IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
Mr Justice Eady

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE DYSON
and
LORD JUSTICE JACOB

Between:

Laroche
- and -

Spirit of Adventure (UK) Limited

Appellant

Respondent

Charles Davey (instructed by Messrs Graham Dawson & Co) for the Appellant
Robert Lawson (instructed by Messrs Bruce, Lance & Co) for the Respondent
Hearing dates: Wednesday 17 December 2008

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Lord Justice Dyson:

Introduction

1. Hot air balloons have been used for purposes of transport by air since the 18th century. On 19 September 1783, Pilatre de Rozier, a scientist, made the first recorded launch of a hot air balloon called "Aerostat Reveillon". It contained a sheep, a duck and a rooster. The balloon stayed in the air for 15 minutes before it crashed to the ground.

2. More than 200 years later, on 20 August 2003 the claimant was being carried in a hot air balloon on a flight organised by the defendant when it crashed to the ground causing him to suffer injuries. He issued these proceedings on 8 August 2006 seeking damages for breach of statutory duty, breach of contract and negligence. The defendant asserts that the claim is subject to Schedule 1 ("Schedule 1") to the Carriage by Air Acts (Application of Provisions) Order 1967, SI 1967/480 ("the 1967 Order") (as amended) and that, in consequence, any right to damages arising from the accident was extinguished two years after the date of the accident.

3. On 22 May 2007, Judge Hammerton sitting at Dartford County Court ordered that there should be a hearing to determine "the issues as to whether Schedule 1 applied and, if so, whether its provisions as to time are determinative of the case or whether there are other matters that allow the case to proceed in terms of limitation and/or prescription".

4. By a judgment given on 17 April 2008, Eady J held so far as is material that (i) the claim is governed by Schedule 1, (ii) Schedule 1 provides the exclusive cause of action and sole remedy available to the claimant in respect of the injuries he sustained in the accident and (iii) the claimant did not bring these proceedings within the two year period prescribed by article 29 of Schedule 1. He therefore dismissed the claim.

5. It is the claimant's case that the judge was wrong to decide that Schedule 1 applied. In particular, it is submitted that the judge was wrong to hold that (i) the hot air balloon was an "aircraft" within the meaning of article 1 of Schedule 1, (ii) there was a "carriage" of the claimant within the meaning of the same article and (iii) the claimant was a "passenger" within the meaning of article 17. He appeals against these conclusions with the permission of Smith LJ. He also seeks permission to appeal against the judge's refusal to hold that the effect of the voluntary liquidation of the defendant on 29 June 2004 was to suspend the claim and the running of the two year period.

The facts

6. The facts can be shortly stated. The defendant ran a business arranging "adventure experiences". These included hot air balloon flights. In December 2001, the claimant was given a voucher for a hot air balloon flight organised by the defendant. He used the voucher for a flight on 20 August 2003. At about 17.30 hours on that day, the claimant and other customers assembled at Great Fowle Farm, Laddingford, Kent which was to be the starting point for the flight. For obvious reasons, the defendant's representatives were unable to say where the balloon would land at the end of the flight. The arrangement was that a driver would follow the balloon in a Land Rover fitted with a trailer with a view to collecting the balloon from wherever it landed and returning the customers to the starting point.

7. The defendant's representatives arrived at about 18.15 hours. There were four compartments in the wicker basket which was attached to the balloon. The central part of the basket was occupied by the pilot together with four large gas bottles. It was common ground that the speed and direction of
a hot air balloon is entirely dictated by the wind. The pilot advised the customers that the flight would last no more than an hour. The claimant and the other three customers entered the basket, each occupying a compartment, and the balloon took off.

8. After about 35 minutes, the pilot decided to make a sudden landing because the wind had picked up. The basket crashed into the ground with considerable force. The balloon then took off again and travelled a short distance before crashing again. The claimant was injured.

9. Following the accident, the claimant entered into correspondence through his solicitors with the defendant's insurers' loss adjusters. As I have said, on 29 June 2004, the defendant went into voluntary liquidation. On 27 October 2004, the loss adjusters told the claimant's solicitors that they were not disputing liability. In October 2005, however, the insurers changed their position and denied liability. The company was dissolved on 8 March 2006. Thereafter, the claimant took steps to restore the defendant to the register for the purposes of enabling these proceedings to be issued and served.

The statutory framework

10. The Carriage by Air Act 1961 (as amended) provides that the Convention concerning international carriage by air known as "the Warsaw Convention as amended at The Hague, 1955" as further amended by Protocol 1955 of Montreal 1975 ("the Convention") has the force of law in England and Wales in respect of all "international carriage of persons, baggage and cargo performed by aircraft for reward" within the meaning of article 1 of the Convention.

