IN THE COUNTY COURT AT CENTRAL LONDON

Claim No: F22YY049
Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL
Date: 3rd July 2024

Before:

HIS HONOUR JUDGE SAUNDERS

Between:

ANDREAS WUCHNER	**Claimant**
- and -	
BRITISH AIRWAYS PLC	**Defendant**

Ms Sarah Prager KC of Counsel (instructed by Irwin Mitchell LLP, solicitors) for the **Claimant**
Mr Tom Bird of Counsel (instructed by Kennedys Law LLP, solicitors) for the **Defendant**

Hearing dates: 13 -16 May 2024 (inclusive)

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HHJ Saunders:

1. This claim arises out of an accident which occurred on 11 November 2017.

2. The Claimant, a Swiss national, was approaching departure gate A3 for flight BA718 to Zurich from London Heathrow when he slipped in a puddle of Baileys liqueur from a bottle dropped onto the floor by another passenger, whose identity is unknown. It is not disputed that the gate was about to close and much turns on the manner of Mr Wuchner's departure, and how and to what extent he slipped and fell to the floor.

3. It is the Claimant's case that the injuries he sustained because of this accident led to the liquidation of his office supplies business in Switzerland. He says that he can never work again and claims special damages exceeding £5 million – principally in respect of past and future loss of earnings. The claim is brought against the Defendant (hereinafter described for ease as "BA") under the Montreal Convention, a qualified strict-liability regime, which (as is common ground) was applicable to the Claimant's carriage.

4. Although liability for the accident under Article 17(1) of the Convention has been admitted, BA makes two important points. Essentially, these are that:

   (a) Its liability to the Claimant is in any event limited to 113,100 Special Drawing Rights ("SDRs"), a sum equivalent to about £120,000 as at the date of the accident; and

   (b) BA should be wholly or partly exonerated from any liability by reason of the Claimant's contributory negligence.

5. Quantum is heavily disputed. BA does not accept that the accident resulted in the loss of the Claimant's business or that he is (or will be) unable to find alternative employment.

6. On 2 May 2024, I directed that the hearing be limited to the following preliminary issues:

   (a) Whether the Defendant's liability for damages is limited to no more than 113,100 SDRs (which equates to approximately £120,000) pursuant to article 21(2) of the Montreal Convention.

   (b) Whether the Claimant's alleged bodily injury was caused or contributed to by his own negligence, such that the Defendant is wholly or partly exonerated from

liability to the Claimant pursuant to article 20 of the Montreal Convention, and if so to what extent.

(c) If the answers to (1) and (2) are 'Yes', whether any deduction for contributory negligence falls to be applied to (a) the value of the claim as limited under article 21(2), or (b) the total notional value of the claim (i.e. without regard to any such limit).

(d) The applicable date for the conversion of the limit of liability under article 21(2) of the Montreal Convention into sterling for the purposes of entering any judgment on the claim.

7. The parties agree, as do I, that the first two issues are mixed questions of fact and law, which will require consideration of the evidence. The third and fourth issues involve short questions of law. The fourth point has been agreed by the parties and I understand that the date of conversion is accepted as the date of the judgment on quantum for the purpose of these proceedings.

8. At the hearing before me, the Claimant was represented by Ms Sarah Prager KC of counsel; BA was represented by Mr Tom Bird of counsel.

9. Although the law depends entirely upon submissions, the circumstances of the accident are highly important to this case, and I have determined that it is better to answer that question first. Consequently, I heard oral evidence from the Claimant, and, for the Defendant, Ms Anneka Hawkes and Ms Sau Kuen Tang (known as "Zoe") Chow, who were two members of the gate staff at the time, working in their respective roles as Customer Service Team Agent and Customer Service Team Leader. I also considered the written statement of David Stonebanks who was the manager of BA's Heathrow Operations and responsible for the relationship between BA and HAL, the operator of the terminal.

10. I was also shown photographs of the location of the accident and various relevant accounts of the accident, given to Mr Wuchner's doctors along with internal documentation that was relevant to the circumstances of the accident.

The circumstances of the accident

11. It is common ground that the Claimant (who was 35 years old at the time of the accident and travelling on a business trip) was due to fly from London Heathrow to Zurich on flight BA718 operated by BA.

12. The flight was to depart from Gate A3 in Terminal 5. The gate opened at 14:56 and was due to close at 15:10, 15 minutes before the flight's scheduled departure time of 15:25.

13. The Claimant was the last passenger to arrive at the gate.

14. Before his arrival, another passenger whose identity is unknown, but who had seemingly not reported the accident to anyone, had dropped a bottle of Baileys liqueur in the queuing area in front of the desks where the passengers present their boarding passes and passports. That is set out in a Tensa barrier style in common practice at airports worldwide.

15. No one reported the spillage to the Defendant's gate staff, who only became aware of it once the queue had dissipated, and they smelt alcohol. The spillage was reported to Heathrow Airport Limited ("HAL"), the owner and operator of London Heathrow, which is responsible for the maintenance, inspection and cleaning of the terminal, including the gate area in question. They are not party to these proceedings.

16. When the Claimant arrived at the gate at approximately 15:11, the cleaners had yet to arrive. On the floor was a large pool of brown liquid and possibly fragments from the broken bottle. It appears to be common ground that the Claimant was late to the boarding gate and was rushing towards it when he slipped. It is the manner of his approach and the extent to which the Claimant should be taking care that is crucial to this case.

17. The evidence that I heard must be considered carefully because there are significant differences between the Claimant's account and the recollection of the Defendant's gate staff:

    (a) The Claimant says that as he approached the departure gate (with two cases, a mobile telephone in one hand and a tray of four coffees in the other), one of the "*boarding ladies*" called to him, "*Come on, you're the last passenger*". He says that he was going as fast as possible and answered, "*I'm coming, I can't go any*

faster", when he suddenly slipped over backwards and landed with his full weight "*on the back of his head*". He says he was "*briefly unconscious*" and lay on the floor for "*1-2 minutes*" before being helped to his feet by someone else.

