

IN THE OXFORD COUNTY COURT

Case No: 00X02043

The Court House  
Speedwell Street  
Oxford  
Oxfordshire  
OX1 1RZ

Monday, 21<sup>st</sup> March 2011

Before:

DEPUTY DISTRICT JUDGE COMISKEY

B E T W E E N:

HENDY

and

IBERIAN LINEAS DE ESPANA SA

Transcript from a recording by Ubiquis  
Clifford's Inn, Fetter Lane, London EC4A 1LD  
Tel: 020 7269 0370

MR HENDY appeared IN PERSON

MR CUNNINGTON, instructed by Barlow Lyde & Gilbert LLP appeared on behalf of the  
DEFENDANT

JUDGMENT  
(Approved)

DDJ COMISKEY:

1. The claimant in this case, Mr Hendy, booked a short break for himself and his wife to Madrid which took place during April 2010. During April 2010 flights across much of Europe were disrupted by a volcanic ash cloud as the result of the eruption of a volcano in Iceland. There was a considerable amount of disruption to travel and I should say that on a personal level one would have a great deal of sympathy for travellers caught up in all of that. However any sympathy that I may feel cannot be a factor in the decision that I make.
2. The claimant has brought a claim for compensation of £2,536.86 which figure includes interest and costs. That claim is expressed under a series of headings including hotel bills, meals, interest, compensation for stress and inconvenience, as well as court fees. The amount of the claim I am dealing with today has been revised during the course of the proceedings quite correctly to take out of account a figure which was incorrectly over-claimed.
3. The claimant is a litigant in person and the defendant is an airline; I will call them 'Iberia' in this judgment. I trust I have given the claimant sufficient opportunity to explain his case to me, including the legal basis of that claim. The claimant tells me that the defendants failed to provide proper assistance and/or breached a duty of care owed to him. The basis of the defence is that the claim cannot be for breach of contract because there was no relevant contract. It cannot be based in negligence or any other tort and it must therefore, in so far as there is a claim, be based on the relevant air transport regulations. These are Regulations EC 261/2004 of the European Parliament and of the Council made in 2004 which I will refer to as the '2004 Regulations'; and the Civil Aviation Denied Boarding Compensation and Assistance Regulations 2005, 'the 2005 Regulations', by which the 2004 Regulations were incorporated into the laws of England and Wales. I have had the benefit of hearing in

evidence Mr Hendy himself; I have seen his statement and various documents he has produced in the course of the proceedings including a document which sets out the basis of the claim and the revised claim. I have also had the benefit of seeing Mrs Hendy and reading her statement; I have also heard from Mr Gambier, the travel agent whose statement I have also read. On behalf of the defendant I have heard from the defendant's London office pricing manager and read her statement.

4. In any civil claim brought before the Court it is for the claimant to prove the claim and the standard to which the claim must be proved is a test called the "balance of probabilities". That is, it is more likely than not that the claim is correct. It may be helpful if I outline the undisputed facts. The claimant booked the break to Madrid through a travel agent, Mr Gambier who is here today; the tickets were in turn booked through an organisation called Gold Medal which I am told is a consolidator when it comes to air travel, and the accommodation in Madrid was booked by an organisation called Superbreaks. The claimant and his wife flew to Madrid with Iberia on 12<sup>th</sup> April 2010; their return flight was due to leave Madrid on 16<sup>th</sup> April 2010. However, the Icelandic volcano eruption occurred on 14<sup>th</sup> April 2010, leading to a volcanic ash cloud which disrupted flights in much of Europe including to and from the UK. It is accepted by everyone that the claimant and his wife were not able to fly back to the UK on 16<sup>th</sup> April because the flight was cancelled; that flight was cancelled because of restrictions imposed on the airlines by various authorities, and in any event the restrictions were completely outside the defendant's control. The claimant and his wife attended at Madrid airport on 16<sup>th</sup> April and tell me that they had a very poor experience; they queued for a long time to get to the Iberia desk and they were turned away and referred to British Airways, and from the British Airways desk they were simply able to pick up a leaflet advising them to contact their travel agent; this they did. Again via their agent the claimant rebooked to travel from Madrid to London on a flight

which was due to leave on 21<sup>st</sup> April. I am told that that flight on which they were rebooked did actually leave Madrid for London on 21<sup>st</sup> April. However on 20<sup>th</sup> April the claimant wished to use the online check-in facility but that facility was closed so it is accepted he was not able to check-in online. In the light of information from news broadcasts, family sources and so on the claimant and his wife decided to seek an alternative means of getting back to England, as they thought there was a significant risk that the flight on 21<sup>st</sup> April would be cancelled. In evidence Mr Hendy told me, 'Our assumption was that if the online check-in was cancelled, that was it.' By which he meant, as it were, the flight would not be happening. He also told me that he needed certainty about the travel plans, given the experience he had had on 16<sup>th</sup> April when he had gone to the airport. It is also clear that the claimant did not actually go to Madrid airport on 21<sup>st</sup> April to see what the position was.

