Appeal ref: 2017/0942
Claim no. B3FY3R03

IN THE COURT OF APPEAL CIVIL DIVISION
ON APPEAL FROM THE COUNTY COURT AT LIVERPOOL
B E T W E E N:-

(1) DARREN BUCKLEY (2) KAREN BUCKLEY (3) JORDAN BUCKLEY

Claimants/Respondents

and

EMIRATES

Defendant/Appellant

RESPONDENTS' REPLACEMENT SKELETON ARGUMENT

Introduction

1. This skeleton argument is produced to assist the court at the hearing of the Defendant's appeal against the decision of DJ Baldwin on 13.3.17 [**Buck/Core/5/pg49**].

2. It is to be listed to be heard together with the appeal in the decision of Gahan v Emirates, in which the passenger Claimant is the Appellant. The writer of this skeleton argument will also represent Mrs Gahan at the combined hearing.

3. Both appeals concern claims for compensation under EC Regulation 261/2004 [**Auths/8/Pg113-9**] where delay to a first flight departing England to Dubai caused the Claimants to miss a second, directly connecting, flight from Dubai to a country not in the EU, and ultimately to arrive in their respective final destinations over 13 hours late.

4. The key difference in the factual matrix is that whereas Mrs Gahan suffered a delay of greater than 3 hours (but less than 4 hours) arriving in Dubai, the Buckleys were delayed by just 2 hours on that part of their journey.

5. This appeal thus concerns whether or not the Buckleys are entitled to compensation under EC Regulation 261/2004 by reference to the > 16 hour delay they experienced in arriving in their final destination of Sydney, notwithstanding that their first flight was

delayed less than the threshold requirement of 3 hours and that the second flight was between 2 non-EU states.

6. The court below determined that the Claimants were entitled to compensation, relying on decisions of the CJEU in the following cases:
Sturgeon v Condor Flugdienst GmbH [C-402/07] (2010) 2 All ER (Comm) 983 **[Auths/19/Pg419-429]**
Nelson v Deutsche Lufthansa AG [C-581/10] (2013) 1 All ER (Comm) 385 **[Auths/23/Pg478-493]**
Air France v Folkerts [C-11/11] (2013) 2 CMLR 44 **[Auths/24/Pg494-503]**

7. Emirates now appeals that decision (with permission), including on the basis of a new argument that an award of compensation under EC Regulation 261/2004 infringes the exclusivity of the Montreal Convention **[Auths/5/Pg93-100]** and that the CJEU cases should not be followed by this court where the Defendant is a non-Community carrier.

8. This skeleton argument is in the following sections:
- Suggested reading
- Background
- The issues in the claim
- Claimants' analysis of the framework under EC Regulation 261/2004
- Ground of Appeal 1 – Claimants' submissions
- Ground of Appeal 2 – Claimants' submissions

Suggested reading

9. The following pre-reading is respectfully recommended (estimated reading time – 90 minutes):
(1) Particulars of Claim **[Buck/Core/8/pg79-80]**
(2) Defence **[Buck/Core/7/pg72-78]**
(3) Reply to Defence **[Buck/Supp/1/pg1-4]**
(4) Agreed statement of facts **[Buck/Supp/2/pg5-7]**
(5) Judgment of DJ Baldwin below **[Buck/Core/5/pg49-69]**

(6) Skeleton arguments of Appellant **[Buck/Core/2/pg16-36]**, Respondent **[Buck/Core/3/pg37-46]**, CAA **[Buck/Supp/8/]**, Emirates' Response to CAA **[Buck/Supp/7/pg5-7]**, IATA; and Respondents' and CAA's Responses to IATA (assuming CAA is given permission to file such a response).

Background

10. The Court is referred to the Statement of Agreed Facts **[Buck/Supp/2/pg5-7]** for the full factual matrix in which this issue of interpretation of the Regulation arises. In summary:

10.1 The Claimants were booked to fly from Manchester (MAN) to Sydney (SYD) via Dubai (DXB). The intended directly connecting flights were as follows:

- Flight 1: EK0020 MAN to DXB: Scheduled departure 21:10 (local) 3 July 2015; scheduled arrival 07:25 (local) 4 July 2015.
- Flight 2: EK412 DXB to SYD: Scheduled departure 10:15 (local) 4 July 2015; scheduled arrival 06:05 (local) 5 July 2015.

10.2 The Claimants' connecting flights were operated by the Defendant and were booked by way of a single reservation. Dubai was intended only as a transit airport, the Claimants remaining airside with their baggage being immediately and directly transferred from Flight 1 to Flight 2.

