EXTRAORDINARY CIRCUMSTANCES: TIME FOR SOME MUCH NEEDED CLARITY IN THIS COMPLEX AREA OF LAW

Coby Benson

Introduction

Since 17th February 2005 passengers travelling within the Member States of the European Union have been afforded the protection offered by Regulation (EC) No 261/2004, known colloquially as ‘The Denied Boarding Regulations.’

As the name suggests, the Regulation defines the rights a passenger has when they have been denied boarding, however it also applies to passengers whose flights have been cancelled or delayed.

The rights a passenger has under the Regulation can be divided into 3 categories: reimbursement or re-routing (Article 8), care and assistance (Article 9) and compensation (Article 7). It is the last category that has caused the most controversy since the Regulation came into force.

Exemption to Providing Compensation

The starting point for the exemption afforded by the Regulation is Article 5(3), which provides as follows:

“An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation [or delay] is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”

Unfortunately the Regulation itself does not provide any definition of the term ‘extraordinary circumstances’, however Recitals 14 and 15 in the Preamble provide a list of examples which may give rise to extraordinary circumstances, namely political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, strikes that affect the operation of an operating air carrier and air traffic management decisions.

The definition was considered in detail by the European Court of Justice (‘ECJ’) in the case of Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA. In Wallentin-Hermann

1. Pursuant to Sturgeon v Condor (conjoined cases C-402/07 and C-432/07) and TUI Travel, British Airways, Easyjet and ABTA v CAA (C-629/10).
the ECJ was asked to consider whether there were extraordinary circumstances where a flight was cancelled (although this could equally have said delayed) due to a technical defect affecting the operation of an aircraft.

The ECJ held that although Recital 14 lists ‘unexpected flight safety shortcomings’ as a possible extraordinary circumstance and although a technical problem may be amongst those shortcomings, the fact remains that the circumstances surrounding such an event can only be characterised as ‘extraordinary’ if they relate to an event which, like those listed in that recital, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.

The Court therefore imposed a two part test:—

1) Was the event inherent in the normal exercise of the activity of the air carrier concerned; and

2) Was it beyond the actual control of that carrier on account of its nature or origin.

The ECJ added that air carriers are confronted as a matter of course with various technical problems to which the operation of an aircraft inevitably gives rise and therefore the resolution of a technical problem caused by failure to maintain an aircraft must be regarded as inherent in the normal exercise of an air carrier’s activity.

Helpfully, the ECJ gave two examples of circumstances that will not be considered extraordinary:—

a) Technical problems which come to light during maintenance of aircraft; or

b) Technical problems caused by failure to carry out such maintenance.

The Court also gives examples of circumstances which would be extraordinary, namely hidden manufacturing defects which impact on flight safety or acts of sabotage or terrorism.

The case of Denise McDonagh v Ryanair Ltd (C 12/11 31/1/2013) confirmed the Wallentin-Hermann test and also elaborated by stating that “In accordance with everyday language, the words ‘extraordinary circumstances’ literally refer to circumstances which are ‘out of the ordinary.’”

Let’s take as an example a technical problem which was identified on push back and has occurred despite the fact that the aircraft has been maintained properly.

An air carrier will typically argue that as the technical problem was (a) not identified during maintenance or (b) not caused by a failure to maintain the aircraft properly then it must automatically be extraordinary. In effect, the airline is seeking to argue that the two categories listed above are an exhaustive list and since that particular problem does not fall into either category it must be extraordinary.

It is usually advanced that technical problems which come to light during maintenance or as a result of a failure to carry out such maintenance are both foreseeable consequences and therefore inherent in the normal exercise of the activity of the air carrier, hence they are not extraordinary circumstances.

The difficulty with this interpretation however is the suggestion that the ECJ were stating categorically and without reservation that failing to carry out required and proper maintenance is an event inherent in the normal operation of an air carrier. No doubt all would agree
that failing to maintain an aircraft properly must be out of the ordinary and therefore not inherent in the normal operation of an air carrier.