11. Article 3 of the 1967 Order provides that the 1967 Order applies to all carriage by air not being carriage to which the Convention applies. Article 4 provides that Schedule 1 shall have effect in respect of carriage which is not "international carriage" as defined in Schedule 2 to the 1967 Order. Schedule 1 therefore has effect in respect of carriage within the United Kingdom: see, for example, Fellowes v Clyde Helicopters Ltd [1997] AC 534, 538D-540A.

12. Schedule 1 itself replicates the Convention subject to certain exceptions, adaptations and modifications (none of which is relevant for present purposes). So far as material, Schedule 1 provides:

"Article 1

The Schedule applies to all carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

Article 17

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 24

(1) In the [carriage of passengers and baggage], any action for damages, however founded, can only be brought subject to the conditions and limits of liability set out in this Schedule without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights."
Article 29

(1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which it stopped.

(2) The method of calculation the period of limitation shall be determined by the law of the court seised of the case."

Relevant principles of construction

13. It is common ground that the judge stated the principles of construction correctly and that, although Schedule 1 governs carriage by air which is not international carriage within the meaning of the Convention, it should nevertheless be construed in a similar way to the corresponding provisions of the Convention: see Fellowes at p 552A-E.

14. The judge summarised the principles in these terms:

"24. It follows that it is necessary to apply the following principles when construing [Schedule 1]:

i) The starting point is to consider the natural meaning of the language of the article itself.

ii) It is necessary to consider the Convention as a whole and give it a purposive interpretation.

iii) The language of an international convention should be interpreted "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation".

iv) It is legitimate to have regard to the travaux préparatoires or legislative history in order to resolve ambiguities or obscurities in the enacting words, but only where the material is publicly available and clearly points to a definite legislative intention.

v) It is legitimate to have regard to any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

vi) Assistance can be sought from the relevant jurisprudence of this country and of other jurisdictions, and respect should be paid to relevant decisions of courts of other signatories to the Convention, particularly those of high standing.


The issues

15. The issues in respect of which the defendant has permission to appeal are whether Schedule 1 applies to this claim and in particular whether (i) the hot air balloon was an "aircraft" within the
meaning of article 1, (ii) the claimant was being carried pursuant to a contract of "carriage" within the meaning of the same article and (iii) the claimant was a "passenger" within the meaning of article 17. As I have said, the defendant also seeks permission to appeal against the judge's refusal to hold that the effect of the voluntary liquidation of the defendant was to suspend the running of the two year period in respect of the claim.

Two important authorities


17. In Fellowes, a police sergeant (Sergeant Herd) had been carrying out policing duties on board a helicopter and received fatal injuries when the helicopter collided with a block of flats. The issue in the proceedings brought by his widow and his mother was whether the defendants' liability was governed by Schedule 1. It was not in dispute that a helicopter was an "aircraft" within the meaning of article 1. But the issues included the questions whether (i) since there was no arrangement for the helicopter to go outside the United Kingdom, it involved "carriage" within the meaning of article 1; and (ii) the deceased was properly regarded as a "passenger" within the meaning of article 17.

18. Lord Mackay (with whom 3 of their Lordships agreed without qualification) said at p 542A-B that it was clear that the sergeant was being "carried" by the helicopter and that as a result of giving the words of article 1 their ordinary meaning, Schedule 1 applied to the "carriage" of the sergeant. Lord Mackay then considered whether the sergeant was a "passenger" within the meaning of article 17. At p 542D-E, he said that it was clear that the sergeant did not have responsibility in respect of the operation of the aircraft, which was solely under the control of the pilot. It followed that the activities of the sergeant while on the aircraft were not to be regarded as contributing in any way to the carriage of himself or the other persons on board. He was therefore properly regarded as a passenger.

19. Lord Hope said that the applicability of Schedule 1 did not give rise to any difficulty if the words in the 1967 Order and the relevant articles of the Schedule were given their ordinary meaning. He noted at p 548D-E that, on the basis of that meaning, the terms of the order and the relevant articles of Schedule 1 were so widely expressed that they applied even to a case where the person being carried was not travelling on a route which had been pre-determined by the contract with the air carrier before the helicopter became airborne. But the point which caused Lord Hope difficulty was whether the 1967 Order and the relevant articles of Schedule 1 could be given such a wide meaning having regard to the context and background of the Convention.

20. Lord Hope then embarked on a consideration of the Convention and noted the width of article 1(1) in that it applies "to all international carriage of persons, baggage or cargo performed by aircraft for reward" (emphasis added). He said at p 553C-E:

"But the starting point is the generality of effect indicated by the use of the word "all". The nationality or place of business of the carrier is irrelevant, as all carriers who undertake international carriage, as defined in article 1(2), of passengers, baggage or cargo by the aircraft are bound by the Convention. There is nothing in the Convention to indicate that the purpose for which the passenger, baggage or cargo was on the aircraft has any bearing on the question whether the Convention applies.