(b) There were two members of gate staff on duty at the desks: Ms Hawkes (then a Customer Service Agent) and Miss Chow (then a Customer Service Team Leader). Their evidence is that neither recall the Claimant being told to hurry up. On the contrary, Miss Chow says that she called out to the Claimant to warn him of the spillage, but he did not appear to notice. She recalls that the Claimant got to his feet before any assistance could be provided. Ms Hawkes also says that the Claimant got back up quickly after the incident.

(c) Mr Wuchner claims that he was "walking normally" albeit navigating the cordoned off area close to the check – in at the gate. BA say that is simply not correct. Their witnesses say that he was "running" and hampered by the items he was holding, having placed himself under pressure in boarding the flight on time.

18. It is not disputed that, shortly after the incident, HAL's cleaning staff arrived to deal with the spillage and set up a yellow warning sign – that is demonstrated by the photographs which the parties accept were taken shortly after the accident.

19. After the accident, the Claimant made his way to the boarding point desk and was offered medical assistance, which he declined. The Claimant says that he was asked whether he wanted to go to hospital or take the flight – and that, as he wanted to fly, he decided to board the aircraft with his business associate, Benedikt Riege, who did not give evidence at trial or provide a witness statement.

20. During the flight, the Claimant says that he was in pain and felt tired and confused, and that on returning home his condition deteriorated. He visited a GP in Switzerland the following day and was diagnosed with concussion. Over the following months, the Claimant says that he struggled to return to work and that his once-profitable business (Druck-Verband) filed for liquidation in May 2018. It is the Claimant's case that since that time he has found no alternative source of income and is now financially dependent on his partner.

21. Mr Wuchner, in his oral evidence, given in German with the assistance of an interpreter, accepted that he was the last passenger to board the flight. The previous evening, he had attended a football match at Wembley as part of his visit, which was for business purposes, and was undoubtedly running late – having missed an earlier flight. He gave evidence that his alcoholic intake the night before was limited.

22. By his own account, he entered the boarding gate area and decided to go and buy himself and Mr Riege some coffees at the nearby Starbucks as, to use his words, he preferred that coffee to the kind that he could purchase on the plane. He approached the boarding gate carrying four cups of coffee (two macchiato lattes and two espressos). These were held in one of those paper trays that coffee shops give out and he placed this under his left thumb (as he demonstrated to me) whilst holding a small carry – on bag (without wheels) in his left hand, and held his mobile phone in his right hand, whilst also holding a small bag in that same hand.

23. Mr Wuchner said that one of the two members of BA staff at the gate (Ms Hawkes or Ms Chow but he does not think it was Ms Chow) called to him to hurry up as he went as quickly as possible to the gate. At this point, according to his account, not noticing the spillage, he slipped, and fell backwards, hitting his head. The BA staff said that they had identified the spillage shortly before the accident and had called for a cleaner; after the accident they called again, and the cleaner arrived soon afterwards and placed a warning sign on the spillage.

24. The photographs taken shortly after the accident show the cleaner who arrived after the accident, a yellow warning sign which was not in place at the time of the accident, and two distinct spillages – the spillage on the left is thought (and accepted by the parties) to be Mr Wuchner's coffee, and the spillage on the right is the spillage responsible for the accident. I also note that there is a diagram produced by the Ms Chow. The diagram replicates the scene shown in the photographs but, in addition, shows the position of the boarding gate, which appears to be where the photographer is standing – and that does not appear to be disputed by the parties. This is where the Defendant's members of staff appear to have been positioned at the time of the accident. There is no substantial dispute

as to the location of the accident or that the cleaners from HAL arrived after the accident had occurred.

25. I have been taken to the accident report completed by the BA following the accident. It reads:

> *"A* [passenger] *dropped a bottle of wine [sic] in the middle of the general boarding lane at around 1500. I reported to the cleaner as urgent, but it took me long time to get hold of the cleaner's office. Report ref:SR472379 Unfortunately the last* [passenger] *(Wuchner/A) stepped right on it and slipped* <u>*while he was rushing over to the gate*</u>*. He fell on his backside. I quickly went over but pax managed to get up without assistance. He was covered with the spillage."* (my underlining)

26. The Claimant suggests that some considerable time had elapsed between the spillage being identified and the accident itself. The Serious Incident Reporting Process Form is an account produced by a Ms Janet Jones (who again did not give evidence) where she states:

> "Mr *Wuchner travelling on BA718/11 NOV slipped and fell at the boarding gate. Another passenger had dropped a bottle of alcohol but had not made gate team aware. The spillage was obscured by the pax queueing to board. The gate team noticed the smell and then saw the spillage. The cleaners were called, cleaning report ref..SR472379. However, they arrived after the incident. Mr Wuchner arrived at gate, slipped and fell. He declined medical asst offered by gate…The cleaning team arrived at 1515... the incident occurred at 1510 approx. The passenger took a photo of the spillage. The gate team did not get a photo and spillage was cleared up by the time I went up to the gate area. I did get a picture of the location of the spillage as the cleaners had left a yellow warning sign there. Theresa [indecipherable]no sign when the passenger went through the gate…"*
>
> *"Names of colleagues attending: Zoe Chow. Jasmina Surinovski. Anneka Hawkers. Anji Panzhihua."*

27. The Claimant says that Ms Chow as the team leader at the gate was responsible for overseeing the boarding procedure. She is said to have confirmed Mr Wuchner's

evidence that at the time there would have been two members of staff in the area assisting with boarding - a matter she was able to confirm in her oral evidence. She says:

"Following detection of the spillage, I contacted HAL by telephone in order to report it. Whilst I was reporting the spillage, I believe another member of the boarding team went to finding something to put over the spillage. Not long after the spillage was reported, a passenger, who I now know to be the Claimant, was approaching the queuing area. Boarding was soon to close, and I believe the Claimant was the last to board the flight. I recall that the Claimant was rushing through the queueing area, and despite a call from myself to warn him of the spillage, he did not appear to notice, and proceeded to slip on the spilt liquid…"

28. Further she is also able to confirm, says the Claimant, that:

"it did take some time to get through on the phone to report the spillage to HAL. <u>However, I estimate that it was about 15 minutes from the time the spillage was first detected and cleaners then arriving."</u> (my underlining again))

29. The Claimant also notes that Ms Hawkes was able to say, in her witness statement, that:

"I believe at the time of the incident, shortly after the spillage came to my attention, that I was going to try and find something to put over the spillage. Not long after the spillage had been detected, and whilst I was still in the gate area, I remember seeing a passenger, who I now know to be the Claimant, approaching the gate in a hurry. I believe he was one of the last passengers to board the flight, and as boarding was due to close, <u>he was rushing through the area</u> towards the gate. As he did so, he slipped on the spillage and fell. I do not recall any member of the gate team telling the Claimant to hurry, or otherwise directing the Claimant, prior to him slipping." (my underlining)

<u>Evidence</u>

30. Much of the surrounding evidence given by the Claimant is uncontested. The parties agree that the accident occurred at about 3.10 p.m. shortly before the flight was to depart.

