ASSIGNMENT IMPOSSIBLE? TIME FOR THE FINAL CALL FOR COMPANIES PURCHASING CLAIMS FOR DENIED BOARDING COMPENSATION?

John Bates

Passenger rights to compensation for denied boarding, delayed and cancelled flights have been with us for over 8 years. Some airlines have met their obligations to passengers better than others. The European Commission has recently weighed into the debate, expressing concern that passenger rights were not being vindicated. Should claims purchasing companies be part of the structures to bridge the gap in access to justice for consumers? What are the competing tensions in encouraging access to justice and discouraging a market in claims? John Bates looks at the issues.

Introduction

An innovative business model for consumer redress has emerged – the claims purchasing company ('CPC'). The CPC business model has come under attack. In this journal, Sarah Prager challenges the legitimacy of 'siphoning of compensation properly due to the consumer to a parasitic business which has not suffered the compensatable loss' (Prager, S,. 'Claims Purchasing Companies: The Claimant's Friend, or Unwelcome Parasite?' [2013] TLQ 103). Here, I consider the counter-arguments, in the context of CPCs and claims against airlines under Regulation 261/2004/EC ('the Regulation'). Why should English law allow this business model to survive?

The rights acquisition model

Prager describes the business model as 'brilliantly simple'. The CPC advertises its services, a consumer responds, the CPC assesses the claim's prospects of success and value, and agrees to purchase the rights, by assignment, at a sum discounted from the claim's potential value. The CPC then pursues the claim against the third party, and profits from the differential between the acquisition cost and the sums received, together with any costs that may become payable.

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Regulation rights

Readers will be familiar with the rights to compensation and assistance to passengers in the event of denied boarding, and of cancellation or long delays under the Regulation. There is wide acceptance, at least among those advising aviation businesses, that consumer claims for infringement of Regulation rights enjoy strong prospects of success. This is the product of consumer-friendly decisions cases including *Sturgeon v Condor* (conjoined cases C-402/07 and C-432/07), *TUI Travel and others v Civil Aviation Authority* and *Nelson v Deutsche Lufthansa AG* (conjoined cases (C-629/10 and C-581/10), together with a narrow interpretation, in *Wallentin-Hermann v Alitalia* (C-549/07), of the 'extraordinary circumstances' permitting an airline to escape liability. As Prager comments, 'in most cases litigation will not be necessary, and

there will be no question that compensation is payable.' Consumers themselves however may be less familiar with the Regulation or European Court of Justice jurisprudence.

The claims profile

Regulation claims are of modest value, and, depending on the rights infringed, can include assistance, meals, refreshments, transfers, hotel accommodation and additional fixed sums ranging from €250 to €600 per passenger. In April 2013, the Civil Aviation Authority reported some €95,700 being recovered by delayed UK passengers in the preceding 6 six months. The scale of infringement is difficult to ascertain. Airlines naturally shy away from disclosing this commercially sensitive information. This has prompted other business models to develop, which harvest real-time airport flight departure and arrival data, to contrast with schedules. Any aggregation of high-volume, low-value, relatively risk-free claims carries the prospects of relatively high margins on investment.

Regulation claims are of modest value

Challenges to the rights acquisition model

Two legal uncertainties threaten the survival of these nascent business models: (1) are Regulation rights capable of being assigned; and (2) should an assignment of Regulation rights to a CPC be valid?

Are Regulation rights capable of being assigned?

In section 136 of the Law of Property Act 1925, a 'debt or other legal thing in action' is capable of being assigned. Case law has developed a distinction between two classes of rights. Personal rights, where the assignor's identity is an essential aspect of it, are not capable of assignment. A classic example is an insurance policy where the policyholder's identity materially affects the level of risk accepted and premium offered by the insurer (*Peters v General Accident Fire & Life Insurance Corporation Limited* [1938] 2 All ER 267). Impersonal rights are capable of assignment. In *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2012] QB 640, the Court of Appeal determined that a cause of action in tort for damages for personal injury was impersonal and capable of being assigned.

