Case No: C60YM240

IN THE COUNTY COURT
SITTING AT LIVERPOOL

35 Vernon Street
Liverpool
L2 2BX

"On Paper" Hearing Date: Monday 13th March 2017

Before:

DISTRICT JUDGE BALDWIN

Between:

DARREN BUCKLEY (1)
KAREN BUCKLEY (2)
JORDAN BUCKLEY (3) — **Claimants**

-and-

EMIRATES — **Defendant**

JUDGMENT (Approved)

Preamble

1. This matter comes before me in a somewhat unusual fashion, the context being the Order of Christopher Clarke LJ of the 2nd December 2016 in

Gahan v Emirates (B2/2016/2856) [D40], this case having been selected in furtherance of paragraph 5 of that Order. In consequence, the parties being in agreement between themselves with this course of action, the County Court at Liverpool, being the Court case managing and indeed making decisions on many of these cases, has agreed to facilitate the giving of this decision and thereafter its swift passage to the Court of Appeal, to be heard alongside *Gahan*.

2. For further clarity, the distinguishing feature between the facts in *Gahan* and those in this claim is that the Claimants' initial flight was delayed for less than 3 hours, thus not per se engaging any right to regulatory compensation, whereas the initial delay in *Gahan* was in excess of 3 hours and giving rise to a prima facie right to an award of some compensation in any event.

3. Pursuant to the parties' agreement, this decision is given without the benefit of oral submissions, the parties having agreed the underpinning factual matrix and each having supplied skeleton arguments and bundles of documents to include authorities to which reference is made. As already appears above, I shall refer to pages from the Claimants' and the Defendant's bundles as [C*x*] and [D*x*] respectively.

Introduction including agreed facts [D41ff]

4. This is a claim of small claims track value brought by the Claimants against the Defendant in which the Claimants each claim a fixed award of regulatory compensation, namely the Sterling equivalent of €600, the entitlement to which, they argue, arises pursuant to Regulation (EC) No 261/2004 of the European Parliament and the Council ("the flight regulation"), said to be applicable to the delay in excess of 4 hours, namely 16 hours and 39 minutes, encountered in arriving at their final destination, Sydney, Australia ("SYD") as a result of delay to flight no. EK002 operated by the Defendant carrier from Manchester, UK ("MAN") to Dubai ("DXB"), due to depart MAN on 3rd July 2015 ("flight 1"), being delayed such that there was a missed connection at DXB, the intended

flight being EK412 due to depart 10.15 hours local time on 4th July 2015 ("flight 2").

5. The Claimants' booking was a single booking made in accordance with the Defendant's minimum connection time at DXB, allowing 2 hours and 50 minutes between the scheduled arrival and departure times respectively. In fact, the actual arrival time of flight 1 was only 46 minutes before the scheduled departure time of flight 2. The Claimants were automatically rebooked by the Defendant onto the next available flight to SYD ("the alternative flight") with the above consequent overall delay in arrival.

6. The Defendant, by its Defence dated 2nd September 2016 [D3ff], disputes the claim in full on the grounds that:-

(i) the flight regulation only applies to flight 1, ie that only that flight is within its scope in accordance with Art. 3(1)(a), having departed from an airport in a Member State (UK);

(ii) the flight regulation does not apply to flight 2 or the alternative flight as they are not within its scope, being departures from a non-Member State (Dubai) by a non-Community carrier, as defined by Art. 2(c);

(iii) it is necessary to distinguish between a "flight" and a "journey" irrespective of a single booking (*Emirates v Schenkel* (2008) (C-173/07));

(iv) the fact that flights are directly connecting does not mean that they should not be addressed as separate units of travel;

(v) support for this in the English courts can be derived from *Sanghvi v Cathay Pacific* [2011] EWHC 1684 (Ch) Proudman J;

(vi) any applicability of the flight regulation to flight 2 or the alternative flight would go beyond a contended for "*effective, proportionate and dissuasive*" intention of that regulation;

(vii) Emirates is a non-Community carrier;

(viii) the final destination for the purposes of any flight regulation claim is therefore DXB and no right to compensation is engaged.