5. The claimant and his wife hired a car from Madrid and drove to Bilbao and spent the night in a hotel there and had various meals. They were hoping to be able to take a ferry from Bilbao back to England; or as an alternative to catch trains to France to get to Calais and then to Dover. There were no suitable ferries and no trains so the car-hire was extended and Mr and Mrs Hendy travelled through France by car incurring petrol expenses and the like; they spent one night near Poitiers and the next in [Inaudible], and then were able to catch a ferry from Calais to Dover on 23<sup>rd</sup> April, and thence by train to London where they were able to collect their car. I have seen various receipts and travel vouchers and so on within the bundle of papers. There is no dispute, I think, that the claimant actually incurred those expenses that he has listed and set out, and I do not think it is said by the defendant that the amounts claimed are excessive in the circumstances. I have been told that the defendant had reimbursed the flight cost itself to Gold Medal, the intermediary agency, in December 2010 after these proceedings started.
6. The issue that I need to consider is whether Iberia is liable to reimburse any or all of the

claimant's expenses and/or award any compensation for distress, inconvenience and the like. Of course to make any award in a civil court there needs to be a legal basis for that claim so it has been very helpful to have Mr Cummings' exposition of the legal position because certainly some of the regulations which I will go on to quote are not within the day-to-day work of the County Court. First of all looking at the common law position: could there be a claim in contract here? There cannot have been a contract between Mr Hendy and the defendant in that, from the evidence I have heard, Mr Hendy had a contract through his travel agent with Gold Medal and they in turn had a contract with Iberia. Any contract which might have existed would have been a flight-only contract with the defendant; it was not a package holiday situation. I do not believe that there was an applicable contract, but if I am wrong about that and there was then it must have been rescinded or frustrated; I will explain those terms to Mr Hendy a little more in a moment. I accept the defendant's submission that even if a contract existed between the parties, the claimant's decision to return to England by his own means prior to the relevant flight restrictions being lifted, constituted a rescission of the contract. In the alternative the impossibility of the flight being operated caused the contract to be frustrated. I do hope I am not recalling my contract law too inaccurately when I say that rescission of the contract is where, as it were, the parties both back out of the contract; it is no longer going to take effect; frustration is where it becomes impossible to perform the contract.

7. Could there be a claim in negligence? In order to found a claim in negligence a party needs to show that there was duty of care; that that duty was breached and that there is some loss which is a consequence of that breach. Even if I were to accept that there was a duty of care owed by Iberia, the cancellation of the flight was not a breach of that duty; it was not something within the defendant's control and it cannot therefore have been negligent on their part. Thus there cannot be a claim in negligence. I have been referred to the 2004 and

2005 Regulations; what Mr Hendy told me today is that in a way his claim is founded on a failure to provide proper assistance; that in short Iberia “let him down”. I have to consider whether that is to be a cause of action and if it is whether that leads to any liability to pay compensation. I was concerned about how it would be that passengers would know about their rights, whatever they may be, under the 2004 or 2005 Regulations and I have been referred to Article 14 of the 2004 Regulations which impose on operating air-carriers duties to ensure that information is available. I will not quote the Regulations but there are such duties. I have been told, and I accept, that some information was displayed at the airport and that information about the Regulations would have been available. I have to say such provision of information may not be ideal for passengers who are in a distressed or upset condition when flights are cancelled and there is disruption at airports, but nevertheless I am satisfied that the information was provided in accordance with Article 14.

8. May I just reassure Mr and Mrs Hendy that I am not, as it were, blindly following what the defendant says in the outline submissions but rather than re-inventing the wheel there are some passages which I can usefully quote and which I will adopt from that. The 2004 Regulations impose certain obligations in the event of the cancellation of a flight, and the applicable obligations are conferred by Article 5. I have been referred to Article 5 which deals with cancellation of flights; Article 5.1(a) provides that passengers should be offered assistance in accordance with Article 8, to which I will refer in a moment, and be offered assistance by the operating air-carrier in accordance with Articles 9.1(a) and 9.2. There is also a reference to a right to compensation. Now, I will deal first with the right to compensation under Article 7: it is clear that there is no Article 7 obligation to pay compensation,

‘...if it can be proved that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.’