Simpson strongly points toward a court determining that Regulation rights, being valued impersonally (including by reference to flight distances and periods of delay), are not contingent on personal identity, and are capable of assignment.

Should the law recognise the assignment of Regulation rights as valid?

This is more difficult. Two long-established English legal doctrines have traditionally prohibited outsiders to disputes from supporting the bringing or defending of claims. How do these doctrines sit comfortably (or at all) with the 'brave new world' of the modern dispute resolution landscape?

'Maintenance' and 'champerty'

'Maintenance' is 'the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification.' 'Champerty' has been described as an 'aggravated form' of maintenance, where the [outsider] receives 'a

share of the proceeds of the ... dispute.' (*Trendtex Trading Corporation v Credit Suisse* [1980] 1 QB 629). Originally, these rules sought to prevent powerful non-litigant outsiders from improperly influencing court processes, by intervening in disputes to perpetuate personal feuding. The principle of equality before the law required this protection for weaker and more vulnerable litigants in disputes against exploitation by outsiders external to the dispute. I shall return to this theme. An agreement offending the doctrines of maintenance or champerty would be void as contrary to public policy.

'Trafficking in litigation' – primary and secondary markets

In *Trendtex*, the claimant company ('T') had a right to sue a third party bank ('CBN'). T assigned that right to the defendant ('CS'), on the understanding that CS might then further sell that right on to an unnamed party. T claimed its assignment was champertous, and should be set aside. The House agreed. Lord Wilberforce considered the assignment involved 'trafficking in litigation – a type of transaction which, under English law, is contrary to public policy.' The *Trendtex* prohibition on the assignment of a bare right to litigate is a formidable obstacle to any rights acquisition model.

T claimed its assignment was champertous

Genuine interest?

One exception to the maintenance doctrine was recognised in *Trendtex* by Lord Roskill, who stated: 'in English law an assignee who can show that he has a genuine commercial interest in the enforcement of a claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty.' In *Trendtex*, his Lordship could not see any reason why CS 'should not have taken an assignment to themselves of [T's] claim against CBN for the purpose of recouping for their own substantial losses...' This seems consistent with the CPC model. The profit element is contentious.

It is uncertain what amounts to a sufficient 'genuine interest'. In *Simpson*, Moore-Bick LJ did 'not think that it is possible to state in definitive terms what does and does not constitute a sufficient interest to support the assignment of a bare cause of action in tort for personal injury.' His Lordship held that 'to encourage litigation the principal object of which is not to obtain a remedy for a legal wrong, but to pursue an object of a different kind altogether' was *not* sufficient. CPCs are engaged by consumers to provide a remedy for infringement of Regulation rights: they do not acquire Regulation rights to pursue for political or altruistic ends as in *Simpson*.

It is well- recognised that 'few litigants bring or defend suits at their own expense': *Hill v Archbold* [1968] 1 QB 686. Examples include proceedings supported by insurers and trade unions, where the doctrine of maintenance has been held not to apply. Subrogation is a better example. Under an insurance policy, an insurer can acquire rights of subrogation to stand in the shoes of a policyholder to recover the insurer's outlay. The courts have sometimes relaxed rigid principles in this area. In *Shulman v S H Simon (Electrical) Ltd* [2010] EWHC 2762 (QB), the court allowed recovery of private medical costs, notwithstanding the absence of any direct contractual relationship between the healthcare insurer and the victim employee of the policyholder.

Reappraising public policy justifications

In some circumstances, public policy tilts in favour of upholding an agreement that would otherwise be champertous. In *Trendtex* it was noted that doctrines 'must be reappraised in light of current notions of public policy' and in *Giles v Thompson* [1994] 1 AC 142, Lord Mustill considered 'the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.'

So, we return to the policy rationale for the doctrines of maintenance and champerty: upholding equality before the law and the protection for of weaker litigants against more powerful opponents. In *Alabaster v Harness* [1895] 1 QB 339, maintenance did not apply if given by 'a man [on] behalf of a poor man, who but for the aid of his rich helper could not assert his rights, or would be oppressed and overbourne in his endeavour to maintain them.' State financial support for claims, in the form of legal aid, exemplified such legitimate support.