The flight regulation

7. In my judgment the relevant parts of the Regulation, to include its Recitals are these:-

"Whereas…

(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

…

(6) The protection accorded to passengers departing from an airport located in a Member State should be extended to those leaving an airport located in a third country for one situated in a Member State, when a Community carrier operates the flight.

…

(21) Member States should lay down rules on sanctions applicable to infringements of the provisions of this Regulation and ensure that these sanctions are applied. The sanctions should be effective, proportionate and dissuasive.

…

Article 2

Definitions

...

(c) 'Community carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (1);

...

(h) 'final destination' means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;

Article 3

Scope

1. This Regulation shall apply:

   (a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;

   (b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

...

5. This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2...

...

Article 5

Cancellation

1. In case of cancellation of a flight, the passengers concerned shall:

...

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

...

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival;

or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

...

Article 7

Right to compensation

1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked

(a) by two hours, in respect of all flights of 1 500 kilometres or less; or

(b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50 %."

...

Article 8

Right to reimbursement or re-routing

1. Where reference is made to this Article, passengers shall be offered the choice between:

...

(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats."

Claimants' arguments

8. The Claimants contend that the right to compensation under Art. 7 pursuant to the CJEU decisions of *Sturgeon v Condor* (2009) (C-402/07) and *Nelson v Lufthansa* (2012) (C-581-10) is engaged by any delay encountered of three hours or more by any passengers in arriving at their final destination. Insofar as flight 2 is not within the scope of the flight regulation, the relevance of the overall delay is that this was consequential

upon the delay to flight 1, clearly in-scope, and therefore is part of the quantifiable delay pursuant to Art. 7(1), as extended by *Sturgeon*.

9. The Claimants also pray in aid the decision of the CJEU in *Air France SA v Folkerts* (2013) All ER (EC) 1133 in support of the proposition that it is the arrival at the final destination (c.f. Art. 2(h)) which causes material delay to crystallise, which approach is also reflective of the generally applicable principle of equal treatment. It is argued that the justification for such an approach is that the airline has accepted a booking for directly connecting flights, thereby undertaking the responsibility of transporting the passengers through to the final destination by the scheduled ultimate arrival time, with consequential duty to allow sufficient time in between any connecting flights for unforeseen contingencies.

10. The Claimants remind the court that the flight regulation is in place in order to afford a high level of protection for passengers and stress the references in the material parts of *Sturgeon* and *Nelson* to the importance of the final destination in determining liability in cases of delay or cancellation, the context of either being an irretrievable loss of time. It is emphasised that the choice by the CJEU of 3 hours as the minimum period to engage regulatory compensation in a case of delayed arrival was not arbitrary, but rather determined by direct reference to the formula for acquiring the right to Art. 7 compensation in a case of cancellation. That method of calculation directly involved consideration of the final destination. Therefore, it is argued, in order for there to be equal treatment, a passenger whose in-scope flight is delayed such that a connecting flight is missed giving rise to an overall delay must be treated in the same way as a passenger whose flight is cancelled giving rise to a compensable delayed arrival by alternative means at a final destination.

11. The Claimants point out that the definition of "final destination" under Art. 2(h) is not limited on its face to the final destination of in-scope flights, which it could easily have been. It is also stressed that any other interpretation could give rise to anomalies, for example in terms of

inconsistent requirements to provide re-routing under Art. 8 only as far as the last in-scope flight destination, as opposed to the final destination on the through booking.

12. Reference is also made to the guidance from the European Commission in the Interpretative Guidelines on the flight regulation dated 10th June 2016 [D56ff] which is supportive of the Claimants' position, both in terms of the final destination issue and also as to the irrelevance of whether the operating carrier is EU based or not. Similarly, the Civil Aviation Authority ("CAA") has also expressed its view as of the 22nd February 2017 that the existing European jurisprudence is sufficiently clear.

