Neutral Citation Number: [2019] EWCA Civ 69

Case No: B2/2017/2875

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Oxford Combined Court Centre
Her Honour Judge Melissa Clarke
B42YP030

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2019

Before:

THE SENIOR PRESIDENT OF TRIBUNALS
(Sir Ernest Ryder)
LADY JUSTICE KING
and
LORD JUSTICE COULSON

- -

Between:

Daniel Blanche	**Appellant/ Claimant**
- and -	
EasyJet Airline Company Limited	**Respondent /Defendant**

- -

Mr John Taylor QC & Mr Ben Lynch (instructed by **Bott & Co Solicitors**) for the **Appellant**
Mr Akhil Shah QC & Mr Max Kasriel (instructed by **Norton Rose Fulbright**) for the **Respondent**

Hearing date: Thursday 17th January 2019

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Approved Judgment

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Lord Justice Coulson :

Introduction

1. This appeal concerns a claim for compensation due to a delayed flight, in circumstances where the respondent carrier asserts that the delay was due to the impact of an air traffic management decision ("ATMD") and therefore amounted to "extraordinary circumstances" within the meaning of the relevant European Regulation, namely Regulation (EC) No.261/2004 ("the Regulation"). The claimant argues that the ATMD itself is of little or no consequence, and what matters is the underlying reason for the ATMD, and whether that can properly be characterised as an extraordinary circumstance. The appeal raises potentially important issues as to the rights of passengers and the liability of carriers where the flight delay is due to the impact of an ATMD.

Factual Background

2. The appellant/claimant was booked to travel on flight EZY8522 from Brussels to London Gatwick on 10 October 2014. The flight was to be operated by an aircraft bearing the registration number G-EZIN. The flight was scheduled to depart from Brussels at 17.45 and to arrive at London Gatwick at 18.55. The flight actually departed at 23.45 and arrived at 00.37, 5 hours and 42 minutes late.

3. Aircraft G-EZIN was scheduled to fly from London Gatwick to Brussels at 16.10. However, that afternoon there were thunderstorms east of Gatwick and Gatwick Air Traffic Control ("ATC") suspended all eastbound departures.

4. At around 17.00 it appeared that the suspension would be lifted and, in anticipation of that event, at 17.22, G-EZIN taxied to the runway in preparation for the short flight to Brussels. But the ATC restrictions continued, and the aircraft eventually returned to the terminal at 19.35. Gatwick ATC did not give permission for the flight to depart to Brussels until 21.40. It is unclear precisely when it arrived in Brussels but, as previously noted, the appellant's flight did not depart until 23.45.

5. The evidence was that the decision by Gatwick ATC to suspend eastbound flights affected at least 24 flights, including G-EZIN.

6. The appellant commenced proceedings claiming compensation for delay in the Luton County Court, pursuant to the Regulation. On 21 September 2016, DJ Richard Clarke dismissed the claim on the basis that, because of the ATMD, the respondent had demonstrated that the delay was due to extraordinary circumstances. That conclusion was the subject of an appeal. The District Judge also found that Gatwick ATC was not under the control of the respondent, and that the delay could not have been avoided by the respondent even if all reasonable measures had been taken. Those conclusions have never been the subject of any appeal.

7. On 29 September 2017, in a careful reserved judgment, HHJ Melissa Clarke dismissed the appeal on the correct approach to extraordinary circumstances where there is an ATMD. She based her conclusions on the wording of the Regulation, and in particular Recital 15 (set out in detail in paragraph 11 below). The kernel of her decision can be found in paragraphs [32]-[33] and [37]-[38] as follows:

