests with the applicant (see Re Agrokor [2017] EWHC 2791) and, of particular importance for public policy considerations and the potential consequences for third parties if a stay arises as a result of recognition, that the applicant is under a duty of full and frank disclosure (see Re OGX Petróleo e Gás SA [2016] EWHC 25).

In this respect, Judge Burton highlighted at paragraph 43,

> *"Astora has no assets in this jurisdiction. It is proposed that there be a sale of the Company's business within the context of the Chapter 11 Proceedings with a view to achieving a better result for its creditors as a whole, in particular by preserving such funds as may be realised by relieving Astora of the cost of defending claims in numerous jurisdictions. Mr Bradley acknowledges that Astora has no assets and Mr Al-Altar invited me to proceed on the basis of an assumption that there would be no distribution available to creditors. Against this unfortunate background, I see no public policy grounds which should prevent this Court*

from recognising the Chapter 11 Proceedings."

Other cases where the CBIR 2006 has been relied on (or analysed):

- Recognition of Russian bankruptcy proceedings as a foreign main proceeding, justifying the court deciding that relief prohibiting the debtor from disposing of assets (granted at an earlier stage) under article 19(1)(c) of Schedule 1 to the CBIR 2006) was no longer necessary, once provisional Russian proceedings were made final, because of the automatic terms of article 20(1)(c) of Schedule 1 to the CBIR 2006 (and that that stay also meant that a freezing order under section 25 of the Civil Jurisdiction and Judgments Act 1982 was not available) (Protasov v Derev [2021] EWHC 392).

- Recognition, in respect of one company, of a Croatian extraordinary administration proceeding (which was a group proceeding under Croatian emergency legislation which placed 50 members of the same group into one collective proceeding, not all members of the group being insolvent, and the insolvency proceeding not being an insolvency proceeding to which the Recast Insolvency Regulation applied) (Re Agrokor [2017] EWHC 2791).

- Recognition of US Chapter 11 proceedings in respect of a company incorporated in England but with its COMI in the US, where the applicant foreign representatives were the company's directors (no trustee having been appointed by the US court) (Re 19 Entertainment Ltd [2016] EWHC 1545).

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Flight delay claims – CJEU continues to expand the scope

In a very recent judgment handed down on 6 October in flightright GmbH v American Airlines Inc. (Case C-436/21), the Court of Justice of the European Union has continued its campaign to bring any flight, any time, anywhere, under the aegis of the Regulation No 261/2004 (the Denied Boarding Regulation).

In this case the passenger purchased, through a travel agency, a plane ticket for a journey on 25 July 2018 from Stuttgart to Kansas City which was made up of three flights. The first flight from Stuttgart to Zurich was operated by Swiss International Air Lines, whilst the two flights from Zurich to Philadelphia and from Philadelphia to Kansas City, respectively, were operated by American Airlines. SIAL and AA are not code share partners. The same electronic ticket number appeared on the boarding passes for all three flights and contained a single reservation number relating to the entire journey. Furthermore, the travel agency issued an invoice showing a total price for the whole of that journey and for the return.

The first and second flights ran to schedule. However the final flight from Philadelphia to Kansas City, an entirely domestic flight within the US, was delayed by more than four hours. Flightright took an assignment of the passenger's right to claim and pursued AA in the German courts for the maximum statutory delayed flight compensation of €600 (and see Samuel McNeil's article elsewhere in this Bulletin for further details on how the scheme operates). AA defended the claim on the basis that the Denied Boarding Regulation simply did not apply.

The German Federal Court of Justice referred a number of questions to the CJEU regarding the

proper approach. Once again emphasising the consumer protection aims of the Regulation, the CJEU held that the concept of a "connecting flight" includes scenarios where there are a number of flights operated by separate operating air carriers which do not have a legal relationship, in circumstances where those flights have been combined by a travel agency which has charged an overall price and issued a single ticket for that operation. The Court pointed out that concept of a 'connecting flight' must be understood as referring to two or more flights constituting a whole for the purposes of the right to compensation for passengers provided for in Regulation No 261/2004.

In the present case, the ticket indicated that the passenger had made one reservation from Stuttgart through to Kansas City, and this had been accepted and registered by the travel agent. The Court did not consider that the flights had to be operated by airlines operating under a specific legal relationship. Thus, even though AA has no code share or other partnership affiliations with SIAL, the original anchor flight with SIAL starting in Stuttgart was sufficient to bring the affected flight under the umbrella of the Denied Boarding Regulation. The Court's reiteration that AA retains the right to pursue the travel agent/tour operator probably afforded AA little comfort.

The contrast between the redress available to the passenger in question and probably 99% of the other affected passengers flying from Philadelphia to Kansas City is striking!

The compensation scheme set out in the Denied Boarding Regulation continues to apply in the UK notwithstanding Brexit courtesy of the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019. The EU-UK Trade and Cooperation Agreement requires ongoing EU-UK cooperation and consultation on aviation policy with the shared objective of achieving a high level of consumer protection. Whether English courts will nonetheless take the same approach to the statutory compensation scheme, as with so much else, remains to be seen.

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PEOPIL Conference

Lawyers from every corner of Europe, including Asela Wijeyaratne and Samuel McNeil from these chambers together with our clerk, Duane Hitchman, descended on Copenhagen last month for PEOPIL's annual conference.

Once again it proved a lively event covering a vast range of topics. The conference included eight detailed talks on area of law, with an emphasis on recent developments in the international litigation of torts.

Katherine Allen from Hugh James (recently elevated into the Legal500 hall of Fame for her travel expertise), gave an overview of recent judgments of Court of Justice of the European Union in personal injuries cases, which set the tone for the conference. She also covered the recent work of the PEOPIL Law Reform Group, framing the debate for the years to come.

Esther Abellán, of BCV Lex, and Marco Bona, of Studio Legale Bona Oliva & Associati, gave a detailed explanation of the tricky concept of moral damages in Spanish and Italian law. Particularly useful to English lawyers was their analysis of the differences between moral damages and psychiatric damages, a distinction which is not immediately obvious to the newly qualified in this jurisdiction.

In a presentation by Ukrainian lawyer Kateryna Balaban, Managing Director of UA.SUPPORT, delegates gained perspective on the varied legal needs of displaced people in the context of the war in Ukraine. As Ms Balaban explained, these needs are by no means limited to immigration issues. The length of the war has caused a need for legal advice on employment law, tax law, company law and advice on personal injury. Ms Balaban had herself only recently recovered from a broken arm in a cycling accident.

The conference was a great opportunity for lawyers from jurisdictions across Europe and the United States to meet and share experiences,

particularly over evening drinks. Delegates could decide for themselves whether to spend the evenings heckling karaoke singers or debating whether Spanish interest on damages was a matter of procedural or substantive law (or both). The weekend ended with a boat tour of Copenhagen over lunch. Thank you to the organisers and we look forward to Dublin 2023!

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