Doctrines must be reappraised in light of current notions of public policy

Access to justice must be real, rather than illusory. Justice requires that parties have effective mechanisms for vindicating their rights and holding more powerful opponents to account. In the context of Regulation rights, in March 2013 the European Commission expressed concern that passengers have difficulty in claiming what they are entitled to under the Regulation and become frustrated when air carriers did not appear to be applying the Regulation properly (Memo/13/203, 13 March 2013). Surveys reported that, where the Regulation was engaged, less than 50% of passengers were offered meals, refreshment and accommodation, a tiny proportion (2% to 4% in a Danish survey), received any financial compensation to which they were entitled, and in a German survey, 20% of complaining passengers received no response from the air carrier. Vice President Slim Kallas commented 'It is very important that passenger rights do not exist just on paper'. The present system does not provide effective vindication of Regulation rights.

Vindication of rights can be measured in different ways. Clearly, consumers do not receive from a CPC the full value of their Regulation rights in return for their assignment, but the return may be more than the unrepresented consumer pursuing their own claim, particularly given the Commission surveys noted above. The consumer is also trading off the (irrecoverable) valuable time and effort expended by any litigant in person pursuing a small claim (£10,000 from 1 April 2013), along with the (low) risk of adverse costs liabilities and irrecoverable legal costs, even if successful.

The criticism that CPCs 'siphon compensation properly due to the consumer' overlooks the policy objective of providing legal vindication to consumers whose substantive rights have been infringed, and ultimately is somewhat paternalistic: should autonomous citizens be freely trusted to determine for themselves how and at what price they achieve a vindication of their lawful right to damages? How is this different from any civil dispute in which a party accepts a lower settlement sum now rather than the delayed chance of a higher sum? A practical vindication is better than none at all.

One protection from any perceived unfair exploitation of consumers by CPCs may lie in measuring the proportionality of profit generated by the assignee, and relating this to the legitimacy of the transaction. *Trendtex* was distinguished subsequently in *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, not cited in *Simpson*. In *Brownton*, Lloyd LJ held

that 'it was not fatal to the validity of an assignment that the assignee might be better off as a result of the assignment, or that the assignee might make a profit out of it , however, where the 'figures ... were massively disproportionate' then the agreement would be champertous.'

In *Trendtex* the original sell-on value was expected to be $800,000 but eventually realised $8m. In *Advanced Technology Structures Ltd v Cray Valley Products Ltd* [1993] BCLC 723, rights were acquired for £10,000, and sold for £10m. In *Simpson*, the assignee purchased the rights for £1, to pursue her 'campaign', and then sought to extend the cap of the claim to a potential £15,000. In all three three decisions, the agreements were champertous, but these are far removed from CPCs with margins in the order of 30-40% of claims worth just a few hundred euros.

Restrictions on the ways in which the costs of litigation can be funded threaten the vindication of any rights, particularly those of modest value. Since *Trendtex*, the litigation funding landscape has been transformed, most recently from 1 April 2013. The introduction of 'no win, no fee' agreements (conditional fee agreements) in 1995, allowed parties' legal advisers to recover a success fee – an additional fixed percentage of profit costs – if the client's litigation was successful, in return for the adviser taking a risk of not receiving any costs in the event of an unsuccessful claim or defence. In some jurisdictions, such as employment disputes before tribunals, the law has allowed legal advisers' costs to be calculated as a proportion of damages recovered, and this was extended to fees charged by expert witnesses in litigation. These developments can be seen as non-parties (i.e. legal advisers and expert witnesses) profiting from disputes, measured as a direct proportion of the 'spoils of the dispute'. Another form of external financial comfort given to clients has been the way in which legal advisers have been allowed to indemnify clients against costs orders that might be made against the client – in effect, giving the client the peace of mind of an indemnity, in return for the client instructing the law firm. In each of these developments, courts have recognised the shift in public policy towards improving access to justice for claimants (*Awwad v Gerraghty & Co* [2001] QB 570), *R (Factortame) v Secretary of State for Transport, Local Government and the Regions (No.8)* [2003] QB 381 and *Sibthorpe v Southwark London Borough Council* [2011] EWCA Civ 25). Changes have increased claimants' prospects of achieving redress for infringement of their rights. These changes have all reflected change in public policy in favour of access to justice. The trend continues with developments in permitted third party litigation funding, where external funders agree to fund costs of claimants in return for a share of the proceeds, and the advent of Damages-Based Agreements from 1 April 2013, which have reflected a public policy shift, expressed through statute, allowing legal costs to be charged as a percentage of damages recovered in all mainstream civil litigation.

