IN THE COUNTY COURT SITTING AT KINGSTON-upon-THAMES COUNTY COURT CASE No. B98YJ402

Deputy District Judge Dagnall

1 December 2015 and 22 January 2016

B E T W E E N :

(1) MARIA CHAING

(2) BEN CHAING

(3) SIMON CHAING

(4) MEI MO

Claimants

- And –

AIR CANADA

(a company incorporated under the laws of Canada)

Defendant

PART JUDGMENT AS HANDED DOWN ON 22 JANUARY 2016

CONTINUED JUDGMENT

[This is the continuation of the Judgment which I commenced giving orally on 1 December 2015. It follows on from my recitation of the case, my initial findings of fact, and my identification and incorporation of relevant elements and initial comments upon the Montreal Convention. It replaces my partial references to the Stott decision in the Court of Appeal, and then continues. If a transcript is ever requested of the oral element of the global judgment, then I will consider it for revision in the usual way (and in accordance with the approach set out in the authorities e.g. in MRH v Apex [2015] EWHC 1795 at paras 25-7).]

1. In this case, the Montreal Convention is brought into English law by section 1 of the Carriage by Air Act 1961 as amended by article 2(2) of the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI2002/263); although in relation to a "Community air carrier" the Montreal Convention also has direct effect by virtue of section 2 of the European Communities Act 1972 and Council Regulation (EC) No 2027/97 (as amended by Parliament and Council Regulation (EC) No 889/2002) – see Stott v Thomas Cook 2014 AC 1347 @ paras 3 and 33. Mr Carruth informs me that Air Canada is not a "Community Air Carrier". Under Council Regulation (EEC) No 2407/92, for an entity to be a "Community Air Carrier", it must have a relevant operating licence and pre-conditions for which include that the relevant carrier has its registered office and principal place of business in the EU and is

majority owned and controlled by EU nationals. Those pre-conditions are plainly not satisfied in relation to Air Canada, and I therefore accept what Mr Carruth says.

2. I add that a query existed in argument as to whether Regulation 261/2004 which extends to at least some instances of denied boarding could have any application to this case. However, again I accept Mr Carruth's contention that in relation to flights to (as opposed to from) the UK, the Regulation only has application to a "Community air carrier" within Regulation 2407/92 and which Air Canada is not. In any event, it does not seem to me that Regulation 261/2004 can have any effect on the construction of the Montreal Regulation and which it post-dates. However, I do note that in R (IATA) v Department of Transport 2006 2 CMLR 20 including @ paras 42-48 that it was held that the Montreal Convention is part of the European legal order and provides for a regime in relation to "individual" damage rather than "standardised" damage (being essentially damage which is suffered by all passengers e.g. as a result of cancellation of or delay to a flight).

3. The Defendant contends that the damages claims for (1) the cost of the replacement tickets ("the Tickets Claim") and (2) distress and inconvenience ("the Distress Claim") are barred by the Montreal Convention, and that the damages claim regarding baggage ("the Baggage Claim") is subject to a financial cap under the Montreal Convention. The Montreal Convention is the successor to the previous Warsaw Convention (and this and previous cases have proceeded on the basis that they are essentially similar on the points before me, although there are substantial other differences between them).

4. The Claimants effectively accept the existence of the financial cap, at the agreed figure of £1033.68 in relation to the Baggage Claim, and for the reasons given below I think that they are correct to do so. However, they dispute the asserted effect of the Montreal Convention on effectively two bases, being:

    a. They contend that the Montreal Convention, or at least its exclusionary effects with regard to claims at common-law, do not apply where there has been no relevant carriage by air due to the carrier simply refusing to perform the contract of carriage altogether.

    b. Alternatively, and very much as a fall-back secondary argument, they contend that what has happened is a species of delay and the cost of the replacement tickets, and perhaps even the Distress, are species of damage occasioned thereby within the meaning of Article 19.

5. These matters seem to me to raise difficult and important questions of law notwithstanding the Defendant's contention that I am bound by the Court of Appeal ("CA") 2012 2 AER (Comm) 1265 and Supreme Court ("SC") decisions in Stott to decide in its favour. If the Defendant's contention is correct, then it would seem to follow, as Mr. Carruth accepted, that if an airline, having sold a passenger a ticket (assume a return ticket at a global price with the outward journey having been completed thus avoiding any total failure of consideration arguments), simply for no reason whatsoever decides to bar that passenger from flying, then as long as it does so at the boarding gate (or as here on the aircraft) rather

than at the check-in desk, the passenger has no remedy whatsoever but simply has to bear their direct (and any consequential) loss. Indeed this "Paradigm Example" is close to the facts of this case in regard to the First and Third Claimants, and even more so the Fourth Claimant.