9. The situation here is exactly such a situation; there was nothing that Iberia could have done to get that flight away on 16<sup>th</sup> April. The reason for the cancellation of the flight was the imposition of a prohibition on flights into London and indeed much of England by the Civil Aviation Authority. The defendant could not have avoided that cancellation therefore there is no right to compensation under the Regulations. Article 5.1(a) provides for the defendant to offer the claimant assistance in accordance with Article 8; this offers at paragraph 1, as it were, a choice for passengers: the choice is between reimbursement of the full cost of the ticket at the price at which it was bought “for the part or parts of the journey not made and for the part or parts already made...” The alternative is a return flight to the first point of departure at the earliest opportunity. There is also a provision for re-routing, but that does not apply here.
10. The effect of Article 8 is that the passenger may either choose a substitute flight at the earliest opportunity or reimbursement for the ticket price for the journey not made. Mr Hendy decided on 20<sup>th</sup> April to start making his way home in the light of the circumstances as he understood them. He had, however, been booked on a return flight which looks like the second option under Article 8.1(a) and indeed he stayed in Madrid for a number of days awaiting that flight. It is said that Mr Hendy is entitled to reimbursement for the full cost of the ticket for the part of the journey not made and, as I have already mentioned, I am told that the defendant paid that, possibly to Gold Medal, in December 2010.
11. Provisions for compensation or the right to care are contained in Article 9; this states that ‘Passengers shall be offered free of charge meals and refreshments in reasonable relation to the waiting time, hotel accommodation’ in various circumstances and transport to the airport and place of accommodation, and various other matters. What the defendant says is that the assistance obligation under Article 9.1(a) relates to waiting time for the substitute

flight and it is argued that where the passenger elects not to take up the substitute flight there is not a period of waiting time and therefore the provision of those services is not required. It is argued for the defendant that by choosing to return home by his own means the claimant waived any rights under Article 9.1(a). I am further told that even if there was a breach of Article 9.1(a) there is no available private law right of action to claim damages in respect of such a breach. I am told that under Article 16 of the 2004 Regulations there is, as it were, provision for member states of the EU to provide a designated body to enforce the Regulations and under the 2005 Regulations it is the Civil Aviation Authority which is the relevant organisation in the UK. It also sets out at paragraph 3 of the 2005 Regulations that an operating air carrier who fails to comply with various obligations, including the ones we are talking about here at Article 5, shall be guilty of an offence. There is no provision for there to be a private law cause of action whereby a disappointed passenger can make a claim directly under the 2004 Regulations.

12. Here we have a situation where in the period from 16<sup>th</sup> April to at least 20<sup>th</sup> April it was expected that the claimant would take the flight due on 21<sup>st</sup> April; he did not in fact do so. It seems to me that on a proper reading of Article 5.1(b), with reference to Article 9.1(a) and (b), that there was a period of waiting; the fact that the flight was not in fact taken I do not think in the circumstances I have heard in this case mean that the Article 9.1 obligations can be, as it were, written-off. There had been a re-booking; Iberia were aware that there would be a right to care under Article 9.1 and possibly 9.2. I therefore conclude that Iberia should be responsible for the costs reasonably incurred by the claimant in the period from 16<sup>th</sup> April to 20<sup>th</sup> April at which point the claimant decided to make his own way home. Iberia cannot be responsible for any more than that. My maths on this put the hotel bill, and these figures are all in Euros and we will deal with the conversion in a moment, the hotel bill of €538.11, meals in Madrid incurred in three separate restaurants for €165.50 at the



Padiar del Gelcho, €29.69 at the Grand Hotel, and €40.50 at Café Zegarra. I calculate the total to be €773.80, and I am going to give judgment to the claimant for the amount that comes out at in sterling; the exchange rate used which has not been challenged by the defendant at 1.13 Euros to the pound.

JUDGE COMISKEY: I am hoping that somebody has a calculator and can do the necessary sums.

MR CUNNINGTON: Madam, I think I am going to have to ask you to make findings on two matters.

JUDGE COMISKEY: Sorry, yes.

MR CUNNINGTON: The first is this: under the regulations, as I understand it, you heard submissions from me-

JUDGE COMISKEY: Yes.

MR CUNNINGTON: -that there is a distinction to be made between the right under 9(1)(a)-

JUDGE COMISKEY: Yes.