10.3 Flight 1 was delayed on arrival into Dubai by 2 hours and 4 minutes, arriving at 09:29 (local time) on 4 July 2015. This did not permit the Claimants sufficient time to connect to Flight 2 (which operated on time). As such the Claimants were instead transferred by the Defendant to an alternative flight (EK414, operated by the Defendant), which arrived into Sydney at 22:44 (local time) on 5 July 2015.

10.4 Therefore, the Claimants each suffered a delay of 16 hours and 39 minutes at their final destination within the meaning of Article 2(h) of the Regulation **[Auths/8/Pg115]**.

11. As the Defendant does not raise any defence of extraordinary circumstances under Article 5(3) of Regulation 261/2004 [**Auths/8/Pg116**], the reasons for the delay are irrelevant.

12. It is accepted that the Defendant is not a Community carrier for the purposes of Article 3(1) of the Regulation [**Auths/8/Pg115**].

The issues

13. The Claimants contend that as they were to fly on directly connecting flights, departing from an EU member state (the UK), and suffered a delay in excess of 3 hours at their final destination (Sydney), they are entitled to compensation under Articles 5 and 7 of €600 per passenger.

14. The Defendant contends that only the first flight (UK – Dubai) was relevant for the purposes of the Regulation as both the second flight and its alternative (Dubai – Sydney) did not depart from an EU member state and the Defendant is not a Community carrier; see paragraphs 16 and 27 of the Defence [**Buck/Core/7/pg72-78**].

15. Consequently, the Defendant's position is that, as the first flight arrived within 3 hours of its scheduled arrival, no compensation is due, regardless of the 16 hour+ delay to the Claimants' arrival in Sydney consequential on the delay to the first flight (which caused them to miss the connecting flight).

16. As indicated above, the Defendant raises a new argument on this appeal. That is to contend that the Convention for Unification of Certain Rules for International Carriage by Air 1999 (the Montreal Convention) [**Auths/5/Pg93-100**] applies to the Defendant, a non-EU carrier, as domestic law of England and Wales and that the court does not have to and should not follow CJEU decisions to the effect that compensation under Regulation 261/2004 does not fall foul of article 29 of the Convention [**Auths/5/Pg99e**].

Claimants' analysis of the EC Regulation framework

17. A high-level summary of the Claimants' analysis of the EC Regulation framework of compensation for delay (explained in more detail in the skeleton argument produced on behalf of Mrs Gahan) is as follows:

17.1 Passengers who experience a delay of 3 hours or more in arriving at their final destination are entitled to compensation under Article 7 pursuant to Sturgeon v Condor (2010) 2 All ER (Comm) 983[**Auths/19/Pg419-429**], confirmed by Nelson v Deutsche Lufthansa AG (2013) 1 All ER (Comm) 385 [**Auths/23/Pg478-493**].

17.2 Where the passenger has directly connecting flights, it is any delay in arriving at his final destination that is the relevant delay. Although in the Claimants' case the second flight did not fall within the scope of the Regulation, the delay in arriving at the final destination via that second/alternative flight was consequential upon the delay to the first flight.

17.3 In other words, the first flight is within the scope of the Regulation and the second flight, though not itself within its scope, defines the delay caused by the flight that is within the scope of the Regulation.

17.4 Sturgeon and the more recent case of Air France SA v Folkerts (2013) All ER (EC) 1133 [**Auths/24/Pg494-503**] confirm that this is the correct interpretation of the Regulation. See in particular paras 61 & 63 of Sturgeon [**Auths/19/Pg427-428**] and paras 28-30 & 33-39 of Folkerts [**Auths/24/Pg500-502**].

17.5 The interpretation in Sturgeon [**Auths/19/Pg419-429**] and Folkerts [**Auths/24/Pg494-503**] is necessary to ensure that the Regulation is interpreted in accordance with the general principle of equal treatment, as expressly recognised in those cases. If passengers who are delayed on an in-scope flight, and thereby caused like inconvenience to those who have their flights cancelled, are not entitled to compensation, their treatment is not equal to that of the latter passengers despite the comparable circumstances. See paragraphs 48 & 49 Sturgeon [**Auths/19/Pg426-7**].

17.6 The right to compensation in these circumstances is consistent with the Regulation's objective of providing a high level of consumer protection.

Ground of appeal 1: the court below was wrong to award compensation on the facts of the case

18. The Defendant makes four arguments under this ground, which the Claimants address in turn.

(i) The DJ erred in concluding that a complaint of "delay as a whole and arising out of actual delay to flight 1" was within the scope of Article 3(1)(a) of the Regulation.