13. The Claimants also argue that *Sanghvi* should be seen as a decision on a "denied boarding" claim only. The *Sanghvi* case is said to be a failed attempt to bring an episode of denied boarding which occurred outside the European Union and in relation to a non-EU carrier and a flight destination itself not within the European Union within scope. This, it is said, is entirely different from the situation in the index claim, which is on the issue of consequential delay caused by delay to an already in-scope flight. The Claimants here are not attempting to bring flight 2 within the scope of the flight regulation as they do not need to do so. Any difference in treatment arising out of a departure from the approach in *Sanghvi*, it is argued, would be entirely justifiable as arising out of differing amounts of delay suffered and inconvenience caused to passengers in incomparable situations. Similarly, there would be no prospect of any "round the world" context impacting upon this type of decision, as such a situation would be inconceivable in terms of directly connecting flights on a single booking.

Defendant's arguments

14. The Defendant, at paragraph 25 of its skeleton argument, appears to attempt to raise a doubt in the court's mind as to the soundness of the CJEU's decision in *Sturgeon*, referring as it does to apparent criticism

originally engendered by it. Fairly, however, the Defendant goes on to concede that CJEU confirmed its views in the subsequent case of *Nelson*.

15. The reference in those decision to "final destination" is dismissed by the Defendant as having no material bearing on the issues in the instant claim as neither *Sturgeon* nor *Nelson* were "missed connecting flights" cases.

16. The court is asked to consider the principle of equal treatment and how, if the Claimants' arguments were accepted, the Claimants would effectively be being placed in a better position than they would have been in if flight 2 had been cancelled or if they had been denied boarding on flight 2.

17. The Defendant is equally dismissive of the June 2016 European Commission guidelines which, it is said, should be given no weight. Thus, it is argued that flights 1 and 2 should be treated as separate units of carriage or air transport for the purposes of the flight regulation and therefore, for the claim to succeed, flight 2 must fall within the scope of Art. 3. To find liability on the Defendant in such a situation, it is said, would be to find liability in relation to flights by non-EU airlines departing from an airport outside the EU, contrary to the principle of equal treatment and presumption against extra-territoriality. *Schenkel*, it is said, gives clear guidance as to the meaning of "flight", namely a unit of air transport performed by an air carrier which fixes its itinerary. This may be contrasted with the concept of "journey". Successive carriages in terms of several stages chosen by a passenger are said to resemble more a journey than a flight. In order, therefore, for the delay at Sydney to be relevant for the purposes of this claim, flight 2 must individually fall within the scope of the flight regulation.

18. *Folkerts*, contends the Defendant, should not be seen as supportive of the contrary proposition, in that *Folkerts* was not a case in which the scope of the flight regulation was considered. This is explained in the following ways. Firstly the carrier in *Folkerts* was an EU carrier and secondly it is safe to assume that there was an element of qualifying delay in the flight

from the EU to South America, both the first and 2nd flights therefore being in scope within Art. 3.

19. Unsurprisingly, the Defendant also argues that the approach of Proudman J in *Sanghvi* is applicable to the instant claim.

20. The Defendant further supports its submissions by reference to contended for discriminatory effects, should the Claimants' interpretation be preferred.

21. Firstly, a Claimant whose flight commenced outwith the EU and concluded in a country which also was not a Member State, passing through and landing in, for the purposes of connection, the EU en route would not be in scope as the entire "flight" would not fit within either Art. 3.1(a) or (b).

22. Secondly, reverting to the issue of the hypothetical cancellation of flight 2, the Defendant stresses that the Claimants' analysis would lead to delayed passengers being in a substantially better position than passengers who were faced with such a cancellation. Thus the principle of equal treatment would be infringed.