MR CUNNINGTON: -and 9(1)(b). Under five, regulation five, 9(1)(b) only comes into play in the event of re-routing. You have made a finding-

JUDGE COMISKEY: Oh, sorry. Sorry, I should clarify. Not 9(1)(b).

MR CUNNINGTON: Yes.

JUDGE COMISKEY: Sorry. Yes.

MR CUNNINGTON: So that leaves simply the costs for meals and refreshments in 9(1)(a).

JUDGE COMISKEY: Yes.

MR CUNNINGTON: You also have to make a finding of law-

JUDGE COMISKEY: Yes.

MR CUNNINGTON: -to say that these regulations do give rise to a private cause of action

in order to award money under the regulation. That is a matter I'm going to appeal if you make it.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: But you have to make a finding of law if you are to give any money and it's going to be directly contrary to the 2005 regulations.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: And all the case law on this. I have other case law which I could have handed up but I have spared you time.

JUDGE COMISKEY: Thank you. Perhaps the point that has confused me, therefore, is how is it that this money is paid? Iberia, as far as I am aware, did not say to the hotel or the restaurants we will meet these charges directly.

MR CUNNINGTON: What has happened is this. I'm now going to tell you because it's an offer made by Iberia. The correct cause of action, as I've said, is that the claimant did have an obligation under 9(1)(a). I'm not contesting the final effect in respect of the waiting time and the application of 9(1)(a).

JUDGE COMISKEY: Yes.

MR CUNNINGTON: It's quite proper. I relied on the submission and you reject it. I don't seek to go behind that.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: That waiting time isn't applicable.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: If you find that the defendant should have been obliged to pay under 9(1)(a), then that is well and good. That's a finding of law in the respect. Now, the appropriate route is for the claimant to say to the Civil Aviation Authority, look, I have a right to be paid there.

JUDGE COMISKEY: Right.

MR CUNNINGTON: The defendant hasn't paid me and-

JUDGE COMISKEY: Yes. Sorry, Civil... I see.

MR CUNNINGTON: If you make a finding in fact, the Civil Aviation Authority, if they agree with that, given your judgement, will prosecute.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: That's the route.

JUDGE COMISKEY: Yes, okay.

MR CUNNINGTON: And that is why I said [inaudible] but I can tell you that the claimant has been offered in excess of this sum [inaudible].

JUDGE COMISKEY: Yes.

MR CUNNINGTON: Because that is a right that has been registered. Now, because of this litigation I made the submission saying that waiting time isn't applicable.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: I don't seek to go behind your finding and I accept it but what I do still say and [inaudible] -

JUDGE COMISKEY: Yes, I see.

MR CUNNINGTON: -[inaudible].

JUDGE COMISKEY: No.

MR CUNNINGTON: But you have to make a finding that there is a civil right of action.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: Which, I repeat, there isn't, what [inaudible].

JUDGE COMISKEY: I see. Yes. I accept that I, as it were, misled myself as to the impact of Article 9. Therefore, although, as you have rightly said, I think there was a period of waiting time... Oh, I am sorry, you have not fully accepted it, but I think there was a period

of waiting time in which the Article 9(1)(a) right accrued. I do accept having been, as it were, re-referred to the 2005 regulations that it can only be, if anything, an offence rather than a civil right. Does that cover the point?

MR CUNNINGTON: It does, Madam.

JUDGE COMISKEY: Yes. As I say, rather than being appealed, I do not normally go back on my judgments but that helps clarify matters. I did not quite grasp the mechanism.

The outcome is, therefore, that there is no award for compensation.

MR HENDY: Sorry. [Inaudible] has raised that point. Can I just come back on one or two questions? That is that we had an offer from Iberia.

JUDGE COMISKEY: Yes.

MR HENDY: They therefore accepted their-

JUDGE COMISKEY: Making offers does not accept anything, yes. Carry on.

MR HENDY: They made an offer which I had read to assume that they accepted some responsibility for the way in which they dealt with us or failed to deal with us. We felt that that offer was too low.

JUDGE COMISKEY: Yes.

MR HENDY: And, therefore, we corresponded further with them.

JUDGE COMISKEY: Yes.

MRS HENDY: We thought we [inaudible].

MR HENDY: And they asked us what we would accept so we thought there would be a revised offer. Secondly, we brought this case to the small claims court.

JUDGE COMISKEY: Yes.

MR HENDY: [Inaudible] small claims court [inaudible]. We were trying to avoid the High Court or whatever [inaudible]. The reason we brought this to court [inaudible] through a period of something like six months they had failed to resolve our claim. Nor had they re-

directed us to the CAA and said that we should get the CAA to [inaudible] claim.