In my opinion the Convention agreed at Warsaw, as amended at the Hague, was intended to be, and is, capable of accommodating changes in the practice of airlines and aircraft operators with regard to the purposes for which aircraft are used to carry people and goods, and in the contractual arrangements in pursuance of which people and goods are carried by air for reward."
21. Following his review of the Convention and some foreign authorities, Lord Hope concluded at p 555F that he was not compelled by the Convention or those authorities to depart from the plain meaning of the words used in Schedule 1.

22. In *Disley*, the claimant was undertaking training to obtain a pilot’s certificate to fly a paraglider and was sitting on the front lower seat of a tandem glider and assisting the defendant, who was her instructor and had control of the flight. When the defendant attempted to land, the paraglider collapsed and the claimant suffered serious injury. The issue in that case was whether the defendants’ liability was governed by Schedule 1 and in particular whether the claimant was subject to “carriage” performed by an “aircraft” within the meaning of article 1 and was a “passenger” within the meaning of article 17. This court upheld the decision at first instance that the claim was not governed by Schedule 1.

23. Henry LJ started with the question whether a tandem paraglider is an aircraft within the meaning of Schedule 1. In approaching this question, he was influenced by the fact that gliders are exempt from the principal regulatory provisions of the Air Navigation (No 2) Order 1995 (“the 1995 Order”). Henry LJ posed the question formulated by Lord Bridge in *Holmes v Bangladesh Biman Corporation* [1989] AC 1112, 1131:

"In authorising the application of such rules, based on or adapted from the Hague Rules, to non-Convention carriage by air, what categories of such carriage may Parliament have reasonably had in contemplation as the proper subject matter of United Kingdom legislation?"

24. At [39], Henry LJ answered that question by saying that Parliament could not reasonably have had in contemplation applying the 1967 Order “to a tandem paraglider training flight, for a pilot under instruction by a paraglider school not required to have either certificates of airworthiness or an air operator’s certificate”. At [40], he said that he did not believe that “Parliament intended heavier than air non-power driven aircraft to come under the 1967 Order in circumstances where the 1995 Order exempted them”.

25. Finally at [41], Henry LJ said that he agreed with the basic distinction drawn by the judge below between air transport and recreation and that on a purposive construction of the 1967 Order, paragliders were not aircraft.

26. Henry LJ next considered whether there was “carriage” for reward. He held at [43] to [45] that the flight was not carriage since it was part of a course of instruction.

27. He then turned to the question of whether the claimant was a “passenger” and held at [52] to [56] that she was not a passenger since she was on the flight as a pilot under instruction “and so was one of the crew”.

28. Buxton LJ agreed with Henry LJ on each of the three issues, although his reasoning differed to some extent. He started at [59] with the observation that “common sense shouts out that it is bound to be inappropriate to apply to a recreational activity a Convention designed to harmonise the rules regulating commercial air transport”.

29. On the question whether the paraglider was an “aircraft”, he said at [61]:

"...The appropriate context, as Mr Lawson reminded us, was the context in which the Warsaw Convention was drawn up. The words used were indeed broad and general, to encompass all cases to which the Convention was designed to apply. But one cannot overlook that the Convention was originally for application only to international transport,
and when it was applied to domestic transport by the 1967 Order its essential terms and limits, and thus its meaning, were not otherwise altered. If one asks whether those drawing up that Convention in 1929 would have thought it to apply to paragliders, the question answers itself: not because paragliders did not then exist, but because such machines could not sensibly be used as a means, and certainly not as a regular means, of international air transport. On a purposive construction of article 1 of the Convention, paragliders are not aircraft."

30. He agreed with Henry LJ at [64] that the fee was paid for the course of paragliding instruction and not for the carriage of the claimant.

31. Buxton LJ also agreed that the claimant was not a "passenger" because the predominant contractual arrangements between the claimant and the defendant were that of trainee and instructor, not carrier and carried.

32. Bodey J agreed with both judgments.

33. It is convenient to take the course adopted in Disley and deal separately with the questions whether (i) the hot air balloon was an "aircraft", (ii) the contract between the claimant and the defendant was a contract of "carriage" and (iii) the claimant was a "passenger". But it is important to keep in mind that these concepts are not hermetically sealed from each other. Thus, for example, the question whether a person is flying pursuant to a contract of "carriage" and is a "passenger" may shed light on the question whether he is being carried in an "aircraft". But before I consider the three questions, I need to deal with the submission of Mr Davey that the fact that the claimant's flight was solely for recreational purposes is a complete answer to the judge's conclusion that the claim is subject to Schedule 1.

The flight was for recreational purposes: a complete answer?

