



STOTT V THOMAS COOK TOUR OPERATORS LTD AND HOOK V BRITISH AIRWAYS PLC

Court of Appeal upholds exclusivity of Montreal Convention 1999 in respect of claims brought under Regulation (EC) 1107/06 by disabled passengers and passengers with reduced mobility

*On 7 February 2012, the Court of Appeal held that, where an alleged breach of Regulation (EC) 1107/06 of the European Parliament and the Council of 5 July 2006 concerning the rights of disabled passengers and passengers with reduced mobility (**Regulation**) occurs between embarkation and disembarkation, no private law remedy is available under the Regulation due to the exclusive liability regime of the Montreal Convention 1999 (**Convention**). The Court of Appeal stated that the Regulation and UK implementing legislation must not trespass on the territory of the Convention.*

BACKGROUND

Both Mr Hook and Mr Stott brought proceedings against BA and Thomas Cook respectively complaining of injury to feelings as a result of failure by the airlines to meet seating needs pursuant to promises apparently made during booking.

The Hook claim arises in relation Mr Hook's return flights with BA from London Gatwick to Paphos, Cyprus in 2008. Mr Hook, who is a disabled passenger within the meaning of the Regulation, complained that BA failed to make reasonable efforts to meet his seating needs, contrary to Article 10 and Annex II of the Regulation. Article 10 requires carriers to provide assistance specified in Annex II to passengers, which includes the making of all reasonable efforts to meet the

seating needs of individuals with a disability or reduced mobility, upon request.

BA challenged the applicability of the Regulation in the present set of circumstances, on the basis that any breach would have occurred on board the aircraft and so any private law remedies provided by the Regulation were precluded by application of the Convention. The claim was struck out at a summary judgment application hearing in Central London County Court.

Similarly, Mr Stott's claim arose from flights booked with Thomas Cook from East Midlands to Zante, Greece in 2008. Mr Stott, also a disabled passenger within the meaning of the Regulation, was granted a declaration by the trial judge that his rights under the Regulation had been breached, as he did not receive the seating he was promised, but his claim for damages was dismissed on the basis of exclusivity of the Convention. Thomas Cook did not challenge the declaration but Mr Stott appealed against the rejection of his claim for damages.

An appeal to the High Court by both Hook and Stott was dismissed by Supperstone J in his judgment of 11 January 2011¹. That judgment was the subject of this appeal to the Court of Appeal.

MAIN ISSUE

The main issue in both cases was the relationship between the Regulation and the UK Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations² (**Implementing Regulations**); and the Convention³ as implemented in EU law by Regulation (EC) 2027/97, as amended by Regulation (EC) 889/2002.

Article 9 of the Implementing Regulations provides that infringement of a passenger's rights under the Regulation, including the failure to meet reasonable seating requirements, may be subject to a civil claim for damages, including damages for injury to feelings.

Article 17 of the Convention provides passengers with a cause of action for bodily injury suffered as a result of an accident on board an aircraft or during the course of embarkation or disembarkation. However, it is well established that such a bodily injury would not include injury to feelings, and pursuant to Article 29 of the Convention, any action for damages in the carriage of passengers by air, however founded, must be brought subject to the conditions and limits of the Convention.

SUBMISSIONS

The Appellants submitted that the Regulation was made to give fundamental rights and access to air travel to disabled persons, and that such persons must be provided with an effective, proportionate and dissuasive remedy in the event of breach of the Regulation. It was submitted that the UK was entitled to make provision for actions for damages including damages for injury to feelings.

It was also submitted by the Appellants that exclusivity of the Convention, as set out in *Sidhu*⁴ and other cases relied on by the Respondents, was overextended by the courts. It was submitted in the alternative that the Convention, as implemented in the EU, cannot overrule the requirements of the Regulation, which was later in time and made to give effect to fundamental rights.

The airlines submitted that the Appellants' cases transgressed the principle of exclusivity of the Convention, which is established by numerous authorities from various jurisdictions. It was further submitted that the Convention is an integral part of EU law and neither the Regulation nor the Implementing Regulations can override it. As the Appellants' claims fell out with the categories of liability provided for by the Convention⁵, Article 29 had the effect of barring their claims.

OBSERVATIONS

The Court of Appeal made the preliminary observation that the Convention governs events from boarding to disembarkation, and that breaches of the Regulations

have a broader temporal scope, including breaches occurring during booking to boarding period e.g. failure to process promised arrangements. The Court of Appeal further noted that a wrongful act or omission occurring before boarding, if un-rectified, may cause distress which only crystallises on board.