23. The Defendant also suggests that the Claimants would still have a claim for damages under Art. 19 of the Montréal Convention and further urges the court not to consider giving extra-territorial effect to the flight regulation.

Discussion

24. In addition to the written submissions considered today, having heard oral argument in my previous decision of *Kay v Emirates* (B21YP611 9th May 2016 unreported) I remain persuaded that the Court's approach to scope and the applicability of the flight regulation to this and indeed any such claim for compensation for irreversible loss of time equal to or in excess of three hours, in other words an actionable delay, see *Sturgeon* paras [52]

and [61] and *Nelson* paras [34] and [40], should be the "unit of air transport" approach, *Schenkel* para. [40], noting also *Sturgeon* para. 30,

> "*a 'flight' within the meaning of Regulation No 261/2004 consists in an air transport operation, performed by an air carrier which fixes its itinerary*".

25. In terms, then, of the applicability of the flight regulation, I also accept that flight 2 and/or the alternative flight when viewed as individual units and in the context of a complaint specific to and arising out of the operation of those flights, would not be within the scope of the flight regulation, as they neither departed from or to a Member State's airport, neither was the operating carrier a Community carrier.

26. However, insofar as it is suggested that the complaint of delay as a whole and arising out of actual delay to flight 1, in these circumstances, is not within the scope of Art. 3(1)(a), I continue to remain unpersuaded.

27. In my judgment, Art. 3(1)(a) is clear as to the applicability of the flight regulation, as elucidated by *Schenkel* para. 30,

> "*... the regulation applies to situations in which passengers use a flight ... departing from an airport located in the territory of a Member State*".

28. The Claimants in this claim did just that when departing from MAN and therefore the flight regulation applies to any complaint of delay arising out of the operation of flight 1, in my view.

29. Beyond that, in my judgment, the question of scope per se, as opposed to identification of an actionable right to or quantification of a right so identified, falls away.

30. There is no doubt in my mind that this claim is brought by means of complaint as to the impact of the delay to flight 1 in arriving in DXB upon a through booking (there having been no element of cancellation or denied boarding) and therefore I am entirely satisfied that this is a delay case the right to Art. 7 regulatory compensation in relation to which arises directly from the purposive decision of the CJEU in *Sturgeon* and not from the flight regulation itself, which solely addresses the consequences of cancellation or denied boarding, irrespective of whatever contemporaneous criticisms there may have been of *Sturgeon*.

31. Para [44] of *Sturgeon* stresses the need to ensure a high level of protection for passengers, I may add in, departing on a flight from a Member State airport,

> *"That is implicitly borne out by the objective of Regulation No 261/2004, since it is apparent from Recitals 1 to 4 in the preamble, in particular from Recital 2, that the regulation seeks to ensure a high level of protection for air passengers regardless of whether they are denied boarding or whether their flight is cancelled or delayed, since they are all caused similar serious trouble and inconvenience connected with air transport."*

32. Para [45] confirms that relevant provisions must be interpreted broadly,

> *"That is a fortiori the case since the provisions conferring rights on air passengers, including those conferring a right to compensation, must be interpreted broadly (see, to that effect, Case C-549/07 Wallentin-Hermann [2008] ECR I-0000, paragraph 17)."*

33. The discussion as to extending fixed compensation to delay continues,

> *" 49 In view of the objective of Regulation No 261/2004, which is to strengthen protection for air passengers by redressing damage suffered by them during air travel, situations covered by the regulation*

must be compared, in particular by reference to the type and extent of the various types of inconvenience and damage suffered by the passengers concerned (see, to that effect, IATA and ELFAA, paragraphs 82, 85, 97 and 98).

50 In this instance, the situation of passengers whose flights are delayed should be compared with that of passengers whose flights are cancelled.

51 In that connection, Regulation No 261/2004 seeks to redress damage in an immediate and standardised manner and to do so by various forms of intervention which are the subject of rules relating to denied boarding, cancellation and long flight delay (see, to that effect, IATA and ELFAA, paragraph 43).