> "32. In my judgment the wording of Recital 15 gives clear guidance to the interpretation of Article 5(3) that:
>
> (1) it is a matter of fact for the court to determine whether 'the impact of an air traffic management decision' in relation to a particular aircraft on a particular day 'gives rise' to a long delay;
>
> (2) if it does, then extraordinary circumstances should be deemed to exist, so long as all reasonable measures had been taken by the air carrier to avoid the delay.
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> 33. Taking the natural meaning of the words of the Recital, it must, in my judgment, be interpreted to mean that where an ATC decision gives rise to a delay, the source or origin of the problem causing the delay is the ATC decision itself. It is the 'impact' of that decision which 'gives rise to' the delay. I find myself unable to stretch or strain the natural meaning of those words to reach an interpretation which supports the Appellant's contention that the source of the delay is instead the underlying circumstances leading to the ATC decision.
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> …
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> 37. Both Counsel agree that this falls short of a statutory deeming provision, being found in a non-binding Recital, and I accept that is correct. However use of the word 'should', although not mandatory, is more prescriptive than 'may' for example, and it is the same word used in the closely followed guidance at the beginning of Recital 14: "*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 had been taken*". In my judgment, that deeming provision is equally powerful guidance that in circumstances where Recital 15 applies, the ATC decision is itself deemed to be 'extraordinary circumstances' for the purposes of Article 5(3), without any need for further consideration for the two-limb *Wallentin-Hermann* test of inherency and control.
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> 38. I do not accept the Appellant's submissions that such an interpretation undermines the policy of the Regulation to compensate consumers. Those consumers are all passengers and passenger safety must be paramount. It ensures that ATC decisions remain beyond question by air carriers, who must follow them. It removes any tension between safety and the costs consequences of a long delay or cancellation arising from an ATC decision. It avoids an unbearably heavy burden on ATCs across Europe from having to explain and evidence the reasons for their decisions for the purposes of claims brought under the Regulation."

8. On 29 November 2017, the appellant was given permission to appeal, principally on the basis that the appeal raised an important point about the extent to which the claimant could go behind an ATMD, and "the desirability of definitive guidance" on the issue.

The Regulation

9. The Regulation deals principally with flights that are cancelled. Article 5 provides as follows:

> "1. In case of cancellation of a flight, the passengers concerned shall:
> ….
>
> (c) have the right to compensation by the operating air carrier in accordance with Article 7…
>
> 3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken."

10. It is common ground that passengers who are subject to a delay of 3 hours or more are entitled under Articles 5(1) and 7 to claim compensation, subject to the defence in Article 5(3): see *Sturgeon & Ors v Condor Flugdienst GmbH* and *Böck & Anr v Air France SA* (joined cases C/402/07 and C/432/07) [2010] 2 All ER (Comm) 983.

11. The Regulation does not define "extraordinary circumstances". However, assistance can be found in the Recitals to the Regulation. Thus:

    (a) *Recital 12* states that air carriers should inform passengers of cancellations in advance of the scheduled time of departure and offer re-routing, and a failure to do this should result in compensation "except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken".

    (b) *Recital 14* states that "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 had been taken. Such circumstances may, in particular occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that effect the operation of an operating air carrier".

    (c) *Recital 15* states that "extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights of that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations."

The First Issue

12. The first, and most important, issue on this appeal arises in this way. The appellant submits that what matters is not the ATMD to suspend all eastbound flights from London Gatwick on the afternoon of 10 October 2014, but the underlying reason for that ATMD, namely the thunderstorms. He argues that, since thunderstorms cannot be regarded as extraordinary circumstances, the Article 5(3) defence is not available to the respondent. As part of this argument, the appellant submits that Recital 15 cannot mean

that, without more, every delay due to the impact of an ATMD should be deemed to be extraordinary circumstances, and that it is for the court to investigate the circumstances that lay behind every ATMD to see whether or not it can be characterised as extraordinary.

13. For three separate reasons, explained below, I reject the appellant's arguments on the first issue.

Reason 1: Interpretation of the Regulation

14. The starting point for any consideration of the first issue is Recital 15, because that is the only part of the Regulation which expressly addresses ATMDs. Moreover, the Recital is, in the usual way, an aid to the construction of the Regulation (a point made in all the textbooks, and expressly confirmed in the authorities cited in paragraphs 22-24 below). Although a Recital cannot override the express words of the Regulation itself, that does not take the matter further in this instance because, as I have already said, "extraordinary circumstances" is not defined in the Regulation at all.

15. In my view, Recital 15 could not be clearer. It states that, for the purposes of the Regulation, "extraordinary circumstances should be deemed to exist" where an ATMD has (amongst other things) caused a long delay to a particular aircraft on a particular day. The use of the expression "should be deemed to exist" is critical, because it leaves no room for doubt or argument: an ATMD which causes a long delay to a particular flight on a particular day should be deemed to be an extraordinary circumstance. That clear guidance is not qualified in any way.

