

IN THE MAYOR'S & CITY OF LONDON COURT

B E T W E E N :-

(1) PHILIP MARSHALL

(2) BARBARA MARSHALL

(on her own behalf and as the Litigation Friend of

(3) ALASDAIR MARSHALL,

(4) CAMERON MARSHALL, and

(5) TAMSIN MARSHALL)

Claimants

-and-

IBERIA LINEAS AEREAS DE ESPAÑA S.A.

Defendant

JUDGMENT

1. On 18th April 2010 the claimants and their family flew into Madrid on the penultimate leg of their travel back from a family holiday in Ecuador. They were booked to fly out to London Heathrow. They had the misfortune to arrive during the period 15 – 20 April 2010 when their flight to London was cancelled due to flight restrictions imposed as a result of the spread of volcanic ash in European Airspace. The ash cloud caused hundreds of thousands of Britons to suffer the misery of delayed or cancelled flights. Many travellers have returned home with compensation in mind. This is one such claim.
2. All flights from Madrid to London had been cancelled. The claimants chose to make their own way back and, other than paying them a full refund for the lost airline tickets, the airline refuse to compensate them for these travel

costs or to pay compensatory damages either under Regulation, contract or common law.

Background

3. A travel agent called World Odyssey, acting on behalf of the Claimants, purchased tickets for flights for the Claimants for a family holiday on the Defendant's airline departing from Guayaquil, Ecuador on the 17th April 2010 and arriving at London Heathrow via Madrid on the 18th April 2010. The price paid in respect of the Madrid to London element of the journey amounted to £1,075. The tickets were for business class seats.
4. There is no claim in relation to the first leg of the journey from Ecuador to Madrid.
5. There is no dispute that the second leg of the journey (flight IB3172 from Madrid to London, "the flight") was cancelled by reason of the flight restrictions caused by the presence of volcanic ash in European Airspace following the eruption of Iceland's Eyjafjallajökull volcano on 14th April 2010.
6. There is no dispute that the Claimants received a full refund in respect of that portion of their tickets relating to the Madrid to London leg of the return journey (£1,075-00).
7. There is no dispute that the Claimants made their own way home from Madrid to London following their arrival at Madrid Barajas Airport. Liability for the costs of that return journey is in dispute.

The Claim

8. These proceedings were issued separately by the First and Second Claimants on the 13th May 2010. Following an application by the Defendant, they were consolidated on the 29th September 2010
9. The claims are based on alleged breaches by the Defendant of both the contract(s) of carriage and European Regulation No. 261/2004 which establishes common rules on compensation to passengers in the event of, amongst other circumstances, the cancellation of flights (“the Regulations”).
10. The Defendant denies that it is in breach of either the contract of carriage (relying upon its conditions of carriage) or the Regulations in their entirety as correctly interpreted.
11. The Defendant contends that contract was subject to its Conditions of Contract (specifically clauses 9 and 11). I will deal with that immediately. The Defendant relies on the evidence of a Pricing Manager, Maria Del Carmen Val Loureda, para. 9 “*when a passenger purchases a flight directly with us or through our website, the passenger is required to confirm that he/she has read and accepts our conditions of carriage prior to the ticket being issued*”. No documentary or other evidence has been produced to confirm that the Conditions were accepted in this case. The Defendant says it was relying on the Claimant to produce his ticket at trial to show that the terms were incorporated by reference and he has not. It is not for the Claimant to prove the Defendant’s case. Ms Val Loureda’s evidence is not good enough. The Defendant is a major international airline and I would have expected to see clear documentary evidence supporting conditions that are sought to limit their liability. They have failed to overcome the burden of proof by producing cogent evidence evincing incorporation by reference and this element of the defence fails.