52 Regulation No 261/2004 has, in those measures, the objective of repairing, inter alia, damage consisting, for the passengers concerned, in a loss of time which, given that it is irreversible, can be redressed only by compensation.

53 In that regard, it must be stated that that damage is suffered both by passengers whose flights are cancelled and by passengers whose flights are delayed if, prior to reaching their destinations, the latter's journey time is longer than the time which had originally been scheduled by the air carrier.

54 Consequently, passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, consisting in a loss of time, and thus find themselves in comparable situations for the purposes of the application of the right to compensation laid down in Article 7 of Regulation No 261/2004.

55 More specifically, the situation of passengers whose flights are delayed is scarcely distinguishable from that of passengers whose flights are cancelled, who are re-routed in accordance with Article 5(1)(c)(iii) of Regulation No 261/2004 and who may be informed of the flight cancellation at the very last moment, when they actually arrive at the airport (see Case C-204/08 Rehder [2009] ECR I-6073, paragraph 19).

56 First, both categories of passengers are informed, as a rule, at the same time of the incident which will make their journey by air more difficult. Second, even if they are transported to their final destination, they reach it after the time originally scheduled and, as a consequence, they suffer a similar loss of time.

57 That said, passengers who are re-routed under Article 5(1)(c)(iii) of Regulation No 261/2004 are afforded the right to compensation laid down in Article 7 of the regulation where the carrier fails to re-route them on a flight which departs no more than

one hour before the scheduled time of departure and reaches their final destination less than two hours after the scheduled time of arrival. Those passengers thus acquire a right to compensation when they suffer a loss of time equal to or in excess of three hours in relation to the duration originally planned by the air carrier.

58 If, by contrast, passengers whose flights are delayed did not acquire any right to compensation, they would be treated less favourably even though, depending on the circumstances, they suffer a similar loss of time, of three hours or more, in the course of their journey.

59 There appears, however, to be no objective ground capable of justifying such a difference in treatment.

60 Given that the damage sustained by air passengers in cases of cancellation or long delay is comparable, passengers whose flights are delayed and passengers whose flights are cancelled cannot be treated differently without the principle of equal treatment being infringed. That is a fortiori the case in view of the aim sought by Regulation No 261/2004, which is to increase protection for all air passengers.

61 In those circumstances, the Court finds that passengers whose flights are delayed may rely on the right to compensation laid down in Article 7 of Regulation No 261/2004 where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is to say when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier."

34. Similarly in *Nelson* at para. [40],

"40 In the light of the foregoing the answer to question 1 in Case C-629/10 is that Articles 5 to 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed are entitled to compensation under that regulation where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been avoided even if all

reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier."

35. It is no accident or coincidence, in my view, that the enabling authority of *Sturgeon*, as replicated in *Nelson*, chose to utilise the phrase "*reach their final destination*" and to that extent I respectfully disagree that this feature of those cases takes matters nowhere. The Court could easily have said "upon arrival of any delayed flight" or even missed out the word "final", but it did not do so and in my judgment the purpose behind and the reality of the use of this phrase is to engage the definition in Art. 2(h).

36. It therefore follows that I am persuaded that in a "delay to the departing flight leading to missed connection" situation where both Arts 3(1)(a) and 2(h) are engaged, as I am satisfied that they are here, ie that the Claimants have departed from an airport located in the territory of a Member State, travelling by directly connecting flights to a final destination, Claimants who can otherwise bring themselves within the flight regulation are entitled to regulatory compensation upon establishing an irretrievable or irreversible loss of time of at least 3 hours upon arrival at that final destination resulting from such delay, unless a regulatory defence is made out by the Defendant. This is precisely the type of mischief, in my judgment, which the decisions in *Sturgeon* and *Nelson* intended to address.

37. In terms of the Defendant's residual arguments, or additionally in general, I take this opportunity to express the following further views.