The Court of Appeal further observed that the Convention, and its predecessor the Warsaw Convention 1929, have a long and established "pedigree", whereas the Regulation's origin dates back to the Commission proposal of 2005⁶.

The Court of Appeal considered two of the cases cited, namely *Sidhu*, and *IATA v Department for Transport*.⁷ In the former case it was held that the plaintiffs had no rights in respect of their injuries save under the Convention. In the latter case, the Grand Chamber of the CJEU held that there was no inconsistency between the Convention and Regulation (EC) 261/04 on delay, denied boarding and cancellation because the type of immediate assistance provided for by the Regulation occupied a different stage of the system than the delay provisions of the Convention.

What fell to be considered in the present cases was whether they were *Sidhu*-type or *IATA*-type cases.

REAFFIRMING EXCLUSIVITY OF THE CONVENTION

In dismissing the appeal the Court of Appeal held that it was "*abundantly clear*" from the domestic authorities cited by the Respondents that, quoting *Sidhu*, "*in those cases with which it deals*" the *Montreal Convention* has exclusivity in domestic law".⁸

On the authorities cited from non-EU jurisdictions, the Court of Appeal held that "[t]hey plainly show a consistent approach, unequivocally applying the exclusivity principle and doing so in an expansive way. They offer no support to Mr Hook and Mr Stott."⁹

In relation to the CJEU cases cited¹⁰, the Court of Appeal noted that the Convention had been affirmed as an important part of European law. The Court of Appeal observed that the Regulation and its Implementing Regulations did not occupy a space left vacant by the Convention, thereby separating them from the situation in the *IATA* case where Regulation (EC) 261/04 was held to operate within different frameworks and at different stages from the delay provisions in the Convention.

The Court of Appeal stated that permitting a civil claim for damages for injury to feelings was not necessary to ensure the rights created by the Regulation, and their enforcement, are "*effective, proportionate and dissuasive*" and that it was "*incumbent upon [the court] to construe EU and domestic legislation so as to avoid a conflict with the Montreal Convention.*"¹¹

The Court accepted that the Convention did not cover every manifestation of the relationship between the passenger and the airline, but held that “*once one is within the timeline and space governed by the Convention, it is the governing instrument in international, European and domestic law*”.¹²

The Court of Appeal observed that it was open to the EU and domestic legislatures to develop law in the area of access for disabled passengers “*provided that they did not trespass into the domain of the Convention.*”¹³

It was held that there was no reason to depart from the comity approach, which extends beyond the Member States of the EU.

CONCLUSION

This decision is an important addition to the catalogue of domestic, European and international case law affirming the exclusivity of the Convention. It provides useful clarification for passengers and airlines on the boundaries of the Regulation, and confirms the application of the pre-emptive effect of the Convention, regardless of the nature and basis of the claim.

That said, it is unlikely to be the last case arising from potential discord between the emerging body of European consumer rights legislation and established international air law.

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¹ [2011] EWHC 379, judgment dated 25 February 2011.

² 2007 SI 2007/1895.

³ The Convention on Unification on Certain Rules for International Carriage by Air signed at Montreal.

⁴ *Sidhu v British Airways Plc* [1997] AC 430.

⁵ Namely claims for death or bodily injury to passengers as a result of an accident pursuant to Article 17; claims for loss/damage to baggage pursuant to Article 18; and, passenger and baggage delay pursuant to Article 19 of the Convention.

⁶ *Proposal for the Regulation of the European Parliament and the Council concerning the rights of persons with reduced mobility when travelling by air. Com (2005) 47 Final, Brussels, 16 February 2005.*

⁷ [2996] 2 CMLR.

⁸ Paragraph 36 of the Judgment.

⁹ Paragraph 44 of the Judgment, citing main authorities including *El Al Israel Airlines Ltd v Tsui Yuan Tseng* 525US155(1999); *King v American Airlines* the US Court of Appeals; and South African case *Potgieter v British Airways Plc* (2005) (2) SSA 13(C).

¹⁰ *IATA, Rehder v Air Baltic* [2010] Bus LR 549, *Walz v Clickair SA* [2011] Bus LR 855 and *Rodriguez v Air France Case C-83/10, Wallentin-Herman v Alitalia - Linee Aeree Italiane* [2008] ECR I-11061.

¹¹ Paragraph 50 of the Judgment.

¹² Paragraph 53 of the Judgment.

¹³ *Id.*

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