34. In support of his submission, Mr Davey relies on the observations of Henry LJ quoted at [25] above and those of Buxton LJ quoted at [28] above. He also relies on the decision no 94-20.194 of the Cour de Cassation Chambre Civile 1 of 25 November 1997. In that case, the claimant was a passenger in an aeroplane which, for entirely recreational purposes, performed various manoeuvres such as sudden changes of direction and speed. The court held that, since the flight was recreational and not for the purposes of transporting the claimant from one place to another, the accident did not occur during the course of carriage by an aircraft.

35. I do not accept that the mere fact that the flight in the hot air balloon was for recreational purposes determines this appeal. Indeed, Lord Hope went further when he said at p 553D in Fellowes that there is nothing in the Convention to indicate that the purpose for which the passenger is on the aircraft has any bearing on the question whether the Convention applies. Although what Buxton LJ said in Disley at [59] might suggest that he considered that the fact that a flight was recreational was of itself determinative of the question whether Schedule 1 applied, I do not consider that this is how his judgment should be understood. He considered the purpose of the flight in the last section of his judgment (which is headed "The purpose of the flight"). It is clear that he was considering the purpose of the flight only in order to determine whether the claimant was a "passenger" and for no other reason. If he had been of the view that the fact that the flight was for recreational purposes was of itself determinative of the applicability of Schedule 1, he would surely have said so.

36. It is true that Henry LJ agreed with the judge below that there was a relevant distinction between air transport and recreation. But he made that observation in the course of his consideration of the question whether a paraglider is an "aircraft". In any event, he did not say that he considered that the question whether the flight was for recreational purposes was of itself determinative of the applicability of Schedule 1.
37. I agree with Buxton LJ that the purpose of the flight may be relevant for determining whether the claimant is a "passenger" being carried pursuant to a contract of "carriage". That is not inconsistent with what Lord Hope said in *Fellowes*. But in my judgment the fact that a flight is for recreational purposes is not of itself a sufficient reason for concluding that the Convention and Schedule 1 do not apply.

38. Flights for recreational purposes are now quite commonplace. Take a flight over a glacier in the Alps in an aeroplane carrying a number of passengers that is solely for the pleasure of seeing the glacier from the air. Suppose that the aeroplane crashes. On the assumption that the claimants are passengers being carried in an aircraft within the meaning of the Convention (and Schedule 1), it is difficult to see why the mere fact that the flight was for recreational purposes should of itself preclude the application of the Convention (and Schedule 1). No policy reason has been suggested as to why the court should adopt a restrictive approach to the scope of the Convention and Schedule 1. The language of the Convention itself points to the contrary. As Lord Hope said, the starting point is the generality of effect indicated by the use of the word "all" in article 1(1) of the Convention.

39. The decision of the Cour de Cassation relied on by Mr Davey does not on its face support the proposition that the question whether the flight is for recreational purposes is of itself determinative of the applicability of the Convention. The judgment of the court contains little more than an assertion that the Convention does not apply. In my view, it is perhaps best explained as a decision that a series of aerobatics and other air manoeuvres cannot properly be characterised as "carriage".

40. The fact that the flight in the present case was for recreational purposes is not, therefore, determinative of the appeal. It is, therefore, necessary to consider whether the claimant was a "passenger" pursuant to a contract of "carriage" being carried in an "aircraft".

**Aircraft**

41. Mr Davey submits a hot air balloon is not an "aircraft" within the meaning of article 1 of Schedule 1. There is no definition of "aircraft" in the Convention or the 1967 Order. Mr Davey submits that, in the absence of such definition, the ordinary meaning of "aircraft" should be applied. The Oxford English Dictionary definition is "a machine capable of flight, especially an aeroplane or helicopter". A "machine" is defined as "an apparatus using or applying mechanical power, having several parts each with a definite function and together performing certain kinds of work." The Oxford English Dictionary defines a "hot air balloon" as "a balloon consisting of a bag in which air is heated by burners located below it, causing it to rise."

42. He submits that the judge was wrong to find support in the Air Navigation Order 2000 ("ANO") for his conclusion that a hot air balloon is an "aircraft". The judge noted that the ANO classifies a balloon as a lighter than air aircraft: see article 129(4) and Schedule 2. The ANO does not assist because (i) it postdates the 1967 Order by more than 30 years and (ii) Schedule 2 of the ANO classifies gliders and kites as "heavier than air aircraft". It is true that gliders are exempt from the registration requirements of the ANO, but they are nevertheless classified as "aircraft" by the ANO. Since gliders are not aircraft within the meaning of Schedule 1 of the 1967 Order, the fact that the ANO also classifies hot air balloons as "aircraft" does not advance the argument.

