Press Summary

10 July 2024

Lipton and another (Respondents) v BA Cityflyer Ltd (Appellant)

[2024] UKSC 24

On appeal from [2021] EWCA Civ 454

Justices: Lord Lloyd-Jones, Lord Sales, Lord Burrows, Lady Rose, Lady Simler

Background to the Appeal

This appeal concerns a claim for compensation in respect of a cancelled flight. Although the sum at stake is small, the decision has the potential to affect tens of thousands of claims which are made annually under the applicable legislation. It also addresses important questions regarding the status of accrued EU law rights.

The respondents, Mr and Mrs Lipton, were booked onto a flight from Milan Linate Airport to London City Airport on 30 January 2018 operated by the appellant airline, Cityflyer. The flight was cancelled because the pilot did not report for work due to illness and it was not possible to find a replacement pilot. The Liptons were rebooked onto a replacement flight and landed in London just over 2.5 hours later than scheduled.

The Liptons claimed against Cityflyer for €250 (about £220) under Regulation (EC) 261/2004 of 11 February 2004 ("**Regulation 261**"). Regulation 261 entitles passengers to compensation for cancelled flights. Airlines have a defence if they can show that the cancellation was the result of "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". Cityflyer refused to pay on the ground that the pilot falling ill was an extraordinary circumstance. The Liptons' claim was dismissed by a Deputy District Judge in the Portsmouth County Court, and on appeal by a Circuit Judge at the Winchester County Court. The Liptons then appealed to the Court of Appeal, which determined that the defence was not made out and upheld the claim.

Cityflyer now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses Cityflyer's appeal. It holds that the pilot falling ill did not amount to an extraordinary circumstance within the meaning of Regulation 261. Lord Sales and Lady Rose give the leading judgment, with which Lady Simler agrees. Lord Burrows gives a concurring judgment agreeing with the leading judgment. Lord Lloyd-Jones gives a concurring judgment agreeing as to the result but disagreeing with the reasoning regarding accrued EU law rights.

Reasons for the Judgment

Issue 1 - What law applies?

An important question raised by this appeal is what law applies to a cause of action that accrued under an EU regulation prior to Brexit. On the date of the Liptons' flight, the UK had not yet left the EU. At that point in time, the EU text of Regulation 261 applied in the UK by virtue of section 2(1) of the European Communities Act 1972 ("**ECA 1972**"). By the date of the Court of Appeal hearing, the UK had left the EU and the ECA 1972 had been repealed by the European Union (Withdrawal) Act 2018 ("**EUWA 2018**"). Whilst it is common ground that these subsequent events did not extinguish the Liptons' accrued cause of action, the parties disagree about why that is and what law now applies to their claim [**48**]-[**50**].

Answering those questions requires the Supreme Court to examine the domestic legislation which implemented Brexit. EUWA 2018 provided for certain EU enactments and rights to remain in domestic law after 31 December 2020 ("**IP completion day**"), which was the end of the implementation period during which EU law applied in the UK. These are known as "retained EU law". In particular, section 3 of EUWA 2018 provides that EU regulations "operative immediately before" IP completion day remain in domestic law as retained EU law [**51**]-[**55**]. Section 4 provides that certain rights and liabilities which were enforceable under section 2(1) of the ECA 1972 continue to be available in domestic law after IP completion day. On IP completion day, Regulation 261 was amended by the Passenger Flights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (the "**Amended Regulation**") [**33**]-[**34**]. By the date of the Court of Appeal hearing, the Amended Regulation was in force.

The Supreme Court unanimously holds that the Court of Appeal was wrong to apply the Amended Regulation to the Liptons' claim [**66**], [**186**], [**193**]. A basic principle of the rule of law is that the applicable law is that in force at the time an event occurs. There is nothing to suggest that the Amended Regulation was intended to apply to fact patterns arising before it came into force.

As regards what law does apply, there are two alternative analyses which could explain how the Liptons' cause of action was carried forward post-IP completion day [**59**]:

a. The "Complete Code analysis": EUWA 2018 dealt comprehensively with the application in the UK of EU law following IP completion day. Where a cause of action arose in relation to events that took place pre-IP completion day, that cause of action is brought forward as retained EU law by EUWA 2018.
b. The "Interpretation Act analysis": EUWA 2018 transposed into domestic law certain rules of EU law with prospective effect but left undisturbed any cause of

> action that accrued under EU law prior to IP completion day, save where it expressly provided to the contrary. Such causes of action are saved by the application of section 16 of the Interpretation Act 1978, which provides that the repeal of an enactment does not affect any right accrued under that enactment, unless the contrary intention appears.