It is agreed that the Claimant slipped on the pool of Baileys liqueur just before he entered the cordoned area in his approach to Gate A3, Heathrow Terminal for the flight to Zurich.

31. BA accept that they are liable, but it is the extent of that liability which is very much in dispute.

32. The Claimant was able to confirm, in his oral evidence, that he was carrying the coffees as described, and, at the same time, seeking to navigate his way to the gate, also carrying his mobile phone and two relatively heavy hand – held bags. By his account, Mr Riege was already at the gate waiting for him as they were late and had been delayed though security.

33. There was no dispute that, even though he was late, (and was effectively the last passenger to board), that he took the decision to collect the coffees from Starbucks, located about, by his estimation, some 50 metres away.

34. He explained that he had seen and heard one of the BA staff (not Ms Chow) shouting at him to "*hurry up*", in a tone which he described as "*inappropriate*". That is disputed by the BA staff. He was prepared to concede, in his oral evidence, that he walked briskly – as he was being told to hurry up, Mr Riege was already at the gate, and he was the last passenger to board.

35. The crucial part of his evidence, in my view, centred around the process by which he proceeded from Starbucks to the site of the spill. According to Mr Wuchner, "(he) *was walking normally and carrying the coffees and did not want to spill it".* The next thing he knew that happened was that he slipped over, and described how he landed on, and broke a bottle on the floor, and banged his head. He had not seen the spillage.

36. Contrary to BA's evidence, he said that he distinctly recalled one of the members of staff shouting to him to hurry, *"about 10 times*". He believes that he fell directly as a result of this, because if he had not been shouted at then he may have been more focussed on what was in front of him and seen the spillage. He recalled someone saying something about the flight departing without him.

37. His evidence was that he fell, hit his head and lay unconscious for *"1-2 minutes"* before being helped to his feet by Mr Riege and one other person who he could not identify.

38. In terms of his movement across the gate area, he was able to confirm, variously, that he was *"walking normally and not running"*, conceded that he was walking *"as quickly as he could"* (bearing in mind that he was carrying a number of items, and that *"I was moving swiftly as I could and bearing in mind the safety of the coffee cups, as quickly as he could in that situation. "*

39. It was (quite rightly) put to him in cross – examination that his account of the manner of his fall varied in the various accounts given to the medical profession in both Switzerland and in England. For example, when speaking to a Professor Kraft shortly after his return, the doctor notes, at their walk-in clinic, that "*can't find cause of the accident*".

40. Other examples include in an account to his GP, where he says, in describing the accident, "*he was briefly unconscious, slipped with his full weight on his head"* but that was contrary to what Professor Kraft recorded, which was *"(head) not definitely struck, and possibly unconscious.*"

41. In terms of his account to medical experts involved with this litigation, BA also point out that there are varying accounts. For example, Mr Pinto, records that the accident occurred when he was presenting his ticket (which is clearly wrong), and that he was *"knocked out for a few seconds"*. Indeed, his account to Dr McCrorry, a Consultant Neurologist, an expert in these proceedings, is generally more consistent -see paragraphs 280 – 292 of his report dated July 2021.

42. In my view, I must be very careful in assessing these types of inconsistencies, as well as they are made out. I must consider the passage of time – some of these accounts are several years after the accident. If the general thrust of Mr Wuchner's account is correct, then it may well be that he has suffered some cognitive deficit which may impact on his recollection, although I have to say that was not considerably noticeable in his giving evidence. It is not uncommon for parties making claims to give variable accounts, bearing in mind that they have little or any control over what is written down. In this case, little turns on it. In his account to Mr Pinto, it is recorded that he had bags in both hands (although he does not mention the mobile phone and coffees) – which is broadly consistent with his account.

43. Moreover, some of the earlier reports have been translated from German (because they relate to doctor's visits in Switzerland), and, as demonstrated by the fact that he required

a German interpreter at the hearing, it is correct to say that, inevitably, there are nuances of language which may come into play, particularly when he is relying on English, which is not his first language. Again, this means that I treat these discrepancies (provided they are not glaring in detail, which is not the case here) with a little scepticism.

44. In summary, considering the inevitable inaccuracies that occur in recalling events after several years, I found him overall as being a straightforward and credible witness subject to the inconsistencies which were put to him in cross -examination.

45. One matter that was established, in my view, was that he was "*moving swiftly*" to catch his flight – a matter he was prepared to concede. He was late. He had made himself late by his own design (and by his own admission) in buying coffees when it may have been more sensible to simply board the plane. Hindsight is a wonderful thing, but it was probably not the best decision that he has ever made, and one that he now surely regrets.

46. That scenario, even by his own account, would, in my view, have placed him under considerable pressure. As a result, even by his own account, he was "moving swiftly", heavily laden down, with 4 coffees in a tray, in one hand, along with a bag, his mobile phone in the other, and another bag.

47. It is more likely in my view that this must have had a significant effect on his ability to navigate the gate area, the cordon and his ability to observe what was around him. In those circumstances, in my view, it was not surprising that he did not notice the spillage on the floor in front of him.

48. BA fielded two witnesses of fact. Ms Hawkes gave oral evidence that she had seen the spillage (which no one had reported) from her vantage point at the desk. She recalled Ms Chow (the other witness) calling HAL and remembered there being some delay. That was in accordance with BA's procedure – they would call HAL immediately and any spillages would be removed as soon as possible.

49. During her evidence, she remembered considering means to try and make the area safe. This included obtaining newspapers from the area outside the plane, or putting yellow sticky tape around the spill, and finding something to cover it. Unfortunately, the accident occurred before she could attend to this.

