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Have the headwinds changed for Regulation 261/2004 claims in the UK?

The Court of Appeal decisions in *Blanche v easyJet* and *Bott & Co v Ryanair*

Airlines will welcome two recent decisions of the English Court of Appeal concerning EC Regulation 261/2004.[1] Each case involved Bott & Co, the English firm of solicitors that has made a name for itself in handling Regulation claims on behalf of consumers, as either solicitors for the claimant or the claimant itself. Furthermore, both cases resulted in a victory for the airline in question.

Blanche v easyJet

Air traffic management decisions are extraordinary circumstances

The first case concerns whether an air traffic management decision ("**ATMD**") can be considered as an extraordinary circumstance under Article 5(3) of the Regulation thereby releasing an airline from the obligation to pay compensation.

On 10 October 2014, all eastbound departures from London Gatwick were suspended by Gatwick Air Traffic Control ("**ATC**") due to thunderstorms in the area. This ATMD caused a knock-on delay to the Claimant's flight from Brussels to Gatwick as the aircraft scheduled to perform that flight was prevented from departing Gatwick for several hours. In total, the claimant suffered a delay to his arrival at Gatwick of 5 hours and 42 hours.

The claimant, represented by Bott & Co, brought a claim in the County Court at Luton under the Regulation for compensation for delay. At first instance, the airline relied on Recital 15 of the Regulation as providing that an ATMD is an extraordinary circumstance. This states:

> "*Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.*"

In response, the claimant asserted that the mere fact of the ATMD was not sufficient to constitute extraordinary circumstances, and that it was necessary to go behind the ATMD itself and consider whether the event giving rise to the ATMD, in this case the thunderstorms, could also be classified as extraordinary. This argument was rejected and the claim was dismissed by the District Judge.[2]

Mr Blanche appealed to a Circuit Judge in the County Court, Her Honour Judge Melissa Clarke, who also dismissed the claim.[3] HHJ Melissa Clarke's reasoning

[1] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 ("**the Regulation**").

[2] *Blanche v easyJet Airline Company Limited*, District Judge Richard Clarke, County Court at Luton, 21 September 2016 (unreported).

[3] *Blanche v easyJet Airline Company Limited,* Her Honour Judge Melissa Clarke, County Court at Luton, 29 September 2017 (unreported).

was very straightforward: Recital 15 provided the Court with "*clear guidance*" that if an ATMD had, as a matter of fact, caused a long delay in relation to a particular aircraft, then "*extraordinary circumstances*" should be deemed to exist provided that the carrier concerned had taken all reasonable measures to avoid that delay.

Mr Blanche obtained permission to appeal for a second time, this time directly to the Court of Appeal, on the basis that it would give the English courts the ability to provide "*definitive guidance*" on the issue. In dismissing the appeal,[4] Lord Justice Coulson began by emphasising that the starting point for consideration of delays caused by ATMDs must be Recital 15 of the Regulation.

Although this is not an operative provision, it is the only part of the Regulation that deals expressly and directly with the issue. In Coulson LJ's view, Recital 15 "*could not be clearer*" and ensured that the answer to the appeal was plain. The use of the term "*should be deemed to exist*" was of critical importance, insofar as this "*deeming provision*" meant that if an airline could show that an ATMD had caused a long delay to a certain flight, and that this delay could not be avoided by reasonable measures taken by the airline, then the court was bound to agree that "*extraordinary circumstances*" existed. In this respect, Coulson LJ agreed with the reasoning of HHJ Melissa Clarke and confirmed that the courts are not willing to go one step further and look at the reasoning behind an ATMD when considering whether "*extraordinary circumstances*" exist.

Coulson LJ gave three reasons for rejecting the appellant's argument that what matters is the underlying reason for the ATMD:

1. **Interpretation of the Regulation:** Recital 15 "*could not be clearer*".
2. **Case law:** the authorities are either of no assistance to the appellant or they support the equation of ATMDs and "extraordinary circumstances" identified in Recital 15.
3. **Policy reasons:** it would be impractical and time-consuming for airlines to routinely challenge every ATMD at the time it was made and for the courts to debate about the merits of a particular ATMD long after the event and in circumstances where ATC would not be a party to the litigation.

Given the clarity of the wording of the Regulation, you could be forgiven for thinking that no further guidance was needed on this point. Nonetheless, the Court of Appeal's judgment has provided airlines with practical guidance as to the application of the extraordinary circumstances defence to claims for delays caused by ATMDs.

In this respect, Coulson LJ stated that, in order to avail itself of the protection provided by Recital 15, "*the carrier must demonstrate the necessary causal link between the ATMD and the particular delay that is the subject of the compensation claim*." This means that carriers must be able to identify the effect that a particular ATMD had on a particular aircraft in relation to a particular scheduled flight in order to rely on the extraordinary circumstances defence. In *Blanche*, this was satisfied easily by the fact that the ATMD of Gatwick ATC had prevented the aircraft scheduled to operate the claimant's flight from arriving in Brussels until well after the scheduled departure time for that flight had passed.