This paradox can be solved by interpreting the ‘failure to carry out such maintenance’ provision as introducing a concept of strict liability, i.e. if a technical problem occurs because a part fails then it is a feature that is automatically deemed inherent in the normal operation of the air carrier and therefore not extraordinary. This differs from technical problems caused by hidden manufacturing defects, sabotage or terrorism because they do not arise as a result of any failure to maintain.

This strict liability approach has been adopted by the Courts in the Netherlands and it has been noted that in Germany “[It is] so difficult for airlines to bring themselves within the Article 5(3) defence when an aircraft has suffered technical difficulties that it is only extremely rarely that a court will be prepared to withhold compensation when an aircraft has ‘gone tech’.”

Unfortunately however this is not the case in England, where the Regulation itself is still relatively new to the judiciary. The majority of claims concerning unexpected flight safety shortcomings have been presented to the courts by litigants in person and this has led to a large number of inconsistent County Court decisions which have done nothing but muddy the already very murky waters.

**English Test Case**

Due to the large number of inconsistent decisions being reached by various Courts all over the country it quickly became apparent that a test case was needed in order to add clarity to this complex area of law.

In October 2013 His Honour Judge Platts, sitting at Manchester County Court, delivered his appeal Judgment in the matter of *Huzar v Jet2.com*, the first test case brought to examine the operation of Article 5(3) in the context of technical problems with an aircraft.

The issue in *Huzar* was whether a delay caused by the rectification of an unexpected, unavoidable and unforeseeable technical defect can amount to an extraordinary circumstance, notwithstanding the fact that it was not identified during maintenance or caused by any failure to maintain the aircraft properly.

**Huzar v Jet2.com**

Mr Huzar was delayed by approximately 27 hours on a flight from Malaga to Manchester on 26th October 2011. The aircraft experienced an unexpected technical problem during its inbound flight to Malaga when the left engine fuel advisory light became illuminated indicating a possible defect in the fuel shut-off valve.

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When the plane landed the defendant arranged for a spare valve to be fitted but the problem remained. Despite further investigations it was not possible to identify the cause of the problem before the airport closed for the evening. The following day further investigations revealed a wiring defect in the fuel valve circuit such that the wiring needed replacement. As a result it was necessary to send a specialist engineer and spare wiring from the defendant’s hangar at Leeds Bradford airport.

It was argued that unless intermittent failure occurs prior to complete failure, failure of a run of wires such as that which occurred here is virtually impossible to detect. Furthermore, it was unusual for a run of wiring (rather than a wiring failure within splices) to occur. The defendant therefore concluded that:

“... the technical problem encountered was random, unexpected and not one which the defendant could reasonable have been able to anticipate. It was therefore not inherent in the normal activity of the defendant and beyond its control.”

In its Skeleton Argument the defendant elaborated on this by arguing that:

“[In Wallentin-Hermann] a clear distinction was drawn between matters arising out of routine\(^5\) maintenance, which are considered ‘part and parcel of the standard operating conditions of air transports undertakings’, and unforeseen faults which could not have been prevented or predicted by the air carrier. The entire purpose of routine maintenance is to detect and prevent technical defects from arising.”

On that basis, it was submitted that, like a hidden manufacturing defect, a latent defect not attributable to the fault of the operator should be viewed as an extraordinary circumstance. At first instance the case was heard at Stockport County Court by District Judge Dignan, who found in favour of the defendant. The Judge’s reasoning was as follows:

“I accept it could be argued that a fault with the engine wiring is not an event which is not inherent in the normal exercise of the air carrier’s activities because the engine is part and parcel of the aeroplane, but the crux is, it goes on to say, ‘and are beyond its actual control.’”