43. Mr Davey also submits that an "aircraft" must be capable of performing a contract of international carriage, ie a contract of carriage between an agreed starting point and an agreed destination in different countries. It is only such a contract of carriage that was intended to be the subject of the Convention. To adopt the language of Buxton LJ in *Disley*, hot air balloons could not sensibly be used as a means, and certainly not as a regular means, of international air transport. Further, whilst
it may be possible to have an agreed starting point for a journey by hot air balloon, it is not possible to agree its destination in advance.

44. In support of his argument that a hot air balloon is inherently unsuitable for a contract of international carriage, Mr Davey relies on the provisions of the CAP 611 Air Operators’ Certificates: Operation of Balloons which inter alia prohibit an air balloon being operated more than one nautical mile from the mainland of the United Kingdom (para 2.10.1).

45. I cannot accept these submissions largely for the reasons given by Mr Lawson. In my judgment, the natural and ordinary meaning of the word "aircraft" is wide enough to include a passenger carrying hot air balloon. Mr Davey has cited one dictionary definition of "aircraft". The Pocket Oxford Dictionary defines "aircraft" as "aeroplane(s), airship(s) and balloon(s)". The word "craft" is defined in the same dictionary as including "vessels of any kind for carriage by water or air". The hot air balloon which is the subject of these proceedings was a craft designed to be used and was in fact used to carry persons by air. In my judgment, as a matter of plain and ordinary language it is difficult to see why the hot air balloon which carried the claimant on 20 August 2003 should not be regarded as an "aircraft".

46. I accept, however, that the plain and ordinary meaning of the word "aircraft" is not necessarily determinative. But it is an important starting point. I agree with what Buxton LJ said at [61] in Disley that it is necessary to adopt a purposive interpretation. In particular, it is necessary to bear in mind that the Convention was originally applied only to international transport. It is common ground that both the Convention and Schedule 1 do not apply to machines which could not realistically be used as a means of international transport.

47. Hot air balloons are undoubtedly capable of being used as a means of international transport. Before the invention of the aeroplane, they were the means of transport by air, sometimes across borders. In the modern era, they are capable of flying considerable distances. Most countries have land borders. Para 2.10.1 of CAP 611 does not bear the weight that Mr Davey seeks to place on it. First, it does not prohibit flights more than one nautical mile from the mainland of the United Kingdom. It merely describes the range or operation normally permitted by an Air Operators’ Certificate for Balloons. As paras 2.10.2 and 2.5.6 make clear, an extension can be applied for if there is evidence that operations in an extended area can be conducted safely. Secondly, flying over water involves special considerations. Hot air balloons that take off close to borders with other countries frequently cross those borders. They are undoubtedly capable of doing so.

48. A hot air balloon is designed for, and capable of, carrying passengers from one place to another. I agree with the judge that the ANO provides some support for the view that a hot air balloon is an aircraft. Subject to certain immaterial exceptions, it provides that an aircraft in flight shall be deemed to fly "for the purposes of public transport (a) if valuable consideration is given or promised for the carriage of passengers or cargo in the aircraft on that flight": articles 129(1) and 130(2). It does not exempt a balloon used for public transport from (i) the need to be registered (article 3 and Schedule 3); (ii) the need to be flown under and in accordance with an air operator's certificate granted to the operator (article 6); and (iii) the need to hold a valid certificate of airworthiness (article 8 and Schedule 3). The ANO, therefore, subjects passenger carrying hot air balloons to basic regulatory controls imposed on commercial aircraft used for public transport, in the same way as aeroplanes and helicopters. That being so, on a purposive construction of the 1967 Order, it is reasonable to suppose that Parliament intended such balloons to be subject to Schedule 1. As Mr Lawson points out, it is difficult to see why Parliament should have intended otherwise, given that by the terms of article 3 of the 1967 Order, the 1967 Order was intended to apply to "all" carriage by air not being carriage to which the Convention applied.

49. Mr Davey’s criticisms of the reliance placed by the judge on the ANO are misplaced. The relevance of the ANO is that it shows that hot air balloons used for flights where valuable consideration is
given or promised for the carriage of passengers is subject to the UK regulatory requirements affecting air transport aircraft. In other words, the ANO shows a legislative understanding that hot air balloons can be used for these purposes. It follows that the significance of the ANO does not lose its force because it also includes other things such as kites and gliders and other unmanned aircraft as "aircraft" for some purposes apart from the regulatory requirements it imposes in respect of public transport.

50. As the judge found, the hot air balloon used in this case was designed for the carriage of passengers. The defendant conducted hot air balloon flights as part of its business and the flight was for reward. In consequence, the flight was for the purposes of public transport within the meaning of the ANO and was therefore subject to the regulatory requirements of the ANO. In my view, the judge was right to hold at [40] that there was no logical basis for excluding a hot air balloon designed for the carriage of passengers from the classification of "aircraft".

