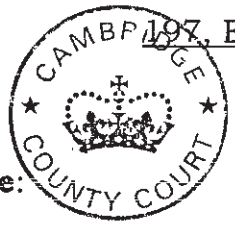
Case No: 2QZ57244

IN THE CAMBRIDGE COUNTY COURT

197, East Road, Cambridge

Date: 29/07/2013



Before:

HH JUDGE YELTON

- -

Between:

JAMES DAWSON	**Claimant**
- and -	
THOMSON AIRWAYS LTD.	**Defendant**

- -

- -

The claimant in person
Robert Lawson QC (instructed by Herbert Smith Freehills LLP) for the defendant

Hearing date: 15th July 2013

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HH JUDGE YELTON

HH Judge Yelton:

1. I have before me a claim brought by Mr. James Dawson against Thomson Airways Ltd. for a relatively small sum of money. The claim was originally allocated to the small claims track but the defendant is worried about the point of law in the case and on its application it was reallocated to the multi-track, on the basis that the defendant would not in any circumstances claim costs against Mr. Dawson.

2. The facts out of which the claim arises are very straightforward. On Christmas Day 2006 Mr. Dawson and another were booked to fly with the defendant from Gatwick to the Dominican Republic. The flight was very considerably delayed: it is accepted that when it arrived at its destination it was 6 hours 26 minutes late. It had in fact left Gatwick very late, apparently because of crew shortages brought about by sickness.

3. Mr. Dawson claimed to be entitled to the sums set out in EC Regulation 261/2004 as a consequence of the delay. That Regulation has been interpreted as setting out a fixed sum of 600 Euros per head for delay of this duration in relation to flights of this length.

4. The defendant accepts that had Mr. Dawson brought these proceedings within two years of the incident, then they would be liable to him for the sums claimed. However they say that the proceedings were brought too late.

5. The issue in the case can be simply stated. It is whether the limitation period for a claim of this nature is (a) two years, as provided by the Montreal Convention 1999 or (b) six years, as provided by s9 of the Limitation Act 1980. If it is two years the claim fails: if it is six years the claim succeeds.

6. The defendant and other airline operators are very concerned about the matter because apparently there have been and are likely to be a large number of such claims brought some time after the delay in question.

7. There is no doubt that in English domestic law the governing provisions in relation to the relationship between passenger and airline are the Carriage by Air Act 1961 and the Montreal Convention of 1999, which succeeded the Warsaw Convention of 1929. There is equally no doubt that the English courts at the highest level have maintained in strong terms that a passenger can take proceedings against an airline only under the terms of the successive Conventions. The judgment of the House of Lords, given by Lord Hope of Craighead, in Sidhu v British Airways plc [1997] AC 430 is extremely clear. At p447F-H Lord Hope said:

> "The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger would sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention."

8. The decision in Sidhu has been followed in many other cases since that time.

9. By Article 19 of the Montreal Convention: "The carrier is liable for damage occasioned by delay in the carriage by air of passengers..." Any claim under that Article is limited in amount, and also, by virtue of Article 35, must be brought within two years or the right to do so is "extinguished".

10. The European Community then, in 2004, set out in Regulation 261 further provisions, which replaced and extended an earlier provision from 1991. The new Regulation applied only to those departing from an airport within the Community on a flight operated by a "Community carrier": in other words they apply to Mr. Dawson's flight from Gatwick with Thomson.

11. The crucial Articles of the Regulations are 4, 5 and 6.

12. Article 4 provides for "denied boarding" and stipulates that in the event of a passenger not being given a place on the plane he should (i) receive compensation in accordance with Article 7 and (ii) receive assistance in accordance with Articles 8 and 9, which deal with meals and the like. Article 7 sets out a scale of fixed payments which depend on the length of the flight.

13. Article 5 deals with cancellation. It provides that in the event of cancellation, the aggrieved passenger has the right to assistance in accordance with Articles 8 and 9 and the right to compensation under Article 7, with exceptions.

14. Article 6 deals with delay. It provides that where the time of departure is delayed, assistance under Articles 8 and 9 should be given. Nothing is set out in relation to payment of compensation for delay.