6. The Defendant's contentions of law can be summed up in Mr. Carruth's propositions that:

    a. The Montreal Convention applies to all events between embarkation (meaning from after check-in) and disembarkation ("the temporal scope").

    b. As long as the gravamen of the resultant claim took place within the temporal scope then the Montreal Convention, and in particular Article 29, provided the only basis on which the carrier could be liable; and with all other common-law remedies in contract or tort excluded.

    c. It did not matter how a claim was pleaded or what harm was alleged to have been suffered or what remedy was sought; and indeed the court should not allow the width of the Montreal Convention to be undermined by artful or deft pleading.

    d. The Montreal Convention only permits claims for death or bodily injury (Article 17.1); damage to or loss of baggage (Article 17.2-4) or cargo (Article 18); and damage occasioned by delay (Article 19), and nothing else.

    e. Arguments about justice, the enabling of carriers to charge but not to perform, and imbalance, are irrelevant because this is an international treaty given statutory force whose wording is clear.

    f. The fact that this may undermine any Conditions of Carriage is irrelevant at least because (i) their temporal scope may be wider (ii) carriers may fly to non-signatories (iii) the Montreal Convention excludes such rights and contracting around it (Articles 29 and 49). Each and all of these three contentions are correct in my judgment, and Mr Butler did not really seek to argue otherwise.

7. Accordingly, Mr Carruth submits that the Tickets Claim and the Distress Claim are based on events which took place after embarkation, are not claims permitted by the Montreal Convention, and therefore fail.

8. In support of his contentions, Mr. Carruth referred me to various cases, as to one of which Sidhu v British Airways 1997 AC 430 was mainly by way of citations in Stott (CA) of the House of Lords in that case.

9. In Stott a disabled passenger (in the CA there were two passengers with similar claims but only one appealed to the SC) had arranged in advance of coming to the airport that various steps would be taken to meet his needs and had paid for this. When he arrived at and on the aircraft, the carrier reneged on those promises and failed in breach of statutory regulations implementing an EU Disability Regulation to meet his needs. He brought a claim for injury to feelings under the statutory regulation, but does not appear to have brought

any claim relating to the ticket price. He could not rely on Article 17.1 as he had not sustained "death or bodily injury" which expression was held not to extend to mental injury or injury to feelings – see 2014 AC 1347 @ para 28 (SC).

10. The Court of Appeal (CA) report is at 2012 2 AER (Comm) 1265. Relevant passages are as follows:

    a. At para 9 it was noted that "It is common ground that the Montreal Convention governs events from boarding until disembarkation..." although also that the disability regulations had a broader temporal scope including potentially events within or before entry to the air terminal.

    b. At paras 11 and 12 there was an explanation and citations from the report of Sidhu as follows (with my underlining):

    "11 This case, [1997] AC 430, is at the heart of the airlines' submissions. The unfortunate plaintiffs were on a flight from London to Kuala Lumpur via Kuwait. It landed in Kuwait in the early hours of 2 August 1990, a few hours after the Iraqi invasion of Kuwait had begun. Some of the passengers were permitted to leave the aircraft and they went to the transit lounge. Shortly afterwards, the airport was attacked and taken over by Iraqi forces. The passengers and crew were detained by the Iraqis and not released until 21 August 1990. They claimed damages against the airline at common law for personal injuries caused by negligence. The airline applied for the dismissal of the action because it was time-barred under the Warsaw Convention (as amended) which was part of English law by reason of Schedule 1 to the Carriage by Air Act 1961 . At first instance, in the Court of Appeal and in the House of Lords it was held that the plaintiffs had no rights save under the Convention and that any such rights were time-barred. The headnote describes the holdings of the Appellate Committee as follows:
    "... that the issue was the meaning of the Convention as a whole, rather than the Act of 1961 and it had to be given a purposive construction; that although the Convention was a partial harmonisation of the rules relating to international carriage by air it was comprehensive in respect of the issues covered; that under the Convention carriers surrendered their freedom to limit or exclude liability in damages to passengers in exchange for the conditions and limits on claims set by the Convention; and that, accordingly, where the Convention had not provided a remedy, no remedy was available either under the common law or otherwise."