38. The reference in *Schenkel* at para. [33] to Art. 2(h) in my view strengthens my analysis, by seeking to distinguish a "final destination" situation from a "return flight" or several flights not falling within Art. 2(h) examples of a "journey". The Defendant's arguments at paragraph 47 of its skeleton argument [C28], referred to at para. 21 above, which somewhat strangely seem to me to attempt to rely upon a non-*Schenkel* type analysis, fall away in the light of my decision upon scope and I refer further to *Folkerts* below.

39. I remain of the view that *Sanghvi* is not binding upon me in this set of agreed circumstances, it being properly distinguishable from a claim for delay occasioning an irreversible loss of time on the grounds that it was clearly and materially a denial of boarding case, hence, in my judgment, the lack of reference in argument to *Sturgeon* (only relevant to delay), and the lack of further analysis of the issue of "final destination" touched upon at para. [16] of *Sanghvi*, which has no application to denied boarding.

40. Those matters are evidence of a fundamental material difference between these two situations, clearly supported, in my view, by what I see as the crux of the judgment in *Sanghvi* at para. [23],

> "*Para [37] of Schenkel makes it tolerably clear, to my mind, that article 3 connects the liability of an air carrier to either (a) a flight departing from the territory of a member state where* ***denial of boarding*** *will have taken place on the soil of that member state or (b) the grant of a carrier's operating licence by a member state when the flight's destination is a member state. Both (a) and (b) provide a logical territorial basis for the application of the regulation to the* ***denial of boarding*** *by a carrier.*" (my emphasis added).

41. Insofar as, by analogy, the Defendant seeks to suggest an unequal treatment situation similar, presumably, to how *Sanghvi* would appear in the light of the success of the Claimants' arguments, had flight 2 been cancelled, once again the answer, in my view, has to lie in the mischief being guarded against by the flight regulation, namely irreversible loss of time caused by delay to or cancellation of or denied boarding in relation to a flight, in an Art. 3(1)(a) situation, departing from a Member State, assessable in all instances by the distance to the last destination or time of delayed arrival at the final destination as the case may be, see Arts 5(1)(c)(ii) and (iii), 7(1) and (2) and 8(1)(b) and (c). The Defendant's example of cancellation to flight 2 and the decision in *Sanghvi* are, by contrast, situations where the mischief is simply not intended to be in

scope (see Recital (6)), neither Art 3(1)(a) nor (b) applying and therefore not susceptible to any regulation or sanction pursuant to the flight regulation, whether equal to in-scope treatment or otherwise.

42. In short, it is nothing to do with the Claimants attempting to better their position, but rather taking advantage of the high protection available when the mischief complained of is in scope.

43. I remain of my view expressed in *Kay* that my analysis is consistent with *Folkerts* and helps to explain the concerns expressed by the Defendant. Scope was not argued in *Folkerts*, it seems to me, because it was accepted that at least one (delayed) flight departing from a Member State airport was sufficient to engage the Regulation per se, namely the Bremen to Paris flight, which was clearly delayed upon arrival, although not specified or even likely to have been at least three hours delayed. It is not helpful or indeed safe, I would suggest, to attempt to speculate on any potential but unreported "in-scope" actuality in relation to the second flight from Paris. Thus, it is not surprising, that *Folkerts* is not considered in Shawcross as a "scope" case, but does feature in the "consequences of *Sturgeon*" section, as, in my view, it logically should do. As such, although *Folkerts* itself was primarily a case on an issue of departure and its interaction with delay, unlike *Schenkel* and *Sanghvi* it did at least consider *Sturgeon* and apply the concept of irreversible loss of time, see para. [32],

> *"it must be noted that the Court has held that when their flights are subject to long delay, that is delay equal to or in excess of three hours, passengers of such flights are entitled to compensation on the basis of Article 7 of Regulation No 261/2004, like those passengers whose original flights have been cancelled and whom an air carrier is not able to offer re-routing in accordance with the conditions laid down in Article 5(1)(c)(iii) of Regulation No 261/2004, given that they suffer an irreversible loss of time and, hence, a comparable inconvenience (see Sturgeon and Others, paragraphs 60 and 61, and Joined Cases*

C-581/10 and C-629/10 Nelson and Others [2012] ECR, paragraphs 34 and 40)."