19. The Claimants do not contend that Flight 2 was within the scope of the Regulation. It is irrelevant to their claim other than that pursuant to the Regulation and the CJEU decisions identified at paragraph 6 above delay is (quite rightly) measured by reference to the time of the passenger's arrival in his final destination[1]. Necessarily, that is determined by reference to when Flight 2, or the last subsequent directly connecting flight, lands at the said destination. Flights subsequent to Flight 1, or more accurately the arrival time of the last of those flights, may be seen purely as a yardstick of delay.

20. In the case of a connection missed by reason of delay to Flight 1, the ultimate delay in arriving at the passenger's final destination is a loss of time entailed in the delay to Flight 1, since it is its unavoidable consequence; see Air France SA v Folkerts (ibid) [32-35] [**Auths/24/Pg501**].

21. It is not inconsistent with Nelson [**Auths/23/Pg478-493**] (and Folkerts [**Auths/24/Pg494-503**] is a subsequent decision anyway) to look at loss of time in this way. At paragraphs 48 to 58 of its decision [**Auths/23/Pg487-488**], the CJEU is dealing with the Montreal Convention exclusivity argument and demonstrating that the Regulation is concerned with compensating the inconvenience inherent in a loss of time as opposed to delay per se. Its comments about causal link were in that context. It still considered that the right to compensation arose from "delay which entails a loss of time

[1] Just as the level of compensation for cancellation and denied boarding is determined by reference to the passenger's final destination; see Article 7 of the Regulation [**Auths/8/Pg117**].

equal to or in excess of three hours in relation to the time of arrival originally scheduled" (paragraph 54) [**Auths/23/Pg488**]. As above, the time lost by a missed connection is a loss of time entailed in the delay leading to that missed connection. Questions of causation beyond the missing of the connection and the consequent delay in arrival at final destination do not arise.

22. There are no grounds for distinguishing Folkerts [**Auths/24/Pg494-503**]. There is nothing to suggest that any of the factors identified by the Defendant at paragraph 15 [**Buck/Core/2/Pg20**] of its skeleton argument were material to the CJEU's decision. The nationality of the carrier is irrelevant because it is the place of departure in this case that brings Flight 1 in scope.

(ii) The DJ erred in construing Sturgeon [**Auths/19/Pg419-429**] *and Nelson* [**Auths/23/Pg478-493**] *as if they were the Regulation itself.*

23. Whilst it is correct that the CJEU did not consider scope arguments in Sturgeon [**Auths/19/Pg419-429**] and Nelson, [**Auths/23/Pg478-493**] for the reasons given above such arguments are irrelevant and there is nothing in either decision to suggest that it was premised on the connecting flight itself being within scope. The issue of whether the connecting flights were within scope or not was not considered relevant in Folkerts [**Auths/24/Pg494-503**] either.

24. So far as paragraph 28 of the Defendant's skeleton [**Buck/Core/2/Pg23**] is concerned, if Flight 2 had been cancelled, the Claimants could not have said their delayed arrival at their final destination was a loss of time entailed by the delay to Flight 1. Their treatment is not preferential to others on Flight 1, it being remembered that equal treatment involves treating different circumstances differently.

(iii) The DJ erred in failing to appreciate that the illustration at paragraph 47 of the Defendant's skeleton argument shows the flaw in the Claimant's (and the Judge's) approach.

25. As the court below correctly identified, the illustration at paragraph 47 of the Defendant's skeleton argument [**Buck/Core/2/Pg28**] below only applies if the

connecting flights are treated as one flight (which would be inconsistent with the Defendant's own case). That is not the basis of the Claimants' case nor the judgment below. Mrs Folkerts would have been entitled to compensation for any loss of time entailed by delay to a within scope flight, including a missed connection that would itself be out of scope.

(iv) The DJ erred in giving undue weight to the guidance of the European Commission and the Civil Aviation Authority on the interpretation of the Regulation.

26. The DJ gave very little weight to these documents, describing himself (at paragraph 44) **[Buck/Core/5/Pg68]** as fortified in his approach by them. He was, however, perfectly entitled to take them into account as an aid to construction.

(v) The DJ erred in distinguishing Sanghvi.

27. Sanghvi **[Auths/20/Pg430-435]** is plainly distinguishable. It was a claim for compensation for denied boarding of an out of scope flight. Although the denied boarding was caused by a delay to a connecting in-scope flight, the claimant was delayed in reaching his final destination by less than 3 hours so had no delay claim. This case could therefore provide no assistance to the court below.