The Judge appeared minded to accept that the defect was inherent; however he said that in order for the defect to be not extraordinary it must also be outside of the airline’s control. On the latter point, he held that:

“... given the nature of the defect in the wiring, all reasonable measures were taken by Jet2.com in terms of their servicing of their aircraft and the examination that had taken place. If the wiring or the loop is somewhere between the

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5. Note: Wallentin-Hermann does not state ‘routine maintenance’, it merely refers to maintenance generally.
The claimant however felt that the learned District Judge applied the law incorrectly and accordingly he sought permission to appeal to Manchester County Court.

The Court granted permission to appeal and the case was heard before His Honour Judge Platts at Manchester County Court. At the appeal it was argued on behalf of the claimant/appellant that circumstances can only be categorised as extraordinary if the defendant can satisfy both limbs of the Wallentin-Hermann test, i.e. that the technical problem was (a) not inherent and (b) beyond the actual control of the air carrier.

It was submitted that in relation to the ‘inherency’ test one must look at those attributes of the flight which are either inherent or internal to it. Furthermore, the District Judge wrongly introduced into the concept of ‘inherent’ notions of whether the fault was either expected or discoverable.

In relation to the second limb of the test the appellant argued that something is within the control of the carrier if it is within the overall domain of the carrier. If the question is asked ‘under whose control was the wiring concerned?’ the answer must be the airline. Nobody else could be identified as having control over this particular wiring or fault and therefore the carrier is in control even though the fault was unforeseen or unforeseeable.

In effect it was submitted that the test is one of strict liability, as it does not matter whether something was foreseeable or avoidable, as those factors are not a determining factor when considering whether something is ‘out of the ordinary.’

It is important to bear in mind that the notion of extraordinary circumstances does not imply that the air carrier is in any way at fault for the event, but merely that they are responsible for the outcome. Indeed Article 13 of the Regulation clarifies that an air carrier is entitled to seek compensation from a third party that may have been at fault for the circumstances. This may be the case for instance where a third party collides with an aircraft, causing damage that renders the aircraft unserviceable.

This stance can be compared to the English Court of Appeal case of Stark v The Post Office which dealt with the interpretation of the phrase “Every employer shall ensure that work equipment is maintained in an efficient state” in the Provision and Use of Work Equipment Regulations 1992.

In Stark the claimant was injured at work when front brake of his bicycle snapped in two, the front wheel locked and Mr Stark was thrown over the handlebars. The bicycle was supplied by the Post Office. The defect would not and could not have been discoverable on any routine
or rigorous inspection and the court found that the Post Office had done their best to maintain the bike properly. The Court of Appeal ruled that the Regulation imposes an absolute duty, and, since the bike broke, the employers were liable to pay compensation to the claimant.

In response, the respondent in *Huzar* argued that the District Judge made findings of fact which the appellate court should be slow to interfere with and that the legislature clearly did not seek to impose a system of strict liability in the context of compensation claims, as that is a feature solely attributable to the claims for care and assistance and refund or re-routing under Articles 8 and 9 respectively.

On Appeal, His Honour Judge Platts focused his judgment on paragraph 24 of *Wallentin-Hermann*, which provides that:

> “The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier’s activity.”

In particular, he placed particular emphasis on the word ‘resolution’ and concludes that “it is the consequences of the technical problem and not the problem itself which must be considered.”

In other words, His Honour Judge Platts says that the relevant ‘event’ which must be examined is the ‘resolution’ of the technical problem, rather than the cause of the problem itself.

It was concluded (at para 28) that “[a] delay caused by the resolution of an unexpected, unforeseen and unforeseeable technical problem cannot be said to be an extraordinary circumstance.”

The defendant argues however that the *Huzar* judgment goes beyond *Wallentin-Hermann*, as it seemingly implies that any technical problem that requires rectification must not be extraordinary, i.e. regardless of its nature or origin. It is difficult to explain how then a hidden manufacturing defect (for example) can still be extraordinary, given that it is in itself a technical problem which requires rectification.