51. I see no reason, therefore, why a hot air balloon should not be regarded as an "aircraft". For the reasons I have given, the fact that it is being used for recreational purposes is immaterial to whether it is an "aircraft". Nor do I consider that the fact that it is not a regular or obvious means of international transport means that it is not an "aircraft". The important point is that it is capable of being used for international transport and is so used from time to time. It can equally be said that helicopters are not a regular or obvious means of international transport, but they too are capable of being and are so used from time to time. It does not appear even to have been argued in Fellows that a helicopter is not an "aircraft" within the meaning of Schedule 1: it was clearly accepted that it is.

Carriage

52. Mr Davey submits that a contract of "carriage" in articles 1 and 24(1) of Schedule I involves agreement as to the point of departure and destination prior to embarkation. Since such agreement is not possible in the case of a hot air balloon, travel by a person in such a balloon is not "carriage". He relies on the definition of "international carriage" in article 1(2) of the Convention which provides:

"For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention."

53. But as Mr Davey recognises, the House of Lords in Fellows held that it was not necessary for a person to be carried under a contract of a particular type and rejected the submission that agreement as to departure and destination was required. He submits, however, that, if the House of Lords were to consider the matter today, they would reach a different conclusion from that reached in Fellows on this point.

54. This is because Council Regulation (EC) 2027/97 has now come into force. The Fellows decision was given in February 1997, whereas Regulation 2027/97 came into force on 9 October 1997. He submits that the 1967 Order should be interpreted in a manner which is compatible with Regulation 2027/97. Mr Davey relies on two recitals which are in these terms:

"(4) Whereas in addition the Warsaw Convention applies only to international transport; whereas, in the internal aviation market, the distinction between national and international
transport has been eliminated; whereas it is therefore appropriate to have the same level and nature of liability in both national and international transport;

....... (6) Whereas, in compliance with the principle of subsidiarity, action at Community level is desirable in order to achieve harmonization in the field of air carrier liability and could serve as a guideline for improved passenger protection on a global scale;"

55. Mr Davey submits that, in accordance with the principle of harmonisation and the elimination of distinctions between the nature of liability in national and international air transport, the definition of "international air carriage" in the Convention should apply to the definition of "air carriage" in Schedule 1 (subject to the removal of the requirement that the agreed places of departure and destination be in the territories of different High Contracting Parties).

56. I do not accept these submissions for three reasons. First, the reference in article 1(2) of the Convention to the place of departure and the place of destination "according to the agreement between the parties" is no more than a way of defining the carriage as "international": the place of departure and the place of destination must be situated "either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State." Article 1(2) goes on to say what does not count as international carriage for the purposes of the Convention, namely "carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of the Convention." It is significant that the article does not say that "the two points" within the territory of a single State must be agreed beforehand for the purposes of the Convention.

57. Secondly, as Mr Lawson points out, Regulation 2027/97 does not purport to amend, or require the amendment of, Schedule 1 in the way suggested by Mr Davey. The limited extent of its effect is summarised in its article 1, which provides:

"This Regulation lays down the obligations of Community air carriers in relation to liability in the event of accidents to passengers for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board an aircraft or in the course of any of the operation of embarking or disembarking.

This Regulation clarifies some insurance requirements for Community air carriers.

In addition, this Regulation sets down some requirements on information to be provided by air carriers established outside the Community which operate to, from or within the Community."

58. The point of the recitals relied on by Mr Davey is that the obligations and requirements imposed by Regulation 2027/97 were applied to all flights by Community air carriers, not only those governed by the Convention.

59. Thirdly, Regulation 2027/97 could have no application in the present case because the defendant has not been a Community air carrier at any material time. The term "Community air carrier" is defined in article 2(1)(b) of Regulation 2027/97 as being "an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Regulation (EEC) No 2407/92". I agree with what the judge said at [64] of his judgment:
In this context it is necessary to have regard to Council Regulation (EEC) No 2047/92 on the licensing of air carriers. It is clear from Article 1 that the regulation is concerned with the requirements for granting and maintaining operating licences by member states in relation to air carriers established in the Community. It is provided, however, by Article 1(2) as follows:

"The carriage by air of passengers, mail and/or cargo, performed by non-power driven aircraft and/or ultra-light power driven aircraft, as well as local flights not involving carriage between different airports, are not subject to this Regulation. In respect of these operations, national law concerning operation licences, if any, and Community and national law concerning the air operator’s certificate (AOC) shall apply."

Since the Court is here concerned with an instance of carriage by air performed by a non-power driven aircraft, and since the flight did not involve carriage between different airports, it is doubly clear that Regulation 2027/97 has no application to the circumstances.