50. Ms Hawkes' recollection of the accident (and the circumstances surrounding it) was not of considerable assistance to me (apart from in these matters) – I say that not because she did not seek to assist the court (because I am more than satisfied that she tried her best as a competent employee of BA) but simply because that recollection was tainted by the passage of time.

51. Not so with Ms Chow, BA's other witness who gave oral evidence. She was a very helpful witness, as her recollection was much more precise and detailed. I formed the view that, as Team Leader on the day, she was naturally more experienced, and so the events were of greater consequence to her.

52. Like Ms Hawkes, I anticipate that she had been very busy boarding passengers into what appears to be a very full flight – there were 134 on board, although they appear to have boarded before the Claimant and Mr Riege arrived.

53. Her oral evidence was that, as soon as the spillage had been identified, she immediately telephoned HAL, but was unable to obtain an answer. This action was in accordance with BA's protocols, HAL were responsible for cleaning up – a matter confirmed by Mr Stonebanks in his short witness statement, subject to a Civil Evidence Act Notice, setting out the procedure that BA follow in these circumstances. She eventually got through – that I am satisfied with as the photographs clearly show someone from HAL on site albeit after the accident.

54. I will deal with this shortly, but whatever the amount of time which elapsed before the spill was cleared up, there must have been some substantial delay. That is consistent with Ms Chow's evidence, part of Ms Hawkes, and particularly the contemporaneous documentation, which I have referred to above (I refer to Ms Chow's account in her witness statement which gives such delay at 15 minutes).

55. Both she and Ms Hawkes deny ever having told Mr Wuchner to *"hurry up"* and, in particular using an inappropriate tone. On balance, I accept that. From Ms Hawkes' evidence, I formed the view that she was someone who was unlikely to say this in the manner suggested, and that Ms Chow (who was a very pleasant lady) would certainly not say that - a matter confirmed by the Claimant in his oral evidence.

56. The most likely scenario is, I consider, as Ms Chow explained, it was her who called out *"spillage"* or words to that effect immediately before the accident, as she maintains. As a result, the Claimant took this warning as something else (for all the reasons to do with his recollection and which I have set out above).

57. In my view, though, the given warning was insufficient, and appeared to be too late. I fully accept that Ms Chow followed the BA protocol in what she did (as did Ms Hawkes) but, in my view, to provide safety for passengers in a busy area, where accidents are, as Ms Chow explained, common place, health and safety must be a primary concern.

58. I do find it unusual that no immediate steps were taken by anyone from BA to prevent an accident – as both Ms Chow and Ms Hawkes were worried about that eventuality.

59. This might have been remedied quite simply. For example, a simple solution might have been to re- route the Tensa barrier so that incoming passengers would not cross the spillage. That would have been a very simple task.

60. Another example was my rhetorical question as to why no one obtained the yellow sticky tape to place on the floor around the spillage? Alternatively, accepting that the cones operated by HAL were not to hand, why could not a barrier of some kind be put up next to the spill? The photographs show that it was not insubstantial.

61. Moreover, since nearly all the flight had boarded, it would have seemed sensible for one of the members of staff to stand by or next to the spillage and re-direct any late passengers (such as Messrs Wuchner and Riege) around it. Nothing appears to have been placed over the spillage to cover it up. That may have been simply because nothing was available, but it is surprising that this situation could not have been dealt with, at least temporarily, until all the passengers had boarded.

62. In that sense, it is my view that, in waiting for HAL, BA should have had procedures in place to avoid the accident, to provide safety, and to temporarily alleviate the situation, pending the arrival of HAL.

63. Consequently, the evidence about the length of that delay becomes quite relevant.

64. Mr Bird suggests that the delay was, in real terms, quite short. The gate records show that the gate opened at 14.56 hours, and with the spillage being noticed about 5 minutes

before the gate closed, which was 15.05 hours, considering the abortive phone call, the period is a matter of a few minutes.

65. Ms Prager adopted a different scenario which I prefer. The starting point is, of course, Ms Chow's own witness statement where she calculates the delay as one of approximately 15 minutes. That is her evidence-in – chief. The gate was opened at 14.56 hours. Ms Chow gave evidence that she could board 10 -12 passengers a minute – with 134 on the flight. Her oral evidence was that, rather than boarding 10 - 12 passengers per minute on that flight (I consider that she was saying that this was the level she could achieve), that she could *"easily"* board a plane of that number of passengers in 10 minutes, and so it is conceivable that she took less time than that.

66. That would mean boarding would conclude by approximately 3.00 pm at the latest. We know that the accident occurred at 3.11 pm and that would have left 10 minutes or so before the accident – which is directly consistent with her witness statement as to the time that had elapsed between the spillage being noted, and the time that it was cleaned up (consistent with paragraph 28 above).

67. The other part of her evidence where I found Ms Chow to be extremely helpful is in assessing Mr Wuchner's method of getting to the gate from Starbucks. That is important in terms of contributory negligence. He has said, variously, that he was *"moving swiftly*" (which he eventually set upon), and "*walking normally*", which in view of the overall circumstances, I do not accept.

68. It is important to consider context. That has already been explained by me, but it seems inevitable that, through his delay and attempt to obtain last – minute coffees, the Claimant had placed himself under greater pressure to board the flight in time, having missed his earlier flight, and been delayed in security.

69. It is a likely scenario that he was anxious to catch his flight, and that the pressure he had imposed upon himself had made that pressure even greater. That, in my view, contributed to the accident.

70. Ms Chow struck me as an experienced member of BA staff who gave evidence credibly and carefully. Interestingly, she was prepared to give an active demonstration of what

she saw Mr Wuchner do, leading up to the accident – particularly in his manner of movement.

71. In descriptive terms, which confirmed her actions in the witness box, it was concluded that, in her view, Mr Wuchner *"(was) moving fairly swiftly but quickly enough to get somewhere in a hurry."*

72. That evidence, in my view, is consistent with the situation that the Claimant found himself in. When added to the fact that he was heavily laden, by any account, that is significant.