JUDGE COMISKEY: Yes.

MR HENDY: So we have incurred something like £350 worth of costs in getting this far. Iberia have refused mediation. They said in their correspondence [inaudible] that they felt that having talked to us there was no middle ground.

JUDGE COMISKEY: Yes.

MR HENDY: For mediation. We disputed that. Again, [inaudible] costs increased because they refused and they have actually said that the reason they refused is essentially they want to establish a legal position. I mean, that's the words that were used to Mr Gambier.

JUDGE COMISKEY: Yes.

MR HENDY: It seems to me that... Sorry, I mustn't say any more. [Inaudible].

JUDGE COMISKEY: Yes. That could be relevant on the issue of costs but as a general principle, the parties can try to negotiate settlements, as it were, to avoid the expense of people such as Mr Cummington having to come along to court. The fact that offers are made does not necessarily mean that a party accepts your position but it might be, as it were, cheaper for them than going all the way to a final hearing. I cannot read anything into the fact that offers may or may not have been made.

MR HENDY: So are you essentially saying that our only recourse now is to go to the CAA because that's what Mr Cummington appeared to be saying?

JUDGE COMISKEY: That appears to be the effect but obviously I cannot give you legal advice about that.

MR CUNNINGTON: I can make the submission, not giving legal advice, but, yes, the submission I make is that that is the course of redress.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: But had you allowed the claim and made an award under 9(1)(a) that we had a right to-

JUDGE COMISKEY: Yes.

MR CUNNINGTON: -the sum, on the figures presented by the claimant, that you would have awarded is very much less than the offer that has been made.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: And made right at the outset.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: And so it would be a largely fruitless application to the CAA in respect of that sum.

MR HENDY: If Mr.... Sorry, can I just clarify something? I just do need to understand something. Obviously we are going to go away disappointed but I would like to go away understanding.

JUDGE COMISKEY: Yes.

MR HENDY: The fact that Iberia did not, as from our experience many other organisations did do, arrange for accommodation and, in fact, in one of Iberia's own statements they said they provided accommodation and refreshments to its customers.

JUDGE COMISKEY: Yes.

MR HENDY: But that's irrelevant?

JUDGE COMISKEY: Well, you are the people in front of me today, not their other customers, and I have to determine this particular case on the particular set of facts. What Iberia did or did not do in relation to other people is not something with which I have to be directly concerned.

MR HENDY: So they had no obligation to provide us with accommodation and refreshments during the period we were waiting for them to-

JUDGE COMISKEY: Well, I have made some decisions on that and I think what I decided was that you should have been provided with refreshment or the cost of refreshment but they did not do that but have subsequently offered to reimburse those sums.

I am dismissing the claim. Now, I will hear from you both about costs. As it were, the defendants have succeeded, they have successfully defended your claim. It is a small claims matter. There is not usually very much awarded in costs, if anything. Mr Cummington?

MR CUNNINGTON: There can't be an order for costs. I don't seek costs.

JUDGE COMISKEY: No.

MR CUNNINGTON: 47.14 is clear under the Civil Procedure Rules. There would have to be unreasonable conduct.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: I would be in a better position to ask because the defendants made an early offer.

JUDGE COMISKEY: Yes.

MR CUNNINGTON: Which is in excess of anything the claimant could have hoped to receive but I don't press it because I know the claimant is a litigant in person.

JUDGE COMISKEY: Indeed. I think that is right. Mr Hendy, the normal rule is that the losing party pays the winning party's costs but in the small claims court it is a slightly different regime. Certainly, because you have not succeeded, there cannot be any question of you getting your costs back. I think it is quite right that the defendants are not seeking an order for costs against you for Mr Cummington's fees or their solicitors' fees or anything of the sort.

The claim is dismissed and no order for costs.

MR HENDY: Thank you.

JUDGE COMISKEY: Thank you all very much.

MR HENDY: So will we get that in writing?

JUDGE COMISKEY: What you will get is the court order itself.

MR HENDY: Yes.

JUDGE COMISKEY: The judgment is not a written-up document. The only way you will get that would be by obtaining a transcript from the court because everything is tape-recorded, including my hesitations and stumbles.

MR HENDY: [Inaudible].

JUDGE COMISKEY: I think that concludes everything unless there is anything else that I need to know about. Thank you very much indeed.

MR HENDY: Thank you.

JUDGE COMISKEY: Thank you.

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