**Passenger**

60. Mr Davey submits that a “passenger” within the meaning of article 17 must be in an aircraft for the predominant purpose of being conveyed from one place to another. He says that the predominant purpose of the claimant being carried in the hot air balloon was recreational (the enjoyment of the view and the experience as a whole) and not being conveyed from one place to another. The normal purpose of travelling in an aircraft is to be conveyed from one place to another. The normal use of an air balloon is purely recreational. Moreover, a hot air balloon is inherently unsuitable as a means of being conveyed from one place to another as it is incapable of direction.

61. The term “passenger” is not defined by the 1967 Order or the Convention. As Buxton LJ said in *Disley* at [70], the rule of purposive construction requires the concept of “passenger” to be looked at in the context of the Convention as a whole. I do not think that it is disputed that, in the context of the Convention as a whole, a “passenger” is someone (i) who is not regarded as contributing to the carriage of himself or the other persons on board (see *Fellowes* at p 542D-E and 548B-C) and (ii) who is on the aircraft for the predominant purpose of being conveyed from one place to another (see *Disley* at [67] and [70] to [74]). Obvious examples of persons who are carried on aircraft, but not as passengers, are trainee pilots (who are being carried for the purpose of receiving instruction) and pilots, stewards and other members of the crew (who are being carried for the purposes of carrying other persons).

62. I agree with what the judge said at [41] to [43] of his judgment. The claimant was undoubtedly being carried in the balloon at the material time and was not himself making any contribution to the process of flying. The fact that the claimant just went for the ride and the destination was to a large extent unpredictable was immaterial to whether he was carried as a passenger. The predominant purpose of the journey was to be carried by air from the starting point to the destination point, wherever that turned out to be. The claimant did not know precisely where the destination point would be, but that did not prevent him from being carried as a passenger. A person who pays to be carried on a conventional aeroplane "magical mystery tour" has no idea where the flight will end. That is the whole point of such a tour. But that does not mean that he is not carried as a passenger. I can find nothing in the Convention or Schedule 1 to indicate that such a person is not a passenger. If he is not a passenger, what is he? No plausible alternative description was provided by Mr Davey.

63. In my view, the judge was right to hold that the claimant was a "passenger" within the meaning of article 17 of Schedule 1. He was not a member of the crew. Unlike Miss Disley in *Disley*, he did not contribute to the flight in any way. He was not on board as a pilot under instruction. His role was
even more passive than that of Sergeant Herd in Fellowes, who was held to be a passenger although he was on board the helicopter directing the surveillance operations and giving necessary instructions to the pilot. As between the carrier and the carried, the purpose of the carriage of Sergeant Herd was for him to be carried as a passenger. As between the claimant and the defendant, the purpose of the hot air balloon flight was to carry the claimant as a passenger. The fact that the claimant was to be carried from one place to another by hot air balloon for pleasure or reasons of recreation did not mean that he was not carried as a passenger. In this respect, his case stands on the same footing as that of a person carried by conventional aeroplane on a magical mystery tour.

*Did the voluntary liquidation of the defendant suspend the running of the 2 year period?*

64. The claimant seeks to renew his application for permission to appeal against the decision of the judge that the claim was "extinguished" by virtue of article 29 of Schedule 1 because these proceedings were issued more than 2 years after the date of the accident.

65. The defendant went into voluntary liquidation on 29 June 2004 and was dissolved on 8 March 2006. It was restored to the companies register on 19 May 2006.

66. Mr Davey's argument runs as follows. Upon the commencement of the defendant's voluntary liquidation, the claim was suspended. The stopping of time for bringing proceedings following the commencement of a voluntary liquidation is a long-established principle of English law dating back to the 19th century: see General Rolling Stock Company: Joint Stock Discount Company's Claim (1872) 7 Ch App 646. This principle was recently applied by this court in Financial Services Compensation Scheme Limited v Lamell Insurances Limited (In Creditors' Voluntary Liquidation) [2005] EWCA Civ 1408, [2006] 1 QB 808.

67. In *New Pentax Films Inc v Trans World Airlines Inc* 936 F Supp 142, the United States District Court for the Southern District of New York held that provisions contained in the Bankruptcy Code for the automatic stay of all pre-petition claims prevailed over article 29 of the Convention: the plaintiff could not file its Convention claim until the stay was lifted.

68. Mr Davey submits that it cannot have been the intention of Parliament when it enacted the Carriage by Air Act 1961 or approved the 1967 Order and cannot have been the intention of the signatories to the Convention that a company would be able to avoid liability by going into voluntary liquidation. And yet that would be the case if there were no suspension of the running of time following the commencement of a voluntary liquidation. If Parliament had wished to prevent the suspension of the running of time under the Convention following the commencement of a voluntary liquidation, it could have so provided in the Limitation Acts. Section 39 of the Limitation Act 1980 provides that the 1980 Act shall not apply to "any action or arbitration for which a period of limitation is prescribed by or under any other enactment". Thus the provisions in the 1980 Act for the suspension, interruption or extension of the limitation period for various reasons do not apply to a claim under the Convention. There is no provision suspending the running of time in circumstances of a defendant company's insolvency.