73. In my view, as soon as Mr Wuchner placed himself in this pressure situation, he placed himself in a position whereby he was contributing to the accident by, proportionally, not taking sufficient care. It is likely, and I accept that BA has demonstrated this, that he has not taken as much care as he should reasonably have been expected to, that it is likely that he did not pay full attention to his path (such that he contributed to the accident) and that he did not take into account the extent and effect of the items that he was carrying.

74. That is a significant contribution but, in my view, it was not the main cause of the accident, that is down to the failure of BA to take steps to warn passengers, and/or protect the spillage, as this may well have avoided the accident.

75. It is, therefore, my conclusion, on the facts, that BA are largely at fault for this accident, and I calculate that to be an 80% liability by way of having caused the accident, where the Claimant should be found contributorily negligent to the extent of 20% (by his manner of speeding to the gate, having placed himself in that position for the reasons that I have set out above).

<u>Findings of Fact</u>

76. As a result of these conclusions, and in summary, my findings of fact are as follows:

    (a) Mr Wuchner had an accident on the 11 November 2017 when he slipped on a spillage of Baileys liqueur in the boarding gate area of Gate A3 at Heathrow Airport, |London.

    (b) He was injured. The extent of those injuries is not to be determined at present.

(c) I find that he slipped and fell, whilst carrying four coffees in a tray under his left thumb, whilst carrying a carry – on bag in his left hand. In his right hand, he was carrying a mobile phone and another carry – on bag.

(d) He was not running when he fell, but was "moving swiftly", accepting Ms Chow's evidence as to the manner in which he was moving.

(e) That Ms Chow did warn Mr Wuchner of the spillage, but I do not consider that, for whatever reason, probably the pressure he was under to board the plane, he heard her. If he had heard her, he may have avoided the fall.

(f) There is little evidence that either of the BA staff were telling him to hurry up, as otherwise he would miss the flight. I consider that it was more likely than not that, if he heard Ms Chow, that, though a combination of English not being his first language and his need to board the plane, that he misheard Ms Chow's instruction for him to take care.

(g) The overall scenario was such that Mr Wuchner had placed himself under considerable pressure in being late for the plane, and that this was a contributory factor in the mechanics of the accident. He had placed himself in a vulnerable position and was conscious, more likely than not, that he had to catch the plane and that Mr Riege was waiting for him at the boarding gate.

(h) In my view, he contributed significantly to his own downfall by leaving himself almost no time to catch the flight, which could have been avoided, and it must follow that he placed himself in a position whereby he could not give sufficient attention to his actions, coupled with the fact that he appears to have been substantially overloaded. That meant he was not able to adapt to the situation and contributed to the accident accordingly.

(i) Mr Wuchner failed to look where he was going or to notice the spillage when moving towards the boarding gate.

(j) Mr Wuchner moved too quickly towards the boarding gate because he was rushing to avoid missing the flight; and/or

(k) Mr Wuchner failed to pay attention to or respond to Miss Chow's warning to him of the spillage.

(l) He was 20% contributory negligent to the circumstances of the accident as a result.

(m) To the contrary, I also find that BA were clearly mainly at fault to the extent of 80%.

(n) BA should expect (and will be familiar) with the concept that passengers are frequently late for their flight – this is a normal everyday occurrence which BA and other airlines experience – and whatever the delay between the spillage being identified and the accident occurring, which I find to be substantial, I would have thought it incumbent on such staff to "protect the area" around the spillage, or to re- route any passengers as soon as it was discovered. For reasons that I have set out above, BA must assume much of the fault.

(o) If I were to apply ordinary principles of English and Welsh law, then the Defendant is 80/20 liable for the loss that the Claimant has suffered as a result of the accident.

(p) This translates into the application of the Convention, in that I find that I find that the Claimant's alleged bodily injury was caused or contributed to by his own negligence, such that the Defendant is wholly or partly exonerated from liability to the Claimant pursuant to article 20 of the Montreal Convention. Applying domestic law, that contribution amounted to 20%.

The Legal Questions

77. In applying the found facts to the law in this case, it is important to establish and consider two separate matters:

(a) Whether the Defendant's liability for damages is limited pursuant to article 21(2) of the Convention.

(b) As the Claimant's contribution has been established, whether any deduction for contributory negligence falls to be applied to (a) the value of the claim as limited under article 21(2), or (b) the total notional value of the claim (that is without regard to any such limit).

78. This is a significant claim – it amounts to in excess of £5 million, and so, whether the claim is limited and/or deduction should be applied to the limited claim, or without consideration of the limit is highly important.

79. The most important aspect of the determination of this claim, having determined that element of liability, is that BA's case is largely based upon their invitation to the court, that its liability to the Claimant is limited to 113,100 SDRs pursuant to article 21(2) of the Montreal Convention.

80. The importance to BA of this finding is self – evident in view of the extent of the Claimant's claim (which, of course, has not yet been determined).

The Effect of the Montreal Convention

81. It is a matter which turns largely on a question of law.

82. It is useful if I, first of all, set out the history of the various conventions that apply to claims of this nature and which are, largely, adopted internationally.

83. They stem from the Montreal Convention ("the Convention"), which is the most recent of a number of conventions, having been preceded by the Warsaw Convention (and subsequent amendments).

84. The parties agree that BA's liability is governed by the limits and conditions of the Convention.

85. The Convention was given effect in English law by the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002 and came into force in the UK and the rest of the EU on 28 June 2004.

86. The Convention was preceded by the Warsaw Convention and a series of supplementary treaties and private agreements. Its purpose (which appears to follow into the Convention) is set out by Lord Stein, in a factually unrelated case, *Re Deep Vein Thrombosis and Air Travel Group Litigation* ("*In re DVT*") [2005] UKHL 72, at paragraph 27:

> *"27. The purpose of the Warsaw Convention, following the precedent of the earlier Hague Rules governing carriage by sea, was to bring some order to a*

> *fragmented international aviation system by a partial harmonisation of the applicable law. The Warsaw Convention is an exclusive code of limited liability of carriers to passengers. On the other hand, it enables passengers to recover damages even though, in the absence of the Convention and the Act, they might have no cause of action which would entitle them to succeed. It follows from the scheme of the Convention, and indeed from its very nature as an international trade law convention, that the basic concepts it employs to achieve its purpose are autonomous concepts. For present purposes the compromise agreed at Warsaw involved the imposition of a form of strict liability on carriers in respect of accidents causing death, wounding or bodily injury to passengers in return for the limitations of liability expressed in the Warsaw Convention." (my underlining)*

87. The Convention replaced the Warsaw Convention and was intended to modernise it and consolidate the then existing position set out in a series of satellite agreements (in addition to the Warsaw Convention itself).