Although this judgment is not binding it was proving to be extremely persuasive, particularly for judges who were perhaps unfamiliar with this complex area of European Law and welcomed guidance from a senior Judge.

In order to appeal this decision Jet2.com did not need to demonstrate that they have a real prospect of success, but merely that the appeal raises an important point of principle or that there was some other compelling reason.

Given the sheer number of claims affected by the *Huzar* judgment, the Court of Appeal has unsurprisingly granted permission to appeal this decision (which was itself an appeal). The appeal hearing is scheduled to take place sometime between 14th April and 31st July 2014.

One would hope that the Court of Appeal adopts the same approach as that taken by the Courts in other Member States in order to ensure consistency throughout Europe. If an inconsistent decision is reached then passengers may find that they could recover compensation for
a flight in Germany or the Netherlands (for instance), but not in England. An outcome such as this would breach the fundamental principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

It is noteworthy that prior to Huzar and in order to try and add some clarity the National Enforcement Bodies (NEBs) of seven countries (including the UK) came together in April 2013 in order to produce a guidance document for use by airlines and NEBs when assessing passenger complaints. Unfortunately however that document has only made matters more confusing, as it does not seem to dovetail at all with the interpretation of Wallentin-Hermann applied by the National Courts of each of the Member States.

The list begins by providing a definition of extraordinary circumstances which oddly does not appear anywhere within the Regulation itself or the associated case law. According to the NEB list, in order for an event to be extraordinary it must be ‘unpredictable, unavoidable and external.’

It is interesting to note that in the travaux préparatoires for the Regulation, the EU legislature had initially wished to use the notion of ‘force majeure’ rather than ‘extraordinary circumstances’, since ‘force majeure’ is the notion generally used to describe events over which humans have no influence because they are unforeseeable, irresistible and external to them. However, that notion was specifically rejected and instead the legislature settled for the term ‘extraordinary circumstances.’

The NEB list effectively categorises all technical problems as extraordinary unless they arise as a result of the air carrier’s failure to maintain its aircraft in accordance with the required maintenance programme or were found during maintenance. Due to the extremely narrow interpretation applied by the NEBs, it is unsurprising that airlines are keen to rely on this supportive document wherever possible.

It is also difficult to imagine a circumstance where a passenger will be able to rely on those exclusions given that:

1. If a defect is found during maintenance then that aircraft is taken out of service. If the aircraft is out of service then it will not be operating any flights. If the aircraft is not operating flights then there can be no passengers affected by a cancellation or delay.
2. Technical problems caused by an air carrier failing to carry out the required maintenance are few and far between.

Although it was never intended for such use, the airlines routinely refer to the list in Court. In Huzar the Judge briefly referred to the list and stated that “its provenance is unclear and in any event the guidance is just that. It does not purport to be definitive or binding. Whilst it is drawn up by a body whose view deserves some respect, that body is not part of the legislature …”

In the case of Passengers v Transavia Airlines CV the Court of North Holland commented that:-

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7. See http://goo.gl/AoHr3A.
8. 591010 / CV EXPL 13-1694.
“The NEB-list is a policy rule of an administrative body, which does not bind the civil law judge. Decisions of the [NEB] based on this policy have no formal legal force. Thus, the civil law judge has to judge independently based on the Regulation and the jurisprudence of the European Court.”

In that case the Court held that a problem with the bleed air system, which occurred after pushback was not extraordinary, notwithstanding the fact that item No. 22 of the NEB list specifically states that a failure of the bleed-air system either immediately prior to departure or in-flight is extraordinary.

It is clear that there is still much work to be done in order to ensure that passengers, air carriers, NEBs and Courts all adopt a consistent approach to the application of the ‘extraordinary circumstances’ defence.

*Coby Benson is a Solicitor with Bott and Co Solicitors Ltd
He can be contacted at c.benson@bottonline.co.uk*