No application for permission to appeal to the UK's highest court, the UK Supreme Court, was made meaning that the Court of Appeal decision is binding with respect to claims brought in England and Wales concerning ATMDs.

Bott & Co v Ryanair

Conditions of carriage bar Bott & Co from bringing claims on behalf of Ryanair passengers in the first instance

The second case can be described as a resounding success for Ryanair, an airline that has taken a novel and successful approach to addressing the problems caused for airlines by claims management companies when handling Regulation claims.

Bott & Co Solicitors entered the market for bringing Regulation claims on behalf of consumers in February 2013, shortly after the decision of the Court of Justice of the European Union ("**CJEU**") in *Nelson v Lufthansa* and *TUI v CAA*[5] in October 2012, when it was confirmed that passengers could claim compensation for long delays in addition to flight cancellations under the Regulation. Bott's business model is simple: it has a Flight Delay Compensation Department, which is staffed by a single English qualified solicitor, Mr Benson, assisted by a team of paralegals. Bott uses an on-line tool to allow prospective clients to enter their flight details and check whether their claim satisfies basic eligibility

[4] *Blanche v easyJet Airline Company Limited* [2019] EWCA Civ 69.

[5] *Emeka Nelson and Others v Deutsche Lufthansa AG* (C-581/10) and *TUI Travel plc and others v Civil Aviation Authority* (C-629/10).

conditions. This tool confirms to a passenger whether they have a prima facie claim for compensation. A Bott paralegal then manually checks the claim under the supervision of Mr Benson to ascertain whether the claim has more than a 50% prospect of success. If it does, the case will be accepted by Bott on a "no-win no-fee basis". Since it commenced its flight delay business, Bott has acted on approximately 125,000 claims; it is a high volume business.

The business model adopted by Bott is also extremely lucrative. For successful claims, Bott's fees are 25% of the total compensation amount awarded to a client plus VAT and an administrative fee of £25 per passenger, all of which is deducted from the compensation paid by an airline to Bott on behalf of a passenger before Bott sends on the remaining sum to the passenger. In 2016, Bott was handling approximately 1,100 flight compensation claims against Ryanair per month with total claims then outstanding for approximately 6,500 clients. The average recovery per claim handled by Bott was €327[6] and Bott's average fee per claim was £95. This meant that Bott's fee income from claims against Ryanair alone was over £100,000 per month, let alone other airlines.

The reality from the litany of Regulation case law at both the CJEU and English national courts levels means that for a substantial number of claims it is clear whether an airline can rely on the extraordinary circumstances defence set out in Article 5(3) of the Regulation or not. The prime example of this relates to technical defects affecting the aircraft due to operate the flight in question, following the decision of the High Court in *Jet2.com v Huzar* in 2014.[7] This means that all Bott may need to do in order to ensure that one of its client's claims is paid by an airline is send a letter of claim. This is borne out by Bott's claim that it has a 99% success rate and that the "*vast majority*" of claims do not require the issue of court proceedings.

Passengers using an intermediary claims company when bringing Regulation claims is great for businesses such as Bott but it does not make sense for consumers in the "*vast majority*" of claims where the airline pays compensation upon receipt of initial correspondence from the passenger. Moreover, the website of the UK Civil Aviation Authority ("**CAA**") encourages passengers to make direct contact with their airline if they believe they have a claim, and the European Commission, whose Information Notice to Air Passengers of 9 March 2017 states: "*Passengers should always seek to contact the operating carrier before considering other means to seek redress for their rights.*"

This desire for passengers to make direct contact is echoed by the airlines themselves. Since the huge upsurge in public awareness of Regulation claims this decade, a number of airlines have moved all or part of claims handling in-house as part of the overall customer service they offer to passengers. Ryanair went further than that by actively encouraging its passengers to contact it in the first instance regarding a claim, rather than engaging a claims handling company. The airline did this by introducing a clause in its General Terms & Conditions of Carriage ("**GTCC**") in the summer of 2016. This stated:

> **15.2 EU261 Compensation Claims**
>
> ***15.2.1*** *This Article applies to claims for compensation under EU Regulation 261/2004.*
>
> ***15.2.2*** *Passengers must submit claims directly to Ryanair and allow Ryanair 28 days or such time as prescribed by applicable law (whichever is the lesser) to respond directly to them before engaging third parties to claim on their behalf. Claims may be submitted here.*
>
> ***15.2.3*** *Ryanair will not process claims submitted by a third party if the passenger concerned has not submitted the claim directly to Ryanair and allowed Ryanair time to respond, in accordance with Article 15.2.2 above.*

Ryanair also stopped dealing with Bott on outstanding claims and instead began to communicate directly with Bott's clients, and to pay compensation directly to them. This approach caused Bott a number of problems, such as it would issue proceedings on behalf of a client and then discover that Ryanair had settled the claim or responded directly to the client disputing the claim on the merits without Bott having a chance to consider Ryanair's arguments. A second, and more problematic issue for Bott in terms of the viability of its business model, was the fact that the payment of compensation by Ryanair directly to the passenger (i.e. Bott's client) meant that Bott lost the opportunity to deduct its fees from the compensation before it is paid to the client. This meant that Bott

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[6] Article 7(1) of the Regulation provides for different levels of compensation for long delay to or cancellation of flights depending on the length of the flight in question: (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 2,500 kilometres, and (c) EUR 600 for all flights not falling under (a) or (b).