88. The Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. The Convention does not purport to deal with all matters relating to contracts of international carriage by air; but in those areas with which it deals, such as the liability of the carrier, the code was intended to be uniform and to be exclusive also of any resort to the rules of domestic law. Any action for damages, however founded, can only be brought subject to the conditions and limits of liability set out in the Convention – *Stott v Thomas Cook Tour Operators [2014] UKSC AC 1347*.

89. From my reading, several principles emerge from the imposition of the Convention.

90. First, it is intended that signatory states attempt to adopt a uniform interpretation of the Convention.

91. Secondly, as set out in *Abnett v British Airways Plc [1997] AC 443*, the courts can and should seek assistance from relevant decisions of other Convention countries (such as the USA). However, the weight of these cases should depend upon the standing of the court concerned and the quality of the legal analysis within the decision.

92. The case of *Arthern v Ryanair [2023] EWHC 46 (KB)* is helpful here as it recognises that the international approach (which a court should apply) and the balance it seeks to strike between the interests of airlines and their passengers should not be distorted by a judicial approach designed to reflect the merits of the case.

93. Equally, *Arthern* directs us that considering cases under the previous Warsaw Convention are *"just as valuable* "and that the judicial task in such cases is to apply the language of the Convention to the facts of the case.

94. In this sense, the remedy is set out in Article 17 (1) of the Convention. This provides that:

> *"The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."*

95. In other cases, there may be disputes as to whether the Convention applies but, here, BA accepts that the bodily injury and the accident that caused the injury took place in the act of embarkation, and so Article 17 (1) is satisfied.

96. BA say, however, that contributory fault on the part of the injured party, as I have found, may afford a defence to the airline.

97. That is why Article 21(2) of the Convention comes into play because BA say that it strictly limits the extent of liability in this case.

98. The provision reads:

> *"The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger [113,100] Special Drawing Rights if the carrier proves that:*
>
> *(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or*
>
> *(b) such damage was solely due to the negligence or other wrongful act or omission of a third party"*

99. The burden of proof falls upon the carrier airline, so it falls on BA in this instance. There is some discussion on this in the commentary to the Convention, with the intention of balancing the scales of justice towards the passenger, as it will often be the carrier who is fully aware of the circumstances of the accident, particularly in terms of how it was caused, and what its internal operations are.

100. The carrier can only avoid liability for damage in excess of the SDR limit under article 21 by proving that sub-paragraph (a) or (b) applies, though it may be observed that if the

defence in (b) is made out, the defence in (a) – that the damage was not due to the fault of the carrier – must necessarily also be made out.

101. There is no definition of "*negligence or other wrong act or omission*" in the Convention. It is therefore for national courts to interpret these terms under their respective choice-of-law rules: see *The Montreal Convention: A Commentary* at paragraph 21.33 and *Silverman v Ryanair DAC* [2021] EWHC 2955 (QB). It follows that English law principles should apply.

102. Upon my reading of Article 21, it distinguishes between "*the carrier or its servants or agents*" on the one hand, and "*a third party*" on the other. The parties are agreed, as am I, that there is no definition of these terms in the Convention, nor does there appear to be any English authority that has addressed this provision in any detail.

103. I have been tasked to consider several authorities of an international nature, to act as a guide. They are useful, as are the excerpts from learned texts on the question of travel law. I will refer to them where relevant.

104. What is abundantly clear is that the Convention seeks to strike a balance between strict liability being imposed on the carrier, on the one hand, with a relaxation of that approach by protecting carriers against acts on the part of passengers which may contribute towards their liability. However, there is no relevant authority in England and Wales, as I understand it, and no guide to interpretation. Although it may be described as contradictory when dealing with a strict liability regime, it is perhaps understandable in the case of discussions when drafting the Convention that this was agreed upon as no doubt the interested parties would most likely have intended for there to be a need to balance interests that I have described above.

105. Be that as it may, some guidance is given in the *re DVT* case. With an eye to the legal mechanisms being kept global in nature, at paragraph 11, Lord Scott states:

> *"11. Counsel for the parties were in broad agreement as to the principles of interpretation of article 17 that should be applied. The important principles for present purposes are that:*

(1) the starting point is to consider the natural meaning of the language of article 17, with the French text prevailing in case of any inconsistency with the English text (fortunately there is no relevant inconsistency);

(2) the Convention should be considered as a whole and given a purposive interpretation.

(3) the language of the Convention should not be interpreted by reference to domestic law principles or domestic rules of interpretation; and

(4) assistance can and should be sought from relevant decisions of the courts of other Convention countries, but the weight to be given to them will depend upon the standing of the court concerned and the quality of the analysis.

I would add to these that the balance struck by the Convention between the interests of passengers and the interest of airlines ought not to be distorted by a judicial approach to interpretation in a particular case designed to reflect the merits of that case. The point was well put by Justice Scalia in his dissenting opinion in Husain v Olympic Airways (2004) 124 S.Ct. 1221, 1234 (an opinion with which Justice O'Connor concurred):

"12. A legal construction is not fallacious merely because it has harsh results. The Convention denies a remedy, even when outrageous conduct and grievous injury have occurred, unless there has been an 'accident'. Whatever that term means, it certainly does not equate to 'outrageous conduct that causes grievous injury'. It is a mistake to assume that the Convention must provide relief whenever traditional tort law would do so. To the contrary, a principal object of the Convention was to promote the growth of the fledgling airline industry by limiting the circumstances under which passengers could sue. .. Unless there has been an accident there is no liability, whether the claim is trivial .... or cries out for redress".

106. It, therefore, follows, in my view, that, whilst these are all important, the essential matters to be considered are (a) the wording of the Convention, (b) that it should not be interpreted by reference to domestic law, and (c) it should be given a purposive

interpretation. The purpose is set out: to provide uniformity and to strike a balance between the competing aims of carriers and passengers.