The Damages claims

12. In his Claim Form the First Claimant claims the sum of £2,067-92, consisting of special damages of £1,850-53 (various journey expenses of £2,925-53 less the refund of £1,075-00) plus a claim for compensation under the Regulations in the fixed sum of £217-39 (the sterling equivalent of €250-00). In his Particulars of Claim the First Claimant also claims additional unspecified compensation in respect of alleged physical inconvenience.
13. In her Claim Form the Second Claimant claims the sum of £4,858-56, consisting of special damages of £3,989-00 (hotel expenses) plus a claim for compensation under the Regulations on behalf of herself and her 3 children in the fixed sum of £869-56 (the sterling equivalent of €1,000-00 i.e. 4 x €250-00). In her Particulars of Claim the Second Claimant also claims additional unspecified compensation in respect of alleged physical inconvenience to herself and her children.
14. Following consolidation, the claims for damages can be summarised as follows :-
- | | | |
|-------|---|-----------|
| (i) | Special Damage : | £5,839-53 |
| (ii) | Fixed Compensation under the Regulations : | £1,086-95 |
| (iii) | Unspecified compensation for damages to be determined by the Court. | |
15. At the hearing on the 29th September 2010, the Claimants elected to limit their claims to a total of £5,000-00 (in order to keep the claim in the Small Claims Track) in addition to the fixed compensation of €250-00 each under the Regulations.

The evidence

16. The First and Second Claimants have provided witness statements and the Defendant has served statements from Maria Del Carmen Val Loureda,

Pricing Manager in the London Office of the Defendant and Linda Gill, Commercial Services Supervisor. The Defendant has also served hearsay notices in respect of various documents relating to the impact of the volcanic ash cloud on European Airspace in April 2010.

The issues

17. The parties have identified a number of issues in their respective skeleton arguments. As this is a small claims judgment in an already over-inflated piece of litigation, I do not propose setting them out in any detail in view, first, of my finding that the Defendant's Terms do not apply and, secondly, the fact that most of the issues on liability fell away during the trial. As the 1st Claimant said in his closing argument the essential point for me to decide is whether the Defendant is in breach of its duties under the Regulations.
18. I am satisfied that the Defendant has proved that the flight was cancelled by reason of the flight restrictions caused by the presence of volcanic ash in European Airspace following the eruption of Iceland's Eyjafjallajokull volcano on 14th April 2010 (see paragraph 4 of the statement of Maria Del Carmen Val Loureda and exhibit correspondence at with the English translation appearing at **TB Tab 8 p 99**) and the CAA documentation at **TB Tab 8 p 142 and 158**).
19. I am also satisfied that the Defendant's cancellation of the flight was due to circumstances outside its responsibility or control in which it was impossible to operate the flight. It does not amount to a breach of a term of the contract of carriage that the Defendant would transport them from Madrid to London on 18 April 2010. The only issue is whether the Claimants are entitled to compensation under the Regulations or breach of other contractual rights arising from the Defendant's alleged failure subsequently to transport them to London.

20. The Claimants' case relies on an alleged conversation between the First Claimant and a representative of the Defendant at a Customer Service Desk in Madrid Airport on the 18th April 2010.
21. Before I come to that, what were the Claimants' and Defendant's rights and duties under the Regulations following the flight cancellation? The Regulations came into force in 2005. They require the carrying airline to provide passenger assistance if flights are cancelled or subject to severe delays. This support includes a refund within seven days of the full cost of the air ticket or re-routing, whether on the next available flight or at a later date at the convenience of the passenger.
22. In the case of cancellation of a flight, passengers will be entitled to be offered by their carrier :-
- the choice (*my emphasis*) between either (i) reimbursement, (ii) re-routing – i.e. an alternative flight - at the earliest opportunity or (iii) re-routing at a later date at the passengers' convenience (Article 8 of the Regulations); and
 - meals and refreshment in a reasonable relation to the waiting time and 2 telephone calls, telex or fax messages or e-mails (Article 9(1)(a) and 9(2) of the Regulations); and
 - in the event of re-routing, when the reasonably expected time of departure of the new flight is at least the day after the departure of the cancelled flight, hotel accommodation where a stay of 1 or more nights becomes necessary or a stay additional to that intended by the passenger becomes necessary together with transport between the airport and place of accommodation (Article 9(1)(b) and 9(1)(c) of the Regulations); and
 - compensation in the sum of €250-00 per passenger (Article 7(1)(a) of the Regulations) unless the carrier can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken (Article 5(3) of the Regulations).

Extraordinary circumstances

23. Mr Marshall says that notwithstanding the submission by the Defendant of a considerable amount of press and regulatory material concerning the impact of volcanic ash the Defendant is yet to produce any official statement that this did amount to “extraordinary circumstances” so as to exclude this statutory head of compensation. Moreover the Claimants’ own enquiries of the Civil Aviation Authority indicate that no such determination has been reached by the authorities and that some flights of aircraft with propeller rather than jet engines did in fact operate to the United Kingdom throughout the relevant period. Also, the Claimants contend that the Defendant is any event estopped from relying on the “exceptional circumstances” defence to this head of compensation.