44. Finally, in my view it would be doing a disservice to the efforts of the European Commission and the CAA to dismiss their guidance or views as without value. As with such documents generally, in my view it is all a question of weight to be attached. In that the EC guidance post-dates my decision in *Kay* and may be said to be consistent with it, I am fortified in my adherence to my then existing approach as a result.

Conclusion

45. The Claimants are each entitled to judgment for regulatory compensation in the sum claimed of £505.31, in the absence of any contest as to exchange rate to be applied and no claim for interest being advanced.

46. I further assess the Claimants' costs in the context of the fixed costs awardable had the matter been formally allocated to the small claims track in the sum of £195.

47. In accordance with the agreement between the parties and the purpose of this decision having been request, I give permission to appeal for the purpose of being heard at the same time as the existing appeal in *Gahan*. My judgment will accordingly be stayed pending the outcome of the Court of Appeal hearing.

48. Finally, whatever the ultimate determination on these issues, I hope I will be forgiven expressing this sentiment, namely to commend the parties for having the fortitude to advance matters to a court of binding authority, which agreed approach is woefully lacking in many other persistent areas of dispute in the field of flight delay claims. This is resulting in the highly unsatisfactory situation of District Judges (in the main) being required regularly to consider such issues and give judgment over and over again on

similar or identical issues, arguably an entirely disproportionate use of scarce court resources.

John Baldwin

District Judge

14th March 2017

Reasons for allowing or refusing permission to appeal (including referral to the Court of Appeal (Civil Division)), and information concerning routes of Appeal

The judge must complete this form on allowing or refusing an application for permission to appeal at a hearing or trial

Title of case/claim: BUCKLEY v EMIRATES

Case/claim no: C60YM240

Heard/tried before *(insert name of Judge)*: District Judge Baldwin

Date of hearing/trial: 13/3/17

Nature of hearing/trial: Final on paper hearing re connecting flights flight delay claim

Result of hearing/trial: Jmt for Cs

The judgment/order is
- [x] Final
- [ ] Not final

- [x] An appeal lies from this judgment/order to the CJ

OR

- [ ] No appeal lies from this judgment/order

~~Claimant's~~/defendant's application for permission to appeal
- [x] Allowed
- [ ] Refused

continued over ... e page

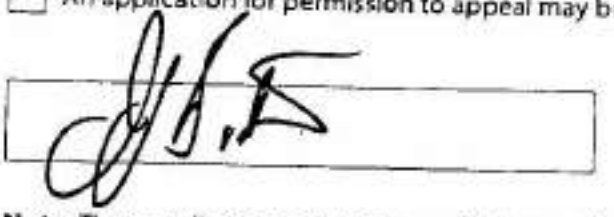
Brief reasons for decision to allow or refuse appeal *(to be completed by the Judge)*:

Binding authority required. Just given in order for C.A. to be able to consider issues arising at the same time as JAHAN v EMIRATES.

If refused

☐ An application for permission to appeal may be made to the Court of Appeal

Judge's signature



Note: The appellant must file a copy of this completed form at the appeal court with the appellant's notice when issuing the appeal.

Do you consider the appeal should be referred to the Court of Appeal (Civil Division)?

☑ Yes ☐ No

If Yes, please indicate which of the following criteria apply:

☐ There appear to be conflicting authorities

☐ There is a point of practice and procedure of significant importance

☑ There is a point of general principle and importance in the development of the substantive law

☑ A number of appeals on similar points suggest that a theme, or trend, is developing which the Court of Appeal needs to consider

Additional reasons

See above