107. Against that background, a useful example of another jurisdiction, in this case the Scottish Courts, is highly persuasive.

108. The case is *Mather v easyJet Airline Co Ltd* [2023] CSIH 8, a decision of the Scottish Court of Session (First Division, Inner House). It is useful because it acts as a review of recent US case law.

109. The facts of that case were that Mr Mather was seriously injured when he fell from a wheelchair being pushed along an air bridge at Hamburg airport by an employee of DRK, a non-profit organisation contracted by the airport to help with passengers. It was covered by the EC Regulation 1107/2006 regarding disabled passengers.

110. It was common ground that DRK's employee was at fault and easyJet accepted that it was liable under the Convention to compensate Mr Mather for his loss up to the applicable limit (113,100 SDRs, as here), but he claimed damages from easyJet more than that amount on the basis that DRK's employee was an agent of easyJet within the meaning of the Montreal Convention.

111. It is worth setting out part of the Lord Ordinary's judgment as it has some relevance to this case, and, in particular BA's argument.

"[54] The Montreal Convention of 1999 governs the liability of airlines for losses occurring to passengers on board aircraft and during embarkation and disembarkation. The airline is liable for any damage, unless self-inflicted, up to 113,100 Special Drawing Rights; about £146,000 at the material time. It is also liable for damage above that value unless it proves either that the damage was not caused by the airline's fault or negligence or that it was caused solely by that of a third party.

[55] The Montreal Convention followed its predecessor, signed at Warsaw in 1929 and amended at The Hague by a Protocol of 1955. It is intended to unify certain of the rules applicable to carriage by air, but it does not provide a comprehensive code (Abnett v British 29 Airways 1997 SC (HL) 26, Lord Hope at 36). It sets out the extent to which airlines can limit their liability contractually and represents a balance or compromise in

the interests of certainty and uniformity (ibid at 45; El Al Israel Airlines v Tseng 525 US 155 (1999), Ginsburg J delivering the opinion of the majority of the US Supreme Court, at 169-170). Such certainty and uniformity is an important element in enabling insurers to gauge the risk which they undertake when providing cover (Reed v Wiser 555 F 2d 1079 (1977), Mansfield CJ (Circuit Judge), delivering the judgment of the US Court of Appeals, Second Circuit, at para [4]). The Articles of the Convention, like any international treaty, have to be given a purposive construction (King v Bristow Helicopters 2002 SC (HL) 59, Lord Hope at para 76) but, as distinct from the Warsaw Convention, the English text alone governs in the United Kingdom. The words must be given an autonomous meaning (ibid Lord Steyn at para 16). The jurisprudence of other contracting states should be considered, with a view to promoting consistency, but appropriate care should be taken when doing so (Abnett v British Airways, Lord Hope at 43). Any construction of Article 17 of the Montreal Convention must provide a bright, clear line which can be applied by passengers, airlines and their insurers. Where the Convention does not apply, domestic remedies will remain available.

[56] The wording of Article 17 of the Montreal Convention is similar to the corresponding Article in the Warsaw Convention, but under the latter the airline's liability was limited to a prescribed sum (of francs) unless the airline or their agents were guilty of "wilful misconduct" (Art 25). Liability could be avoided altogether if the airline proved that they and their agents had taken "all necessary measures" to avoid the damage (Art 20). The Hague Protocol changed the test applicable to damages which exceeded the prescribed sum to acts or omissions by the airline which were committed intentionally or recklessly. The 30 terms, of what was to become Article 30 of the Montreal Convention, were included (Article XIV adding Article 25A into the Warsaw text) to make it clear that the airline's servants or agents were entitled to the protection of the limits on liability which the airline enjoyed."

112. In this highly persuasive decision, in my view, there is a considerable steer in paragraph 54 of the judgment, which sets out the balance that I have spoken of, that is that the limit can be exceeded unless the airline (or carrier) proves that the damage (or presumably injury) was not caused by their fault or negligence.

113. That is reflective of the fact that the correct starting point appears to be Article 17. The phrase used there is clear "*is liable*".

114. If I had found that there was no element of contributory negligence in this case, with BA accepting that the accident occurred during embarkation or disembarkation, then that would be the end of the matter.

115. BA has argued that the *Mather* case throws up some important points about agency which I ought to deal with. Mr Bird argues that there are several relevant issues concerning this. At first instance, he says, the Lord Ordinary found that, when a passenger required assistance, the practice was for easyJet to notify the airport in advance and for the airport to arrange the personnel to attend and to provide assistance on disembarking. As summarised at paragraph 36 of the Court of Session's judgment:

> *"Where the PRM Regulation applied, these services were paid for through a levy on each passenger, which was separate from the landing charge. This levy would form part of the ticket price. In these circumstances, the Lord Ordinary concluded that DRK were the agents of easyJet within the meaning of Article 17 of the Montreal Convention. The services were provided to easyJet in furtherance of the contract of carriage. These services were those which easyJet would have been required by law to provide, had DRK not done so."*

116. That decision, he says, was upheld by the Court of Session. In reaching its decision, the Lord President, Lord Carloway, held:

(a) The Montreal Convention did not define "*agent"*. The domestic concept ought to be of peripheral relevance given the need for international uniformity. In looking to see what autonomous meaning should be applied to the use of the word "agent", regard must be had to the significant cases on the subject, particularly those in the US (Paragraph 57).

(b) In determining whether a person was an agent of the carrier, a test is whether the task which the person was carrying out was "*in furtherance of the contract of carriage*" (Paragraph 61).

(c) This "*provides a neat, clear, and easily understood principle. If the person sued does or omits to do something which is in furtherance of the contract of carriage, such as assisting the disembarkation of passengers, then he is deemed, for the*

purposes of the Convention, to be an agent of the airline, whether or not he is an agent in accordance with domestic law." (Paragraph 61).

117. On the facts, it was held the DRK's employee was the airline's agent, because in assisting Mr Mather he was acting in furtherance of the contract of carriage – transporting the pursuer to the arrivals gate. The Lord Ordinary had also found that the relevant employee was providing a service which easyJet would have been required by law to provide, which was not challenged on appeal.