A majority of the Supreme Court finds that the Complete Code analysis is correct [**83**], [**93**]. Regulation 261 was operative immediately before IP completion day in two ways: (i) by stipulating the law to be applied to any new situations; and (ii) by requiring any causes of action that had accrued under Regulation 261 to be recognised and enforced by domestic courts [**86**]. Section 3 of EUWA 2018 was effective to bring forward both these aspects as retained EU law. This accords with the fundamental purpose of EUWA 2018, which was to provide comprehensively for a post-Brexit legal landscape. It is implausible that the ongoing enforcement of pre-Brexit accrued causes of action was intended to fall outside the new domestic regime [**87**]-[**88**]. The relevant text of Regulation 261 for the Liptons' claim is the EU text as it stood immediately before IP completion day.

The Interpretation Act analysis would generate a number of serious problems [**106**]-[**115**]. In particular, it is unclear how section 6 of EUWA 2018, which makes important provision regarding the status of decisions of the Court of Justice of the European Union ("**CJEU**"), would apply. The heading of section 6 suggests that it only applies to the interpretation of retained EU law, which would not include an accrued cause of action on the Interpretation Act analysis. By contrast, the Complete Code analysis makes clear that: (i) courts are not bound by decisions of the CJEU which are handed down post-IP completion day but may have regard to them; and (ii) the Supreme Court (and certain other appellate courts) are not bound by pre-IP completion day rulings of the CJEU and may depart from them.

Lord Burrows agrees that the Complete Code analysis is correct [**175**]. Accrued EU law rights exist after IP completion day as retained EU law and not as part of a separate body of law. The Interpretation Act analysis would give alarming and illogical answers to fundamental practical questions about the status of accrued EU law rights [**190**].

Lord Lloyd-Jones concludes that the Interpretation Act analysis is correct [**193**]. There was no need for EUWA 2018 to preserve accrued rights and obligations as they were automatically preserved by the operation of the Interpretation Act [**204**]. There is a general legal presumption that legislation does not operate retrospectively. The text of EUWA 2018 and the relevant background do not evidence a clear intention to displace that presumption and disturb established rights and obligations. It is significant that there is nothing in the Explanatory Notes to EUWA 2018 to support the Complete Code analysis [**202**]. The language of sections 2, 3 and 4 of EUWA 2018 is not apt to achieve the transposition of accrued causes of action into retained EU law [**206**]-[**217**]. The Complete Code analysis may result in a claim being governed other than by the law in force at the date the cause of action accrued [**218**]-[**222**]**.** Further, the Complete Code analysis is difficult to reconcile with the Withdrawal Agreement between the UK and the EU, which states that EU law shall apply in the UK during the transition period [**223**]-[**227**]. Section 6 of the EUWA 2018 is not necessarily inconsistent with the Interpretation Act analysis whereas the Complete Code analysis is difficult to reconcile with the power to depart under section 6(4) [**228**]-[**243**].

Issue 2 – Was the pilot falling ill an extraordinary circumstance?

Cityflyer bears the burden of proving that the captain's non-attendance due to illness fell within the concept of extraordinary circumstances [**160**]. The meaning of the phrase must be interpreted in light of the purpose of Regulation 261, which is to ensure a high level of protection for consumers. The basic principles regarding the application of the defence are well-settled [**137**]. The principal question is whether the relevant event is inherent in the normal activity of the carrier [**145**].

The Supreme Court unanimously holds that the pilot's non-attendance due to illness was an inherent part of Cityflyer's activity as an air carrier and cannot be categorised as extraordinary [**160**], [**174**], [**193**]. That phrase must be given its usual meaning, which denotes something out of the ordinary. Staff illness is commonplace for any business. Just as the wear and tear of an aircraft's physical components is considered an inherent part of an air carrier's activity, so too is managing illness of staff [**165**]. An event can be external to a carrier but still inherent to its operations [**166**]. It is irrelevant whether staff fall ill whilst they are off-duty; their attendance or non-attendance for work is an inherent part of the carrier's operating system. It is significant that pilots are subject to rules outside their working hours, such as a ban on drinking in the lead-up to a flight [**170**].

Regulation 261 is intended to provide a standardised level of compensation for passengers which does not require complex analysis. Requiring an enquiry into why, when and how a staff member became ill would be contrary to the intended operation of the scheme [**171**]-[**172**].