24. The Defendant relies on Recital 14 of the Regulations which states :-

“As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures have been taken. Such circumstances may, in particular, occur in cases of meteorological conditions incompatible with the operation of the flight concerned...”

25. They have drawn my attention to the opinion of the authors of Shawcross and Beaumont on Air Law that :-

“The spread of volcanic ash from an eruption of the Icelandic volcano Eyjafjallajökull in April 2010 through the airspace of some 25 European Countries is a prime case of “meteorological conditions incompatible with the operation of the flight concerned” mentioned in Recital (14) as an example of extraordinary circumstances. It led to many cancellations and the airlines were able to rely on extraordinary circumstances in refusing to pay compensation”.

26. In addition, the Defendant relies on the CAA's confirmation that the situation in April 2010 was unprecedented (**TB Tab 8 p 142**).
27. Ms Howells submitted to me and I accept that could scarcely be a better example of *meteorological conditions incompatible with the operation of . . . flight* than the effects of volcanic explosions resulting in blanket International flight bans affecting every airline. Despite the absence of any official statement I have no hesitation in finding, on the balance of probabilities, that the Defendant has proved that these circumstances represented known and unavoidable extraordinary circumstances which, by virtue of Art 5 (3) exclude the Defendant from having to pay compensation under Article 7 (1) (a).
28. I accept, too, that the alleged estoppel is irrelevant to this issue as there is not evidence from the Claimant that the Defendant ever represented to the Claimants that the defence of extraordinary circumstances did not apply.
29. Thus, absent any finding of breach of contract arising from the flight cancellation alone, the Claimants had the choice of either being re-routed or making their own transport arrangements at their own cost, accepting reimbursement. Nowhere in the Regulations is it stipulated that carriers are obliged to fund passengers' alternative means of transport.
30. The Claimants rely on their conversation at the Defendant's customer service desk to ground further claims for compensation. It is the Claimants' evidence (see P. Marshall 2nd, paras. 6-8 (flag 6)) that:
- (i) *Mrs. Marshall and the children, who were extremely tired after a long overnight trip from Guayaquil, left the queue to seek some refreshment. After a considerable wait Mr. Marshall was then eventually served at the Customer Services Desk by a female representative of the Defendant.*

- (ii) *Mr. Marshall began by asking the representative whether his family could be booked on an alternative flight so as to leave Madrid as soon as the Defendant commenced flights to London or within any reasonable time after that. Her response, after checking a computer screen for some time, was to state that this was not possible. All flights had already been booked. The best that could be done was for the Claimants to be put on a waiting list as a result of which they would be informed if a flight became available. The Defendant's representative said that the chances of our obtaining any flight on this basis were remote.*
- (iii) *Mr. Marshall then asked the representative what she recommended that the Claimants should do as he had to return to work and his children were due back to school. He asked whether they should book some alternative method of return travel. The Defendant's representative said that we would be wise to do so. Mr. Marshall was concerned about this and asked whether this was what she was recommending, that they should try and get a train or hire a car or some other means of transport and she confirmed that it was.*
- (iv) *Mr. Marshall had some awareness of the compensation scheme for passengers who have had their flight cancelled under EC Regulation No.261/2004 ("the Regulation"). He had some recollection that under this Regulation an airline was required to provide compensation for cancellation of a flight and also to provide for accommodation and other forms of support. He was also aware from news broadcasts on screens in Madrid airport that some airlines were seeking to suggest that the Regulation did not apply because of "extraordinary circumstances". He therefore enquired of the Defendant's representative whether it was accepted that the Regulation applied given that he would now have to arrange the costs associated with a return journey. The Defendant's*

representative confirmed that it was. This was also confirmed by another passenger who was standing nearby who stated that they had had accommodation and meals paid for by the Defendant airline.

