VOLCANIC ASH – A LIGHT IN THE DARKNESS: THE CASE OF GRAHAM v THOMAS COOK [2012] EWCA Civ 1355

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Even before the eruption of the Eyjafallajökull volcano in April 2010, it was fair to say that Regulation 261/2004 was deeply disliked by the airlines. However, the closure of EU airspace due to the ash cloud served to highlight the peculiar obligations which that Regulation places on airlines operating in the EU. Budget airlines who had in many cases charged passengers far less than €50 for their tickets suddenly found themselves obliged to provide free hotel accommodation, meals and refreshments to tens of thousands of passengers for days on end. Regulation 261/2004 sets no limits to those care and assistance obligations. An attempt by Ryanair to argue that some sort of temporal and financial limit should be read into the Regulation has not so far met with success. Advocate General Bot in his Opinion published on 22 March 2012 in *McDonagh v Ryanair* C-12/11 has held that the obligations in the Regulation without any such limits. The full Court is almost certain to follow suit when it gives judgment.

Regulation 261/2004 is deeply disliked by the airlines

The recent decision by the Grand Chamber of the European Court of Justice in the case of *Nelson v TUI* (C-581/10 and C-629/10) to uphold the much criticised *Sturgeon* decision in full has only added to the gloom for carriers. However, amongst all this bad news for the airlines, the decision of the Court of Appeal in *Graham v Thomas Cook* [2012] EWCA Civ 1355 will come as something of a pleasant surprise.

The claimant in *Graham* was booked to travel on one of the 19,000 or so flights which were cancelled on 19 April 2010 in the middle of the ash cloud chaos. Ms Graham had been due to fly on 19 April from Manchester to Jamaica and return two weeks later. Ms Graham's main complaint was that Thomas Cook had not complied with Article 8 of the Regulation by offering her a choice between re-imbursement and re-routing at the earliest opportunity. Thomas Cook's position was that at the time the outward flight was cancelled European airspace was closed and it was impossible to say when it would re-open. In the circumstances, it had offered all passengers affected by the ash chaos a full re-imbursement of the ticket price and suggested that passengers make a decision on whether to rebook once the air space re-opened, passengers stranded abroad had been repatriated and flight schedules were back to normal. Thomas Cook was naturally concentrating its attention on getting those passengers stranded abroad back home.

Ms Graham issued a claim in the Leicester County Court in which she claimed damages for breach of Regulation 261/2004. Her damages claim fell into three distinct categories: (i) a claim for unquantified 'general damages' for 'distress, anxiety, inconvenience and disappointment' (ii) a claim for £2,300 said to be the wasted expenses of a Jamaican radio presenter/music producer (iii) a claim for punitive and/or exemplary damages

provisionally quantified at between £12.5 million and £50 million.

The punitive/exemplary damages claim was based on an allegation that by simply cancelling the tickets of all passengers who had not yet embarked on flights, which had been cancelled due to the ash cloud, and inviting them to re-book at a later date Thomas Cook had made a profit. The claimant alleged that replacement tickets booked later would cost more than the cancelled tickets. She alleged therefore that re-routing on a later would have been the better option for her and Thomas Cook should be forced to disgorge its profit. Thomas Cook alleged that there was no such profit made because if anything ticket prices went down in the after-math of ash cloud debacle and in any event the circumstances of the case did not meet the strict and restrictive test for punitive or exemplary damages to be available.

The exemplary damages claim was based on an allegation that Thomas Cook had made a profit from the cancellations

However, no evidence on this point or any other was ever heard because the claim did not get to trial. Both parties asked the County Court to dispose of the case on a summary basis. The County Court gave summary judgment to both parties. Against Thomas Cook, the court declared that Thomas Cook had no defence to the claim that it had acted in breach of Article 8 of the Regulation. However, the court also dismissed the claim for damages on the basis that the Regulation did not give rise to a claim for damages (amongst other reasons). In deciding to dispose of the case on this footing, the County Court Judge followed *Parker v TUI UK Ltd* [2007] CLY 297. Since the *Parker* decision, a number of County Court judges had applied and upheld the proposition that Regulation 261/2004 did not create a free-standing private law cause of action for damages but instead created a "public law type remedy" to enforce the obligations in the Regulation.

The practical result of the County Court decisions which have endorsed and followed *Parker* is that if an airline has failed to comply with the Regulation, the only course of action available to an aggrieved passenger is to make use of one or more of the public law enforcement mechanisms created pursuant to Article 16 of the Regulation.

Although the majority of County Courts have tended to follow *Parker*, it has not met with universal support. In a decision of the Mayors and City of London Court handed down in December 2011, Circuit Judge Birtles refused to follow *Parker*. He suggested that it would be "most extraordinary" if a European Union measure designed to ensure a high level of protection for passengers and to "strengthen their rights" were only enforceable in the criminal courts or via a complaint to a designated public law body (*Marshall v Iberia* unreported 5 December 2011). The Judge in the *Marshall v Iberia* case had been referred to cases in Germany and Italy where private law claims had been brought for breach of the Regulation and damages had been awarded.