16. Based on that interpretation of the Recital, the answer to this appeal is plain. Recital 15 does not suggest that it is necessary, or even appropriate, for the court to look at the underlying reasons for the ATMD, or to go behind the ATMD in order to analyse the circumstances in which it came to be made. On the contrary, if the Regulation required the underlying cause of an ATMD to be investigated, so that it was only if that underlying cause could itself be characterised as an extraordinary circumstance that the Article 5(3) defence operated, Recital 15 would become otiose. Such an outcome would, in my judgment, be the opposite of the way in which the deeming provision was plainly intended to operate.

17. On this point it is important to differentiate between Recitals 14 and 15. As I have explained, Recital 15 is couched in prescriptive terms: if the delay is due to an ATMD, it should be deemed to have been caused by an extraordinary circumstance. But Recital 14 is not expressed in the same terms. Recital 14 identifies certain circumstances which *may* be regarded as "extraordinary" (but which, equally, may not be extraordinary circumstances). The operative word in Recital 14 is "may": in this way, the circumstances listed in Recital 14 are clearly intended to be indicative only.

18. On behalf of the appellant, Mr Taylor QC was obliged to argue that an AMTD, as envisaged in Recital 15, may be an extraordinary circumstance, but may not be. In other words, as he conceded, his construction had the effect of adding an ATMD into the pool of potential extraordinary circumstances listed in Recital 14, but otherwise gave no effect to Recital 15.

19. The difficulty with that interpretation is that it completely rewrites Recital 15, red-lining the deeming provision, and instead reading it as if an ATMD was just another example of a possible extraordinary circumstance. Of course, if that was right, an ATMD could have been added to the list in Recital 14, and there would have been no need for Recital 15 at all. I do not consider that there is anything in the Regulation which gives any support to that construction; on the contrary, it is contrary to the words used.

20. Given the clear language of Recital 15, the appeal was in obvious difficulties. However, Mr Taylor QC submitted that justification for his approach could be found in the case law.

Reason 2: The Case Law

21. We were taken to a number of authorities, and I deal with each of them briefly below. In my view, on a proper analysis, the cases are either of no assistance to the appellant or they support the equation of ATMDs and "extraordinary circumstances" identified in Recital 15.

22. In *Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA* (Case C-549/07) (22 December 2008) [2009] Bus LR 1016, the CJEU concluded that the circumstances in Recital 14 were indicative only. At paragraphs 21-23, they said:

> "21. In this respect, the Community legislature indicated, as stated in recital 14 in the Preamble to Regulation No 261/2004, that such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes that affect the operation of an air carrier.
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> 22. It is apparent from that statement in the Preamble to Regulation No 261/2004 that the Community legislature did not man that those events, the list of which indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances. It follows that not all the circumstances surrounding such events are necessarily grounds of exemption from the obligation to pay compensation provided for in article 5(1)(c) of the Regulation.
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> 23. Although the Community legislature included in that list "unexpected flight safety shortcomings" and although a technical problem in an aircraft may be amongst such shortcomings, the fact remains that the circumstances surrounding such an event can be characterised as "extraordinary" within the meaning of article 5(3) of Regulation No 261/2004 only if they relate to an event which, like those listed in recital 14 in the Preamble to that regulation, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin."

23. In my view, these paragraphs make plain that, where the delay was due to one of the circumstances listed as indicative in Recital 14, the court had to be satisfied that, to qualify as extraordinary, the circumstances "relate to an event which is not inherent in

the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin". These paragraphs do not purport to address the prescriptive terms of Recital 15. I reject Mr Taylor QC's submission that this court should ignore the clear terms of Recital 15 simply because "extraordinary circumstances" were defined in *Wallentin-Hermann* in a particular way, without any reference to Recital 15, or to an ATMD.

24. In *Jet2.com Limited v Huzar* [2014] EWCA Civ 791, Elias LJ noted that the circumstances set out in Recital 14 "are only indicators; they identify events which may, but not necessarily will, constitute or give rise to exceptional circumstances". Like *Wallentin-Hermann*, the case was concerned with a technical defect which, on an application of the *Wallentin-Hermann* test, was found not to constitute extraordinary circumstances.

25. *Huzar* is important because at paragraph 48, Elias LJ touched on ATMDs. He said:

> "It makes it clear that events which are beyond the control of the carrier because caused by the extraneous acts of third parties, such as acts of terrorism, strikes or *air traffic control problems*, or because they result from freak weather conditions, cannot be characterised as inherent in the normal activities of the carrier." (Emphasis supplied)

This passage therefore supports the interpretation of the Regulation which I have set out above: this court found that an ATMD was an extraneous act of a third party and could not be characterised as inherent in the normal activities of the carrier.