In all three decisions the agreements were champertous

In *Simpson*, Moore-Bick LJ considered that "'Access to justice is not a consideration, since there is no reason to think that the assignor could not have pursued his claim as easily as the [assignee], if he wished to do so."' *Simpson* is, in my view, distinguishable. Legal representation was available to pursue claims against the Trust vigorously. An individual unrepresented consumer may find enforcing Regulation rights against an experienced commercial airline very challenging. Access to justice must be a factor.

The administration of justice is a policy factor. In *Simpson*, Moore-Bick LJ considered 'it would be damaging to the administration of justice and unfair to defendants for the law to recognise an interest of that kind ... because the conduct of the proceedings, including aspects such as a

willingness to resort to mediation and a readiness to compromise, where appropriate, is entirely in the hands of the assignee and is liable to be distorted by considerations that have little if anything to do with the merits of the claim itself'.

With respect, his Lordship fails to recognise that an assignee, as a party *in their own right*, engaging in unreasonable conduct of the types described runs not only the risk of the court's approbation but of significant adverse costs liability – more so in the post-April 2013 atmosphere of stricter compliance with the Civil Procedure Rules. Strictly, maintenance applies only to litigation, such as in *Simpson:* see *Re Trepca Mines Limited* (No.2) [1963] Ch 199, but Moore-Bick LJ's concerns do not apply readily to CPCs: neither ADR or small claims litigation for vindicating modest-value Regulation rights is likely to be engaged as proportionate or relevant. The notions of fairness to defendants are different between difficult high-risk negligence claims against a publicly-funded hospital in *Simpson* and very small claims against insured commercial airlines for infringements of Regulation rights so strong that success is almost inevitable.

Costs sanctions, recent case law, including *Fairclough Homes Limited v Summers* [2012] UKSC 26, and increased appetite for imposing penalties for contempt of court further discourage fraudulent and exaggerated claims. Axiomatically, CPCs have no scope to enlarge the value of Regulation rights claims beyond sums fixed by the Regulation (for example, *Graham v Thomas Cook Group* [2012] EWCA Civ 1355), and, as parties in their own right, they are subject to expectations as to behaviour in any dispute. Finally, in this context, concerns of fuelling a 'compensation culture' in illegitimate claims can be discounted: as has been noted, claims for infringement of Regulation rights are often practically indefensible and carry negligible risks of exaggeration.

Concerns of fuelling a 'compensation culture' in illegitimate claims can be discounted

Concluding thoughts

The combined effect of the new civil justice reforms, changes in the funding and recoverability of legal costs and structural shifts in the legal regulatory environment risks contributing to a 'perfect storm', threatening the rights of consumers to achieve effective vindication of their rights at proportionate cost. In a challenging economic climate, the risk of unmet consumer redress in lower value claims is increasing.

Claims purchasing companies occupy the contentious gap in access to justice between unrepresented consumers and experienced commercial airline carriers. Their removal risks disproportionately eroding means of consumer access to justice, and perpetuating an unfair structural imbalance, in favour of carriers apparently unwilling to shoulder responsibilities under the Regulation.,

The price of maintaining access to justice is vigilance and evolution, and as public policy moves, so must the scope of traditional doctrines potentially infringing the rights of consumers to effective vindication of their rights.

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