69. In my judgment, these arguments are misconceived. It is (rightly) not disputed by Mr Davey that article 29 provides a substantive and not merely a procedural time bar: see per Lord Wilberforce in *Aries Tanker Corporation v Total Transport Limited* [1997] 1 WLR 185, 188C-G. It is also (again rightly) not disputed that Schedule 1 provides a code that is exclusive of any resort to the rules of domestic law.

70. The judge was in my view right to hold at [48] to [51] that article 29(2) does not permit the 2 year period to be suspended, interrupted or extended by reference to domestic law. The only thing that it leaves for determination by the court seised of the case is the calculation of the precise dates of the
beginning and end of the relevant two year period and the determination of whether the action has been brought within that two year period.

71. In reaching his conclusion on this issue, the judge had regard to what was said in the travaux préparatoires to the Warsaw Convention in relation to what became article 29. The first draft of what became article 29(2) was in these terms:

"The method of calculating the period of limitation, as well as the causes of suspension and interruption of the period of limitation, shall be determined by the law of the court having taken jurisdiction" (emphasis added).

72. The Italian delegation objected that the words in italics made "the legal situation of the carrier too uncertain". The Italians later proposed deleting the second paragraph so that "after two years any action dies and is no longer admissible". Their reasoning was that "the period of time, in order that there be interruption of the period of limitation, varies with the country, and it is very difficult for the shipper, the consignor to know when the interruption or the suspension begins". Their proposal was "very simple; if two years after the accident no action has been brought, all actions are extinguished". After further discussion, the Italian proposal was adopted. These discussions were in plenary session. It seems that the matter was raised again in committee, when it was decided to accept the modified Italian proposal to adopt the wording "the liability action must be instituted under pain of forfeiture within a period of two years". Despite the puzzling French contribution at that stage that "one determines at the same time the periods of interruption and of limitation. We are in agreement in substance", the Italian proposal was adopted. There was then yet further discussion which led to the adoption of article 29 in the form in which it was finally signed.

73. Although it is difficult to follow the minutiae of these negotiations, in my view it is clear that the signatories to the Warsaw Convention intended to adopt the Italian proposal that, in the interests of certainty, at the expiry of the two year period, all claims under the Convention would be "extinguished" and that the only matters for determination by the court seised of the matter would be determination of the dates and whether the action was brought within the two year period. This is a powerful indicator that the words of article 29(1) mean what they say and that the two year period is not subject to suspension, interruption or extension in any circumstances.

74. So to interpret article 29(1) would also further the object of the Convention that it was to be "a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law": see per Lord Hope in Sidhu v British Airways Plc [1997] AC 430, 453C-D.

75. I also accept the submission of Mr Lawson that this interpretation is consistent with the rule that a general provision (such as article 29(2)) cannot give validity to a rule of procedure of the court seised of the case that is in conflict with an express provision of the Convention. As Phillips LJ said in Milor S.R.L v British Airways Plc [1996] QB 702, 707E: "by way of example, if the procedural law of the chosen forum imposed a 12 month limitation period, it does not seem to me that this could displace the two year period of limitation laid down by article 29 of the Convention".

76. As regards US jurisprudence, the decision of New Pentax v Trans World relied on by Mr Davey is a first instance decision. In the subsequent decision of Fishman v Delta Air Lines Inc 132 F 3d 138, the Court of Appeal of the same circuit rejected the proposition that article 29(2) permitted the limitation period to be determined in accordance with the lex fori. In reaching this conclusion, the court had regard to the travaux préparatoires to the Warsaw Convention and reached the same conclusion on their meaning and effect as I have done at [73] above. Although New Pentax does not appear to have been cited in Fishman, the latter is a decision of a superior court.
77. *Fishman* in any event accords with a considerable body of jurisprudence from the courts of other signatories to the Convention: see *Shawcross and Beaumont, Air Law, division VII*, paras 448-461 referred to by Eady J at [51] of his judgment.

78. As regards Mr Davey's argument based on what he conceives to have been Parliament's intention when enacting the 1961 Act and approving the 1967 Order, it is to be noted that by the 1961 Act, Parliament gave the Convention the force of law domestically without modification. Pursuant to section 10, the Convention was then extended to domestic carriage by the 1967 Order. The exclusivity of both schemes is not in dispute: see [74] above.

*Overall conclusion*

79. For all these reasons, I would refuse permission to appeal on the ground on which permission was refused by Smith LJ and dismiss this appeal.

**Lord Justice Jacob:**

80. I agree.

**Lord Justice Mummery:**

81. I also agree.