[7] *Jet2.com Ltd v Huzar* [2014] EWCA Civ 791.

had to pursue its own client to recover its fees with, Bott said, only a 70% success rate.

Following the introduction of Article 15.2 in Ryanair's GTCCs, Bott commenced Part 8 proceedings in the English High Court against Ryanair claiming that it had a solicitor's equitable lien over the compensation paid directly by Ryanair to passengers. A solicitor's equitable lien is a right for a solicitor to ask the court to intervene in order to protect that solicitor's entitlement to fees as against a client. Bott also asserted that Article 15.2 of Ryanair's GTCCs was invalid under EU law, namely it contravened Article 15.1 of the Regulation as it limited or waived obligations vis-à-vis passengers pursuant to the Regulation, and Article 15.2 of Ryanair's GTCCs was unfair to passengers within the meaning of Article 3 of the Unfair Contract Terms Directive. The High Court roundly rejected all of these arguments and dismissed Bott's claim.[8]

Bott appealed to the Court of Appeal. The appeal was heard in early February 2019 and judgment was handed down within a week.[9] Despite Bott's attempts to adduce new evidence a day before the appeal was heard, and a reference to new case law of the UK Supreme Court regarding equitable liens,[10] the Court of Appeal agreed with the High Court's decision. Lord Justice Lewison's judgment commented that the fact that the Regulation sets out the amount of compensation with reference to flight distance and the length of delay means that *"[t]he making of a claim under Regulation 261 is largely mechanical and formulaic*". Since Bott's evidence was that the "*vast majority*" of claims did not require the issue of court proceedings and the firm had a 99% success rate, Lewison LJ did not consider that the services provided by Bott in processing the claims were "litigation services" that may give rise to a solicitor's equitable lien or be required "*in order to promote access to justice*". Furthermore, he ruled that the recognition of an equitable right in relation to flight delay claims would "*place a solicitor in a far more privileged position than a claims handler performing the same services*", for which he could not see any justification. He therefore rejected Bott's ground of appeal relating to the claim for an equitable lien.

As to whether Article 15.2 of Ryanair's GTCCs was invalid, Lewison LJ stated that he found it difficult to see how Article 15 of Ryanair's GTCCs could outlaw a procedure devised by the airline for handling delay compensation claims simply on the ground that it prescribed a process. To the contrary, Lewison LJ commented that Article 15, in conjunction with Ryanair's online process, "*enables a passenger to claim compensation with the minimum of effort*", and conforms with advice given by regulators such as the CAA and the European Commission.

Bott has requested leave to appeal to the UK Supreme Court. Given the UK Supreme Court's track record in denying leave to appeal in relation to claims concerning the Regulation,[11] it will be interesting to see whether leave to appeal is granted.

In the absence of a successful appeal to the UK Supreme Court, the *Bott & Co v Ryanair* decision could sound the death knell for the business models of claims handlers such as Bott similar to the effect of the case of *Menditta v Ryanair*,[12] which resulted in some claims management companies withdrawing from the UK flight claims market. As Ryanair is the largest European low cost carrier, the removal of Ryanair passengers from Bott's pool of clients is a huge loss. If further airlines were to adopt similar clauses in their conditions of carriage to those used by Ryanair, this could make flight claims unprofitable for claims management companies in the UK. At present, only Wizz UK appear to have adopted a similar clause.

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[8] *Bott & Co Solicitors Ltd v Ryanair DAC* [2018] EWHC 534 (Ch).
[9] *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143.
[10] *Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd* [2018] UKSC 21.
[11] Applications for permission to appeal decision in *Jet2.com Ltd v Huzar* [2014] EWCA Civ 791, *Dawson v Thomson Airways Ltd* [2014] EWCA Civ 845 and *Gahan v Emirates; Buckley v Emirates* [2017] EWCA Civ 1530 were all rejected.
[12] *Menditta v Ryanair,* Graham Wood QC, County Court at Liverpool, 31 May 2017 (unreported). This case held that a jurisdiction clause in the carrier's conditions of carriage providing that a passenger must bring a claim for compensation for flight delays or cancellations under the Regulation in the Irish courts defeats claims brought in other national courts.

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