15. Many airlines were not happy with the provisions of the Regulation and took proceedings in this country, which were then referred to the European Court of Justice: see Regina (on the application of International Air Transport Association and another) v Department of Transport [2006] 2 CMLR 20. One of the challenges was that the terms of Article 6 (providing for assistance in the form of food and the like) were contrary to the Montreal Convention and this was one of, indeed the first of, the questions referred to the European Court. It was clear that some of the provisions enacted in the Regulation were not within the scope of the Convention, as that only applies after a passenger has checked in (see Phillips v Air New Zealand Ltd. [2002] EWHC 800 [2002] 1 All ER (Comm) 801).

16. The Court held that the provisions of Article 6 were not inconsistent with the Montreal Convention, but rather gave the passenger additional rights which operated at a different time from the system resulting from the Convention (see paragraph 46). In paragraph 45 the Court said:

> "It does not follow...that the authors of the Convention intended to shield [the] carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts".

17. In other words, the court was holding that the rights given under the Regulation were separate from and in addition to any rights the passenger had under the Convention.

18. There appears to be no comprehensive textbook in print at present on these matters, but it is interesting that Professor Malcolm Clarke in his Contracts of Carriage by Air (2nd Edition, 2010) says at p9 that "The position stated by Lord Hope [in Sidhu] must now be read subject to the effect of the European regulations": this is the stance of the claimant.

19. The problems which have led to the present litigation stem particularly from the decision of the European Court in the case of Sturgeon v Condor Flugdienst GmbH and Bock v Air France [2010] Bus LR 1206. The question referred to the Court in that case was whether a flight delay was to be treated as a cancellation when the

delay was long, and whether such a delay was to be assimilated to a cancellation for the purposes of compensation.

20. The decision of the court was that cancellation and delay were two separate concepts but it went on to say that:

> "Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in article 7 of the Regulations where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier".

21. It is by virtue of that interpretation that the claimant brings this action. He relies upon the time when he arrived in the Dominican Republic, although in fact he also left late.

22. The next case involving the European Court is Nelson and others v Deutsche Lufthansa AG and Regina (on the application of TUI Travel and others) v Civil Aviation Authority. This is reported at [2013] 1 All ER (Comm) 385. The Court upheld the reasoning in the Sturgeon case and held that Articles 5-7 were valid.

23. The final relevant case in the European Court is that most relied upon by the claimant. It is Cuadrench Moré v Koninglijke Luchvaart Maatschappij NV (KLM), [2013] 1 Lloyd's Law Reports 341. This was a reference from the court in Barcelona on the interpretation of Regulation 261/2004, which lays down no limitation period. The court was asked whether the Regulation should be interpreted as meaning that the time limits should be determined under the Montreal Convention or in accordance with the rules of each member state on the limitation of actions. The Court held that the time limit for a claim under the Regulation was in accordance with the rules of each member state: in Spain that was apparently 10 years.

24. Mr. Dawson says, understandably, that this decision must mean that the appropriate limitation period in England is 6 years, in accordance with s9 of the Act of 1980. Mr. Lawson QC says that if you apply the law of England, you must apply the Convention time limits of two years, because Sidhu holds that that is the case. He says in effect that I have to interpret the decision in Moré by concluding that (i) you do not apply the Convention time limit directly but (ii) you apply English law, which incorporates the Convention time limit. He invites me to disregard the reasoning of the Court at paragraph 28 where it was said that the compensation measure in Regulation 7 was outside the scope of the Convention.

25. I am afraid that that argument strikes me as specious.

26. By virtue of s3 of the European Communities Act 1972, any question as to the interpretation of a Community instrument is a matter of law to be determined by an English court in accordance with the principles laid down by and any relevant decision of the European Court. Leading counsel for the defendant submitted that I was bound by the decisions of the European Court which I have set out, but I could disregard the reasoning. That seems to me illogical: I must apply s3, by which I am enjoined to have regard to the principles laid down.

27. It seems to me that if I apply the principles set down by the European Court, which are very clear, compensation under Article 7 is outside, not within, the provisions of the Montreal Convention and so in those circumstances the time limit is not fixed by that Convention but by the general rules: in other words it is 6 years. It seems to me that it is a bold submission on the part of the defendant that the court should not follow Moré, or perhaps more exactly that it should not follow its spirit.

28. It follows that the claimant succeeds.

29. In the light of the importance of the decision, I shall give the defendant permission to appeal on terms that no order for costs is sought against the claimant. In that way there can be a decision by a higher court on the issue which will bind others.