26. In *McDonagh v Ryanair Limited* [2013] 1 Lloyd's LR 440, although Recital 15 was set out in the judgment, no arguments were advanced by reference to it and there was no analysis of it or how it might differ from Recital 14. That was because, on the facts of that case, the existence of "extraordinary circumstances" (arising out of the eruption of the Icelandic volcano and the ATMD to close Irish air space in consequence), was accepted by all parties (and the court). The issue in *McDonagh* was whether the air carrier was right to say that the circumstances were so extraordinary that the remainder of the Regulation did not apply. That is not an issue that arises in this case.

27. Our attention was drawn to paragraph 38 of the judgment in *McDonagh* because of the express reference there to Recital 15. Paragraph 38 reads as follows:

> "38. Under recital 15 and article 5(3) of Regulation (EC) No 261/2004, by way of derogation from the provisions of article 5(1), the air carrier is thus exempted from its obligation to compensate passengers under article 7 of that Regulation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances which are beyond the air carrier's actual control (*Nelson*, para 39)."

In his oral submissions, Mr Shah QC suggested that this paragraph was doing no more than paraphrasing Recital 15, on the assumption that the ATMD closing Irish airspace amounted to an extraordinary circumstance. I accept that submission. Again therefore, to the extent that the judgment in *McDonagh* is of any assistance in the present case, it

supports the interpretation of and approach to the Regulation which I have set out above.

28. The remainder of the European case law was of very little assistance on the issue before this court. In *Siewert v Condor Flugdienst GmbH*, Case C-394/14 (14 November 2014), the CJEU held that a delay caused by a collision between a set of mobile stairs and the aircraft was not extraordinary circumstances. Again, this involved a consideration of Recital 14. Furthermore, the questions to the CJEU were formulated on the express basis that the party in control of the mobile stairs was a company "to whom certain tasks that constitute part of the operation of an air carrier have been entrusted". In other words, the moving of the stairs which caused the collision was part of the carrier's operation (albeit one that had been sub-contracted out), so it is unsurprising that the collision was found to be inherent in the normal exercise of the activity of the carrier.

29. Finally, in *Pešková and Another v Travel Service* [2017] Bus LR 1134, the delay was caused in part by a bird strike and in part by the carrier's decision to fly out their own engineer to consider the extent of the damage to the aircraft's engine caused by that bird strike. The delay due to the bird strike was found to be extraordinary circumstances, but the delay due to the flying out of the engineer was not. The court gave guidance as to how, in those circumstances, the two competing causes of the delay should be approached by the court. No part of that case was concerned with an ATMD.

30. In summary, therefore, none of these cases dealt directly with ATMDs or Recital 15. The only cases which touch on ATMDs are *Huzar* (where Elias LJ indicated that such matters could not be characterised as inherent in the normal activities of the air carrier) and *McDonagh*, where it was assumed that the ATMD to close Irish airspace due to the Icelandic volcano amounted to extraordinary circumstances, and where the reference to Article 15 in the judgment stressed that this result arose because it was beyond the carrier's actual control. Thus, speaking for myself, I do not consider that the case law (such as it is) is contrary to my interpretation of the Regulation set out above; indeed, I consider that it supports it.

Reason 3: Policy

31. Standing back from the obvious differences in the wording of the two Recitals, I consider that it is in accordance with the policy underpinning the Regulation to restrict the carrier's general ability to rely on Article 5(3) (hence the requirement that they demonstrate "extraordinary circumstances", which is a high hurdle), but to provide a defence where the delays are caused by an ATMD, over which the carrier generally has no control. It would be impractical and time-consuming if carriers felt obliged routinely to challenge every ATMD at the time that it was made, because they knew that they would need subsequently to justify that decision in answer to any claims for delay. It would also be impractical for the courts to allow a debate about the merits of a particular ATMD long after the event, and in circumstances where ATC would not be a party to the litigation. Such an approach would be disproportionate to the typical value of compensation awarded in cases of this kind.

32. It was suggested on behalf of the appellant that the policy behind the Regulation is the enhancement of the rights of the consumer, in this case air passengers. So it is: see paragraph 40 of *Huzar*, and paragraph 17 of *Siewart*. But one important strand of that policy, as Recital 1 makes clear, is the need to ensure "a high level of protection" for

those passengers and, in my view, that protection starts with the need to ensure their safety. The paramount importance of safety considerations explains the significance that Recital 15 ascribes to ATMDs: it is there, as a separate and stand-alone Recital, in order to emphasise that any issue of safety, which would in turn require an ATMD, takes the situation out of the ordinary.