Ground of appeal 2: Defendant's contention that the court should not follow CJEU

28. Whilst strictly the application of the Montreal Convention **[Auths/5/Pg93-100]** to a non-EU airline may be a matter of domestic law, the court is considering a claim under the EC Regulation. The application of the Convention to the EC Regulation and the compatibility of the two instruments is a question of EU, not domestic, law; see Stott v Thomas Cook Tour Operators Ltd (2014) AC 1347 at [58-59] **[Auths/25/Pg533]** and Dawson v Thomson Airways Ltd (2015) 1 WLR 883 at [23-24] **[Auths/26/Pg546]**.

29. Section 3(1) European Communities Act 1972 provides as follows:
For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for

determination as such in accordance with the principles laid down by and any relevant decision of the European Court) **[Auths/6/Pg104]**.

As the Defendant's argument is one about the validity or effect of the scheme of compensation under the EC Regulation (in light of the Montreal Convention), this court is bound by the Act to determine it in accordance with principles laid down in the CJEU cases.

30. Were the court not so bound, it should follow the CJEU decisions in the interests of comity and uniformity; see In re Deep Vein Thrombosis Group Litigation (2006) 1 AC 495 per Lord Mance at [55] **[Auths/17/Pg396]**.

31. A consistent application of the Montreal Convention throughout EU member states contributes to the uniformity that the Convention sought to propagate; see the opinion of Advocate General Mazak paragraph 16 in Walz v Clickair SA (2011) 1 All E.R. (Comm) 1037 **[Auths/30a/Pg725a-d]**.

32. There is a particular interest in following CJEU decisions compared to those of other Convention signatory states given that, as the Defendant accepts, CJEU decisions *have* to be followed by the courts of England and Wales in cases where the Convention takes effect via the EC Montreal Regulation. It is incoherent to apply different consequences to a claim under the EC Regulation according to the route by which the Montreal Convention applies and according to whether the airline concerned is an EU-carrier or not (when the EC Regulation plainly applies to non-EU carriers operating in-scope flights).

33. A different application of the Montreal Convention to claims under the EC Regulation by EU citizens in England and Wales according to whether the carrier is EU or not would offend the principle of equal treatment.

34. The Montreal Convention should be given the same meaning whether it is being interpreted as EU or domestic law since the provision concerned is identical; see Morris v KLM Royal Dutch Airlines (2002) 2 AC 628 per Lord Hope at [63] **[Auths/15/Pg297]**.

35. Apart from the considerations above, it is respectfully submitted that the CJEU's analysis of compensation under the EC Regulation as outside of Articles 19 and 29 of the Montreal Convention is correct for the reasons it gives; see R (on the application of International Air Transport Association (IATA) and anor v Department for Transport (2006) 2 CMLR 20 at [44-46] [**Auths/16/Pg360**] and Nelson v Deutsche Lufthansa (2013) 1 All ER (Comm) 385 at [49-58] [**Auths/23/Pg488**]. It is certainly not so plainly wrong as to justify not following it.

36. In particular, it is submitted that the CJEU is right to say that the compensation scheme under the Regulation operates at an earlier stage because it applies simply by reason of cancellation, denied boarding or delay and before and without regard to any investigation of damage caused by the same. It is a statutory entitlement awarded to provide collective redress to all passengers who satisfy the qualifying criteria.

37. The Supreme Court approved the CJEU's reasoning in Stott v Thomas Cook at [54-55] [**Auths/25/Pg532**]. This court applied it in Dawson v Thomson[2] [**Auths/26/Pg536-547**]. It should not do otherwise here, simply because the Defendant is a non-EU carrier, where the Regulation applies by reason of the place of departure of Flight 1. This is squarely a matter of application of the Regulation, which is a question of EU law.

38. References to Sidhu v British Airways plc (1997) AC 430 [**Auths/13/Pg229-254**] and other cases not considering the EC Regulation are not helpful. They do not consider the particular question whether the Regulation's scheme of compensation is pre-empted by the Montreal Convention.

Conclusion

39. For the foregoing reasons, the court is bound to, and in any event should, uphold the decision of the court below and dismiss the appeal.

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Original 22nd June 2017, replacement 18 July 2017.

[2] Including by upholding the decision of the court below that s9 Limitation Act 1980 applied and not Article 35 of the Montreal Convention [**Auths/5/Pg99g**] on the basis, per the CJEU's reasoning, that a claim for compensation under the Regulation was not a claim for damages.