

WATSON FARLEY & WILLIAMS

BRIEFING

TURBULENT TIMES FOR NON-COMMUNITY CARRIERS JANUARY 2018

- ENGLISH COURT OF APPEAL HOLDS THAT WHAT COUNTS FOR DENIED BOARDING REGULATION IS DELAY IN REACHING FINAL DESTINATION
- NON-COMMUNITY CARRIERS MAY BE LIABLE FOR INCREASED NUMBERS OF COMPENSATION CLAIMS



In *Gahan v Emirates* and *Buckley & Ors v Emirates* [2017] EWCA Civ 1530, the English Court of Appeal has decided that delay in arriving at a final destination, rather than delay to the first leg of a flight to a connecting airport, is what counts for the purposes of compensation under the Denied Boarding Regulation (EC 261/2004). This significant decision will be of particular relevance to non-Community Carriers who had argued that where they operate flights from an EU Member State to a non-EU country via a connection at their non-EU hub airport, they were only liable to pay compensation for qualifying delay to the first leg departing from the EU, and not for delay in arriving at the final destination as a result of a missed connection.

Background

Following the decision of the ECJ in *Sturgeon v Condor Flugdienst GmbH*, the scope of the Denied Boarding Regulation, which applied to passengers whose flight was cancelled or who were denied boarding, was extended to entitle passengers to compensation where their flight was delayed by more than three hours. To fall within the territorial scope of the Regulation, passengers must have either departed from an airport located within a Member State or arrived at an airport located within a Member State on a flight operated by a Community Carrier (being an air carrier with a valid operating licence granted by a Member State). However, in assessing whether a passenger was entitled to flight delay compensation in relation to flights involving more than one leg, it remained unclear whether it was the length of delay to the time of arrival in the connecting airport or the time of arrival at the final destination that counted.

The ECJ had sought to clarify the position in *Air France SA v Folkerts*, where it calculated the length of the passengers' delay by reference to the arrival at the final destination of a journey consisting of multiple legs. However, non-Community Carriers seized on the fact that in *Folkerts* the operating carrier was a Community Carrier and the relevant connecting airport was situated within a Member State, distinguishing the case from a scenario in which a non-Community Carrier operated connecting flights departing from an airport within the EU via its hub airport in a country outside the EU, to a final destination in another country outside the EU. Frequently, the delay in arriving into a connecting hub airport is less than three hours, excluding the flight from the scope of the Denied Boarding Regulation, but that delay then causes passengers to miss the connecting flight to their final destination, leading to a total delay of more than three hours.

The County Courts in England & Wales and national courts of first instance across the EU have taken different views as to whether, in the typical missed connection situation, they should assess the length of delay by reference to the first flight or to the passenger's arrival at the final destination. In England and Wales, the issue was complicated further by the High Court's decision in *Sanghvi v Cathay Pacific*, where a distinction was made between a "journey" (whereby a carrier contracts to take a passenger from one destination to another) and a "flight" (being a unit of travel which may be combined to carry out the journey). The inference was that, because the Denied Boarding Regulation applies to a "flight" and not a "journey", then only the delay to the individual flight should be taken into account, and not the delay to the overall journey.

Facts

In *Gahan v Emirates*, the Court of Appeal heard two joined appeals concerning the missed connection issue:

- Ms Gahan's flight from Manchester to Dubai was delayed by three hours and 56 minutes such that she missed her connecting flight to Bangkok, resulting in a delay to her arrival into Bangkok of 13 hours and 37 minutes. At first instance it was decided that Ms Gahan was only entitled to €300 in compensation for the delay to her flight to Dubai rather than the full €600 for the lengthier delay to her arrival into Bangkok. Ms Gahan appealed.
- The Buckleys' flight from Manchester to Dubai was delayed by two hours and four minutes such that they missed their connecting flight to Sydney, resulting in a delay to their arrival into Sydney of 16 hours and 39 minutes. At first instance, the court took the delay to the journey, as opposed to just the first flight to Dubai, into account and awarded the Buckleys the sterling equivalent of €600 each. Emirates appealed.

Decision

The Court of Appeal unanimously found in favour of the passengers, allowing Ms Gahan's appeal and dismissing that of Emirates'. For an issue which has given rise to such varied and contradictory decisions in the lower courts it was perhaps surprising that in her judgment Arden LJ said "the answer to these appeals is clear under EU law". In reaching her decision Arden LJ noted three points:

- What counts for the Denied Boarding Regulation is the delay in reaching the final destination. In the case of directly connecting flights, the final destination is the

place at which the passenger is scheduled to arrive at the end of the last component flight.