31. The Defendant has been unable to produce first hand evidence to challenge this and so I have had to form my own view on the balance of probabilities and from the evidence of the witnesses who gave evidence. I bear in mind that Mr Marshall describes himself in his statement as one of Her Majesty's Counsel and a Recorder. I hope that the Claimant did not give that description in order to influence the court. For the avoidance of doubt, let me make it clear that I intend to disregard the witness's description of himself as a part time judge as a special factor to be taken into account in determining the weight of his evidence. Judges's recollections (especially when over-tired, stressed and jet lagged by travel and coping with the agonies of coping with the crowds of travellers fighting to escape the major emergency conditions at Madrid airport) as equally as fallible as any other human beings and just as likely to be distorted by the passage of time and the excitement of the dispute.
32. Also, we know that flights from Madrid re-started from 21 April and there were seats available immediately as the Defendant laid on larger aeroplanes.
33. Mr Marshall says they should have been told they would be re-booked as soon as air space was available and that the Defendant was laying on larger aircraft. He complains that the Defendant did not offer a confirmed flight from the date the flying ban was lifted. He complains that nothing was done to put him on other airlines or alternative transport including a bus service laid on to get people away.
34. In my judgment, he is being wise after the event. It is necessary to judge what happened in the circumstances prevalent on 18th May. By the time the family arrived in Madrid flights had been banned for three days and there

were hundreds of wretched passengers stranded at the airport many of whom had arrived days earlier. There was no clear prospect of when the ban would have been lifted. The volcanic ash covered most of Europe. It could have been a matter of hours, days or even weeks before flights could resume. To make matters worse, many people stranded in other areas of the World were travelling to Madrid and other European airports closer to the British mainland to mitigate journeys by rail or road should the ban prove long term.

35. It is also material that the first claimant and the children needed urgently to return to work and to school and Mr Marshall made this clear to the representative when he asked what she recommended. Instead of asking what alternative choices he had (either under the Regulations or generally) on his own evidence he asked, *“what she recommended that the Claimants should do as he had to return to work and his children were due back to school. He asked whether they should book some alternative method of return travel”*
36. I find that any comments by Defendant’s representative were in response to that specific enquiry i.e. as to the wisdom of attempting to travel home by alternative means given the First Claimant’s work commitments and the Third, Fourth and Fifth Claimant’s school dates. There is no evidence that the representative either refused to fly the Claimants or a failed to offer an alternative flight as soon as possible or an offer or agreement to pay the costs of the alternative transport. In my judgment it is crystal clear that she was simply trying to be helpful and no more. Moreover, the representative made it expressly clear that the Regulations applied.
37. In my judgment, nothing turns on the comments of another passenger that he had accommodation for meals paid for by the Defendant. The Defendant suggests the passenger had been re-routed and provided with accommodation under the Regulations, the Claimants disagree. The unfortunate fact that the Claimant allowed the casual comments of another

passenger (whatever the reason) to influence his decision cannot in any way bind the Defendant.

38. I accept the Defendant's submissions and find that, on the First Claimant's own evidence (and in contrast to the allegations in the Particulars of Claim and the Reply) :-

- the Defendant by its representative did not refuse to fly the Claimants or fail to offer an alternative flight as soon as one became available. On the contrary, the representative offered to waitlist the Claimants pending availability of flights and actually booked them on a flight for the following day;

- the Defendant by its representative did not represent to the Claimants that they were entitled to reimbursement in respect of transport, accommodation, meals and other expenses incurred as a result of the cancellation of the flight.

39. The Claimants had a choice; either to take reimbursement for the cost of the cancelled flight and make their own way home or wait until the Defendant could re-route them. It is clear that the Defendant's representative put them on a wait list and booked a flight – and there is no evidence to show that the Defendant's inability to confirm an alternative flight (on 18th May) was not, in circumstances in which it was impossible to operate flights for an indeterminate period, a breach of its obligation to use its best efforts to carry the Claimants and their baggage with reasonable dispatch.

40. The Defendant has satisfied its assistance obligations pursuant to the Regulations in circumstances in which (having since received the appropriate refund) the Claimants chose not to be waitlisted and made their own way from Madrid to London following the cancellation of their flight.

41. The Defendant neither refused to offer to fly the Claimants, nor did they fail to offer an alternative flight as soon as one became available nor did they

offer or agree to pay the costs of the Claimants' alternative transport as alleged.

42. In light of my finding that there was no breach of the obligations to provide assistance pursuant to Articles 8 and 9 of the Regulations, any residual claims for damages beyond damages for breach of the Regulatory duty also fail.
43. The Claims are dismissed.



District Judge Trent

Dated 13 December 2010