118. When determining whether a person is an *"agent"* within the meaning of the Montreal Convention:

    (a) The starting point is the natural meaning of the word *"agent"*. Strictly speaking, an agent is a person authorised by the principal to perform some act on the principal's behalf, though it has a broader meaning as a "*person who acts for another*": *Shorter Oxford English Dictionary* (5th Ed. 2002).

    (b) The Court should have regard to relevant foreign decisions but should be astute not to treat those decisions as a substitute for the language used in the Montreal Convention: *In re DVT* at paragraph 12.

    (c) It is relevant to consider all the circumstances of the case, including whether the putative agent was doing something (a) in furtherance of the contract of carriage, and (b) which the carrier would have been required to perform. These tests overlap, but they merit separate consideration: *Alleyn v Delta Airlines* 58 F.Supp.2d 15 (EDNY 1999).

    (d) Whether the putative agent has agreed to carry out the relevant services on behalf of the carrier and/or a contractual right to an indemnity from the carrier are also relevant considerations: see *Vumbaca v Terminal One Group Association* 859 F Supp 2d 343 (EDNY 2012); *Waxman v CIS Mexicana de Aviacion SA de CV* 13 F. Supp. 2d 508 (SDNY 1998).

    (e) Although it might be thought that giving the term "*agent"* a broad scope might be in the interests of passengers, in many of the US cases it is the passenger who is disputing the proposition that a particular defendant should be treated as the

carrier's agent. This is because agents are entitled to avail themselves of conditions and limits of liability pursuant to article 30 of the Convention (such as the 2-year limitation period and the unavailability of damages for non-bodily injuries): *Vumbaca v Terminal One Group Association* and *Alleyn v Delta Airlines*.

119. I refer to the findings of fact that I have made. It is correct that the Claimant has not sued HAL, but that is their prerogative. In this case, and it is the facts of this case that are important, I have found that it was within the gift of BA's employees to ensure that the area was safe, and that they should have done this to satisfy passenger safety (subject to the contributory negligence that I have found) so as to provide a safe area which I consider fell well within their duties in the roles that they were assigned to.

120. It also seems consistent with paragraph 61 of *Mather*. The Claimant's allegation, which I have found is made out, is an omission, and is very much akin to *Mather*.

121. In my view, consistent with the findings of fact that I have made, the wording in Article 21 (2) is quite clear, and consistent with the force of the judgment in *Mather*, such that the limit can be exceeded above the Convention rate on the particular facts of this case.

122. Moreover, if it is at all relevant, and I recognise that it may just be useful commentary, I am satisfied that the acts and omissions by BA staff were carried in accordance with their duties, they may be classified as an agent, and, as such, in any event, this brings BA within Article 21(2) for the avoidance of doubt.

123. It is now important to consider and turn to Article 20 of the Convention which provides:

> *"If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This*

Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21."

124. Following the "balance" which runs through the thread of learned commentary on the Convention, the question then remains, having found that there is an element of contributory negligence, whether that deduction should be made from the total (as the Claimant argues), or upon the total which is subject to the Convention limitation (in accordance with BA's argument) – a substantial point of dispute between the parties.

125. Following my findings on the evidence, the starting point must be that there is an element of the Claimant failing to take reasonable care to avoid reasonably foreseeable damage, as I have found, but that BA is substantially liable to the extent of 80%.

126. Drion "Limitation of Liabilities in International Air Law" (1954) is quite certain about the position, in considering previous protocols and conventions. In answering the relevant questions in this case, that is "*Which of the provisions should be applied first and which last? Or, to put it otherwise, do the limitation provisions of the respective Conventions apply to the operator's or carrier's liability after taking into account the plaintiff's contributory negligence or is the reduction of damages because of the contributory negligence to be made on the basis established by the limitation provisions?"*

127. The response is *"The answer is not difficult.* [although in my view that underestimates the complexity of argument] *Both the rationale of the limitation provisions enabling the operator or carrier to calculate in advance the extent of his risk, and the system of the Conventions, make it clear beyond doubt that the limits are to be applied only after all the facts which determine the existence and the extent of the liability have been established."*

128. The author's view is that the answer is provided by the order in which the articles are set out.

129. Loxton's commentary in "The Montreal Convention" is though helpful. At paragraph 20.4, he comments that Article 20 was considered at the Montreal Diplomatic Conference, and having no doubt access to the relevant papers, opines that liability may be *"exonerated"*, the phrase used, by the extent of fault of the passenger.

130. Paragraph 20.06 of the commentary confirms that, in his understanding, notwithstanding the strict liability approach of Article 21 (1), a carrier retains the defence of contributory negligence in Article 20 describing it as "rather clumsy". That clumsiness expands into no specific guidance as to which comes first. Saggerson on Travel Law, again, says something which is different.

131. I consider that the correct answer is simply to consider the primary source – the Convention itself. I prefer the analysis set out in Loxton, but it makes logical sense that the facts and liability are established first, and that the limitation should not apply – whether that is clumsy or not. That is reflected in the order in which the Articles are laid out. The best interpretation is, in my view, that the Articles do not impose a restriction to limit the Claimant, and so any deduction should be made from the total, not the total subject to limitation. That would also be consistent with the combination of my reading of the effect of the totality of Articles 17, 20 and 21(2).

Conclusion

132. In these circumstances, I find that:

    (a) There is no limit to the claim;

    (b) Any deduction should be taken from the notional sum of the claim, not the amount subject to limitation.

133. For the avoidance of doubt, this means, from my findings of fact, that the Claimant succeeds on liability (without limit) to the extent of 80%, applying the relevant domestic law.

134. In making this determination, I wish to make it clear that this ruling does not preclude BA from challenging any part of the quantum of the Claimant's claim or from contending that the Claimant has failed to take reasonable steps to mitigate his loss including (without limitation) as regards obtaining appropriate treatment for his injuries and/or seeking alternative employment. That will be for future determination.

Housekeeping

135. I invite the parties to agree an Order. If there are any matters arising out of my judgment, they can be dealt with in writing or by a disposal hearing to be listed at the same time as the formal handing down of this judgment. I appreciate that directions may be required in relation to determining the question of quantum. Communication can be made with my clerk at monica.kane@justice.gov.uk.

136. Finally, I would like to thank Counsel for their well – argued submissions and assistance throughout the trial.

HHJ Saunders

3 July 2024