- Article 7 of the Denied Boarding Regulation applies to non-Community Carriers in respect of flights to their final destination. The liability itself may crystallise once the carrier has left EU airspace, but that does not take the carrier outside of its effect.
- EU law governs questions of incompatibility with the Montreal Convention. Arden LJ rejected Emirates' alternative argument that the determination of liability of a non-Community Carrier is a matter of domestic and not EU law as the UK is bound by the Montreal Convention independently of the EU. Thus it was held that the English courts are bound by decisions of the ECJ relating to the interpretation of conflicts between the Denied Boarding Regulation and the Montreal Convention.

Significance of the decision

Unless non-Community Carriers only serve the UK, they will already be required to compensate passengers departing non-UK EU airports in accordance with *Sturgeon* and *Folkerts*. Arguably, the effect of *Gahan* is only to ensure that claims by passengers departing UK airports are treated consistently with those departing non-UK EU airports. The decision also ensures that Community and non-Community Carriers are treated consistently in terms of such claims.

However, the Court of Appeal's decision in *Gahan* represents another defeat for airlines in the battle to limit the expansion of liability under the Denied Boarding Regulation. The judgment also suggests that the decision of the ECJ in *Pešková and Peška v Travel Service A.S.* may have a more limited and specific application than previously believed. It had been hoped that *Pešková* represented a more balanced view of liability under the Denied Boarding Regulation and, had a different decision been reached in *Gahan*, that a more nuanced and balanced approach to the interpretation of *Sturgeon* and *Folkerts* in relation to claims such as those by Ms Gahan and the Buckleys might have resulted.

In the absence of insurance cover for such claims, the burden of paying the compensation must be borne by individual airlines. On certain routes the flight delay compensation can equal or exceed the cost of an economy class ticket. This extends to flights of more than 3,500 km on particularly competitive routes, including those flown by Ms Gahan and the Buckleys. To date, competitive market pressures have ensured that EU consumers have choices and price-sensitive options for a broad range of city pairs within and outside the EU, notwithstanding the effect of flight delay claims on the profitability of a route. However, it remains to be seen whether that will continue as delay claims proliferate.

The decision in *Gahan* is likely to have the greatest impact on non-Community Carriers who rely on sixth freedom transit traffic through their hub airports from UK airports, including Istanbul, Doha, Dubai, Hong Kong, New York, Chicago, Singapore and Bangkok. In many cases, the carriers providing a connecting service via these hubs provide UK consumers with greater choices, lower fares and ensure that the cost of non-stop services remains competitive. Some of these carriers have also provided regional airports with long haul connections not provided by any UK carrier.

In the short term, there has been an increase in claims in the UK arising from missed connections. In 2017, the UK Civil Aviation Authority (CAA) began enforcement actions against a number of airlines for rejecting claims where the delay arose in circumstances similar to those in *Gahan* and *Buckley*. Airlines should anticipate that the CAA will continue to closely monitor such claims and further enforcement proceedings cannot be ruled out.

The Court of Appeal's judgment will also concern airlines that may have hoped for a curtailment of the scope of flight delay compensation post-Brexit. English court decisions such as *Sanghvi*, which were less generous to passengers than the approach taken by the ECJ, may have led some to believe that from the point of view of flight delay compensation, airlines would benefit post-Brexit. However, *Gahan* suggests otherwise.

Emirates is understood to be considering an application for leave to appeal to the Supreme Court. The Supreme Court may well consider that the question of the EU's jurisdiction over flights by non-EU carriers between non-EU airports is of sufficient significance to grant such leave.

In view of the UK's exit from the EU, this issue may now have more significance, particularly in the context of the jurisdiction of UK courts to enforce UK laws giving effect to the Denied Boarding Regulations over flights by non-UK carriers between non-UK airports. Ultimately, however, the way in which the Denied Boarding Regulation becomes part of UK domestic law and their scope will be critical and as yet unclear factors. If leave is granted, the decision of the Court of Appeal may be reversed, creating further turbulence in the handling of claims under the Denied Boarding Regulations.

FOR MORE INFORMATION

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Publication code number: 61337889© Watson Farley & Williams 2018

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