33. Mr Taylor QC endeavoured to argue that not all ATMDs were concerned with safety and used the example of the carrier failing to file an acceptable flight plan, which might in turn lead to an ATMD delaying the flight. That was "just paperwork", he submitted. But anyone with any knowledge of aviation procedure knows that an acceptable flight plan is not merely a matter of form-filling, but the starting point for a safe and controlled flight.

34. Finally on the question of policy, contrary to the emphasis of Mr Taylor QC's oral submissions, Recital 15 does not provide the carrier with some sort of "get out of jail free" card merely because the long delay can be shown to be due to the impact of an ATMD. The carrier still has to satisfy the second limb of Recital 15, namely that all reasonable measures had been taken to avoid the delay due to the impact of the ATMD. In this case, that part of the test was found to have been satisfied.

35. In reaching these conclusions, I note that they are consistent with a number of decisions in the lower courts, including those of HHJ Graham Wood QC in *British Airways PLC v Horstink & Snapper* (15 February 2015, Liverpool County Court), and the Scottish Sheriff Court in *Dunbar v EasyJet Airline Co. Limited* 2015 SLT (Sh Ct) 249; as well as the analysis of HHJ Melissa Clarke in the present case. By contrast, I note there is no authority of any kind which supports the appellant's approach to Recital 15. Accordingly, for these three reasons (of interpretation, of case law, and of policy), I consider that Recital 15 provides a complete answer to this appeal.

***The Inapplicability of the First Limb of the Test in Wallentin-Hermann*.**

36. For completeness, I should say that, in my view, the first limb of the test as articulated in *Wallentin-Hermann* cannot apply directly in a Recital 15 case. That is unsurprising: *Wallentin-Hermann* was a case involving delay due to an engine defect, and so gave rise to a detailed consideration of Recital 14 only. It was in that context that the CJEU made clear that, when considering the circumstances listed in Recital 14, in order to qualify as extraordinary, the carrier had to demonstrate that the cause of the delay "is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin". So, by way of example, a technical defect in the aircraft which was missed on a regular inspection would be inherent in the normal exercise of the carrier's activity and would not therefore be extraordinary, whilst a "hidden manufacturing defect which impinges on flight safety" (the example given in paragraph 26 of the judgment) would be extraordinary.

37. It was for this reason that the court had to look at the underlying reason for the technical difficulty which caused the delay. That can be seen at paragraphs 27 and again at 44 of the judgment:

> "27. It is therefore for the referring court to ascertain whether the technical problems cited by the air carrier involved in the case in the

> main proceedings stemmed from events which are not inherent in the normal exercise of the activity of the air carrier concerned and were beyond its actual control.
>
> …
>
> 44. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court of Justice, other than the costs of those parties, are not recoverable."

38. Likewise, in *Huzar*, this court was also considering technical problems which caused delay. At paragraph 36 of his judgment in that case, Elias LJ said:

> "36. In my judgment, a proper understanding of the inter-relationship between the two limbs should focus on the concept of "extraordinary circumstances" itself, the language used in Article 5(3). This requires that the circumstances must be out of the ordinary, as the Court noted in *Sturgeon*. As the CJEU recognised in paragraph 24 of *Wallentin-Hermann*, difficult technical problems arise as a matter of course in the ordinary operation of the carrier's activity. Some may be foreseeable and some not but all are, in my view, properly described as inherent in the normal exercise of the carrier's activity. They have their nature and origin in that activity; they are part of the wear and tear. In my judgment, the appellant's submissions fail to give proper effect to the language of the exception. It distorts the meaning of limb 1 in defining it by reference to limb 2, and thereby renders it superfluous. It makes an event extraordinary which in common sense terms is perfectly ordinary."

39. In neither of these cases was there any reference to Recital 15, because in neither case was there an ATMD. Both cases were concerned with Recital 14 only. For the reasons given in *Wallentin-Hermann*, it seems to me to be unsurprising that, in such a case, the court has to look at the underlying reasons for the delay. But that is not the test under Recital 15, which is dealing with the binding decision of a third party (namely the ATC) which should be *deemed* to be an extraordinary circumstance.