Thus when Ms Graham's case came before the Court of Appeal, it was open to the Court of Appeal to review the decisions of the lower courts and to give binding guidance on whether the approach taken in *Parker* or the contrary view in *Marshall v Iberia* was the correct one. All the existing decisions on the public law/private issue were put before the Court along with the relevant sections from English and European air law textbooks. The attention of the Court of Appeal was specifically drawn to a decision of the German Supreme Court in which damages had been awarded to a passenger where the airline had failed to organise a replacement flight "at the earliest opportunity" as required under Article 8: *BGH Judgment 25.03.2010 (Xa ZR 96/09)*.

The Court of Appeal framed the issue it had to decide as whether "a breach of Article 8 of the Regulation gives rise to a civil action for damages" (para 17). The judgment of the Court was given by Lord Justice Toulson with which Lord Justice Laws and Sir Robin Jacob agreed. The Court of Appeal held that the judge below had been "plainly correct" to hold that breach of Article 8 does not give rise to a civil action for damages. By framing the issue as being one which is confined to ascertaining the consequences of breach of Article 8, the Court side stepped having to decide the more general point made in *Parker* that no part of the Regulation gives rise to a damages claim. However, the reasoning of the Court of Appeal in *Graham* is strikingly similar to that employed in *Parker*. The central paragraph in the *Graham* judgment is as follows:

> "19. I then turn to the question whether HHJ Hampton was right to hold that breach of regulation 8 does not give rise to a civil action for damages. In my judgment her conclusion was plainly correct. It is a matter for each member state to decide how the regulation is to be brought into effect under its law. In the UK it is given effect through the Civil Aviation Regulations 2005 and through the regulatory powers of the CAA under the Enterprise Act 2002. The Civil Aviation Regulations do not purport to impose on a carrier a statutory duty for breach of which an action for damages may be brought, nor on the other hand do they take away any other cause of action which a claimant may have. Rather, the Civil Aviation Regulations make it a criminal offence to fail to comply with an obligation under the relevant articles of Regulation 261 and appoint the CAA as the designated body for the purposes of Article 16 of the Regulation; i.e. for the purposes of enforcing the regulation. The CAA's enforcement powers are to be found in the Enterprise Act."

The judge below had been "plainly correct"

The Court of Appeal then considered whether Article 12 of the Regulation, which specifically makes provision for the possibility of "further compensation" being awarded beyond that in the Regulation itself, was of assistance to Ms Graham. In this context, the Court of Appeal considered the case of *Rodriguez v Air France* [2012] 1 EMLR 40. The Court held that neither Article 12 nor *Rodriguez* assisted the claimant. The view of the Court of Appeal was that:

> "Article 12 confirms that the passenger's rights under Article 8 are not exhaustive. However, the passenger cannot rely on Article 12 to claim damages for failure by the carrier to comply with Article 8, as distinct from damages for breach of the underlying contract. Insofar as there is a breach of Article 8, the remedies for that breach are those set out in Article 8. The claim in this case is precisely of the kind which the Court of Justice has said is not permissible, i.e. a claim for additional loss caused by breach of Article 8 over and above the remedies provided under Article 8."

The key step in the argument of the Court of Appeal is the assertion that "Insofar as there is a breach of Article 8, the remedies for that breach are those set out in Article 8". This is a rather obscure assertion. It might even be said to be plainly wrong. Article 8 simple sets out a set of (passenger) rights and (carrier) obligations. It is silent on the question of remedies. The question of whether carriers should be liable in damages for a breach of Article 8 (or for that matter any other article in the Regulation) is a matter of statutory interpretation.

It is trite law that an EU Regulation creates directly effective rights in England and that an enactment of the EU legislature may not be more treated more restrictively than a domestic law enactment. A breach of 261/2004 thus falls to be treated in the same way as any other breach of any other statute. Whether breach of a statutory enactment should be held to create a private law cause of action sounding in damages is a matter of statutory interpretation. As Laddie J put it in *Muñoz v Frumar Ltd* [1999] 3 CMLR 684 at [42]:

> "Whether one is trying to determine whether there has been a breach of statutory duty under purely domestic legislation or trying to determine whether a right of action has been created under Community legislation or trying to determine whether a right of action has been created under Community legislation the question being asked is essentially the same, namely 'what was the legislative intent'".

The existence of criminal sanctions and public law enforcement mechanisms is a factor to be taken into account in deciding whether a breach of an enactment ought to be interpreted as giving rise to a private law cause of action but it is no more than that. The Court of Appeal seems to have regarded it as obvious that the public law enforcement mechanism provided in Article 16 of Regulation 261/2004 for dealing with infringements of the Regulation meant that no private enforcement by means of a civil suit was intended. In other words, the Court of Appeal seems like the County Court in *Parker* to have been convinced that the public law remedies were intended to be the exclusive remedy for aggrieved air passengers. It is doubtful to say that the European Court of Justice would take the same view. However, pending a review of the *Graham* decision by a higher court it is hard to see how any claim for damages arising from an alleged breach of any article in Regulation 261/2004 can succeed.

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