40. On this point, Mr Taylor QC had a related but separate submission, to the effect that an event might occur which would not, on the application of the first limb of the *Wallentin-Hermann* test, be characterised as "extraordinary circumstances", but which (on this approach) would become so if it was the subject of an ATMD. One of the many examples that he gave of this was of an aircraft taxiing towards the runway when ATC spotted smoke coming out of one of the engines and aborted the flight. Mr Taylor QC submitted that, if that smoke was due to an ordinary technical defect, it would not be an extraordinary circumstance, and it would be illogical and wrong in law if, merely because an ATMD happened to be issued as a result, the delay that resulted would then be characterised as an extraordinary circumstance.

41. There are, I think, two answers to that. The first is that, in the example, it might be said that there were two competing causes of the delay: the defect or alternatively the ATMD. It would then be for the court to decide which was the operative cause in

accordance with the test in *Pešková.* That would not of itself give rise to any difficulty of principle.

42. Secondly even if, in Mr Taylor QC's example, it was found that the delay was due to the ATMD, I am not persuaded that there would be any unfairness or illogicality in any event. For the reasons which I have already given, safety considerations must be paramount. If in his example the ATC acted because of the smoking engine then, whatever the ultimate cause of that problem, it was of the upmost importance to ensure that the flight was aborted. Everything else was secondary. So, although hypothetical examples can be found of circumstances where an ATMD might, on analysis, 'hide' a more mundane reason for the delay, it seems to me that that would be a small price to pay to ensure that the safety of all air passengers remained paramount. Indeed, I am confident that this requirement was precisely what the draughtsman had in mind when he or she made Recital 15 a separate and stand-alone provision deeming ATMDs to be "extraordinary circumstances".

43. As an extension to his submissions on this point, Mr Taylor QC argued that it was wrong as a matter of European law to treat Recitals 14 and 15 differently, and that to do so would amount to a species of unequal treatment. In my view, that submission demonstrated a fundamental misunderstanding of these Recitals and the function which each is designed to perform. Recital 14 is simply a list of circumstances which may, but which will not necessarily, be characterised as extraordinary circumstances. Recital 15, on the other hand, is a much more prescriptive provision which, all other things being equal, equates an ATMD with extraordinary circumstances, and thereby allows the Article 5(3) defence to be run. There is no question of inequality; the Recitals have different consequences because they are triggered by different factual circumstances.

The Underlying Cause of the Delay in this Case

44. However, even assuming that I am wrong and that the first limb of the test in *Wallentin-Hermann* is applicable here, then I consider that the respondent has satisfied it in any event.

45. Mr Taylor QC made much of the submission that the underlying cause of the delay in this case were the thunderstorms which lead Gatwick ATC to suspend eastbound flights on the afternoon of 10 October 2014. He said that, if the first limb of the *Wallentin-Hermann* test was applied to this case, the court would conclude that the delay was caused by thunderstorms, and that, since thunderstorms are inherent in the normal exercise of the activity of the respondent, they are therefore not "extraordinary circumstances".

46. I reject that submission. In the present case, the cause of the delay was *not* the thunderstorms. Thus, at 17.22 on 14 October 2014, the pilot did not taxi to the start of the runway and then decide not to take off because of the thunderstorms. G-EZIN did not take off at the correct time because its flight had been prevented by Gatwick ATC. They had forbidden all eastbound flights. It would have been unlawful and unsafe for G-EZIN to ignore that prohibition and endeavour to take off in any event.

47. Accordingly, the relevant delay to the aircraft was caused by the impact of an ATMD which prevented the respondent from undertaking the normal exercise of its activities (i.e. flying aircraft from one destination to another). That ATMD was not inherent in

the respondent's normal activity of making/organising such flights; it was the independent decision of a third party, over which the respondent had no control, and it formed no part of the respondent's own activities.

48. Even if (which I rather doubt) it is helpful to compare delay due to an ATMD with delay due to a species of technical defect, I agree with Mr Shah QC that the better comparator is the latent manufacturing defect (as per *Wallentin-Hermann*) rather than, say, a mundane technical fault due to wear and tear. Like an ATMD, a latent manufacturing defect is the result of a third-party act or omission over which the carrier has no control, and is not an inherent part of the carrier's normal activities. It is inapt to compare an ATMD with, for example, the technical problem that arose in *Huzar* (which may have been caused by inadequate maintenance or ordinary wear and tear) or the collision of the aircraft and the steps in *Siewart* (both of which activities being within the carrier's control). Those events, albeit unusual, were plainly inherent in the carrier's normal activities.

49. So, even if (which I do not accept) the court is required to consider the first limb of the test as explained in *Wallentin-Hermann*, it avails the appellant nothing. In my judgment, if it has to, the respondent has satisfied the first limb of the test and, since it is accepted that the second limb does not arise on the appellant's case (see paragraph 6 above), then that is the end of the claim.

50. For all those reasons, therefore, I would find for the respondent on the first issue.

The Second Issue

51. The second issue raised by the appellant is to the effect that, because G-EZIN was the subject of a general prohibition involving all eastbound flights on that afternoon from London Gatwick, Recital 15 does not apply, because the ATMD did not relate to "a particular aircraft" on a "particular day". The argument is, because the decision did not relate to that particular aircraft, but instead affected over 20 flights, it could not amount to extraordinary circumstances within the rubric of Recital 15.

52. It is important to note that this argument was not advanced before either District Judge Clarke or HHJ Melissa Clarke in the courts below. Neither was it an argument advanced in the appellant's grounds of appeal, and the appellant was only allowed to pursue it at all because the respondent did not object to it being raised. In his skeleton argument on behalf of the respondent, Mr Shah QC remained relaxed about it, doubtless because he considered the argument to be hopeless. For the reasons set out briefly below, I consider that Mr Shah QC's confidence was not misplaced. But it is only on that basis that I consider it appropriate for this court to deal with the appellant's argument on the second issue at all: this court is emphatically not the place to raise entirely new points which were not tested at the original trial.

Analysis

53. In my view, it would make no sense if an ATMD affecting one flight was covered by Recital 15, but that an ATMD (made for precisely the same reason), which affected two or more flights, fell outside Recital 15. Despite a number of questions on this point from the court, Mr Taylor QC was wholly unable to provide any rational explanation for such a regime, or any policy which may lie behind it.

54. Indeed, some of the case law relied on by Mr Taylor QC in other circumstances neatly made this point against him. Thus, in *McDonagh*, the CJEU allowed the claim for compensation although the ATMD in question affected hundreds if not thousands of flights. It was not suggested that this lessened the impact of the ATMD itself or meant that, because it related to more than one flight, Article 15 did not apply.

55. In my judgment, the reason for the reference to "a particular aircraft" and "a particular day" in Recital 15 is straightforward. The Recital is making it clear that what matters is the *impact* of an ATMD on a particular aircraft on a particular day; in other words, in order to establish the defence under Article 5(3), the carrier must demonstrate the necessary causal link between the ATMD and the particular delay that is the subject of the compensation claim. It has nothing whatsoever to do with an attempt to limit the impact of Recital 15 to just one flight.

56. At paragraph 41 of his skeleton argument, Mr Taylor QC endeavoured to rely on some cases from the Netherlands in support of his contention. I derive no assistance from those cases. They contain no reasoning or exposition. I agree with Mr Shah QC's written submissions that the results appear to have been dictated by the quality (or lack of it) of the evidence submitted by the carriers. They therefore take the argument no further forward.

57. Finally, I should add that, in his oral submissions, Mr Taylor QC raised for the very first time the suggestion that, in the present case, there was more than one ATMD, and therefore that too meant that this case fell outside Recital 15. I reject that submission out of hand. ATMDs are often issued in series, as part of a developing or ongoing situation, particularly when the cause of the problem is the weather. An interpretation which stipulated that, in order to fit within Recital 15, an ATMD had to be one-off decision, and not part of an ongoing series of decisions, makes no sense at all. Again, no policy was identified in support of such a contention.

58. Accordingly, for the reasons which I have briefly given, I have concluded that there is nothing whatsoever in the second issue(s).

Reference to the CJEU

59. Mr Taylor QC suggested that this was an appropriate case to make a reference to the CJEU. Although it is appropriate to give him the opportunity of reconsidering that application on receipt of the judgments of the court, and to decide the matter thereafter, my preliminary view is that that course is unnecessary. The correct application of Community Law in this case is obvious, for the reasons which I have explained. There is no scope for any reasonable doubt as to the way in which the questions raised should be resolved. In such circumstances, there appears to be no purpose in any reference to the CJEU.

Conclusions

60. For the reasons that I have set out, I would dismiss this appeal.

Lady Justice King :

61. I agree.

Sir Ernest Ryder, The Senior President of Tribunals :

62. I also agree.