    12 The only substantive judgment was given by Lord Hope, who said (at page 453):
    "The language used [in the Convention] and the subject-matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those cases with which it deals – and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law ...
    It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the

conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity."

A little later (at page 454), he added:
"The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention. It would lead to the setting alongside the Convention of an entirely different set of rules which would distort the operation of the whole scheme." "

c. At paras 24 and 25 initial reference was made to the United States ("US") cases of Tseng and King (in which claims for damages for racial discrimination were rejected) and to a South African case of Potgieter and to their general theme being that under the predecessor Warsaw Convention (the judgments relating to it were held at para 35 to be equally applicable to the Montreal Convention as to exclusivity) "a claim for damages "if not allowed under [the Convention] is not available at all" and "the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered."

d. Para 27 refers to the relevance of foreign, and in particular of US authorities, as follows:

"27 The emphasis which Mr Kimbell places on authorities from other jurisdictions is put by reference to the principle of international comity. In *Morris v KLM [2002] 2 AC 628*, Lord Mackay said (at paragraph 7):
"Because I consider that the Warsaw Convention should have a common construction in all the jurisdictions of the countries that have adopted the Convention, I attach crucial importance to the decisions of the United States Supreme Court in [*inter alia*] ... Tseng ... particularly as the United States is such a large participant in carriage by air."

e. The CA judgment returns to Sidhu at para 33 as follows (with my underlining):

"33 The leading domestic authority is Sidhu which I described at paragraphs 11 and 12 above. It is clear authority for the exclusivity of the Convention "in those cases with which it deals" (Lord Hope at page 453). Earlier in his speech (at page 437G), Lord Hope referred to the Warsaw Convention providing "an exclusive cause of action and remedy in respect of claims for loss, injury and damage sustained in the course of, or arising out of, international carriage by air". He also identified (at page 441F) "the stark issue" of "whether a passenger who has *sustained damage* in the course of international carriage by air due to the fault of the carrier, but who has no claim ... under ... the Convention, is left without a remedy" (emphasis added). That was indeed the conclusion. I should refer to one other passage (at page 447 F-H) where he said:
"The intention seems to be to provide a ... regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to passengers in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part

of the carrier. Thus the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention."

On any view, these are expansive words of great generality.

f. The US and SA cases are then reviewed in particular at paras 39 to 44 as follows (again with my underlining):

"39 In view of the obligation to strive for uniformity of interpretation, it is particularly appropriate to take into account authorities from other jurisdictions. Most of those referred to by counsel are from the United States. I have already referred to Tseng and King (paragraphs 24 and 25, above). It is worth saying a little more about their facts. The plaintiff in Tseng complained about an intrusive security search immediately prior to boarding. She was then permitted to board. Her pleaded causes of action included assault and false imprisonment but she alleged no bodily injury. The Supreme Court (Justice Stevens dissenting) concluded that her claim was defeated by the exclusivity of the Convention. In view of the fact that the search took place in a room prior to the physical act of boarding and, I infer, the injury to feelings must have been sustained to a real level at that point, it illustrates a broad, and certainly not a pedantic, approach to the concept of boarding.
40 The claimants in King had a booking with American Airlines from New York to Freeport, Grand Bahamas, with a change at Miami. They were "bumped" at Miami. Upon arrival they were told that the Freeport flight was overbooked and were offered compensation to give up their seats, which they declined. After they had been permitted to board a bus for transportation from the terminal to the aircraft, their boarding passes were confiscated and they were not allowed to board. They alleged discrimination on the ground of race. The Court held their claim to be defeated by the Convention. I have set out the most relevant passages at paragraph 25, above. Again, the decision points to a broad approach to the temporal question in relation to the period of carriage, probably on the basis that it ran from boarding in New York to expected disembarkation in Freeport. Towards the end of her judgment, Judge Sotomayor referred to a submission on behalf of the plaintiffs that a decision against them would "open the doors to blatant discrimination aboard ... flights, invoking images of airline passengers segregated according to race and without legal recourse". In rejecting the submission, she referred to the case of Turturro, 128 F. Supp 2d at 181, and cited this passage:
"The Convention massively curtails damages awards for victims of horrible acts of terrorism; the fact that the Convention also abridges recovery for ... discrimination should not surprise anyone."

41...
42 The final American authority to which I should refer is Wysotski v Air Canada [2006] WL 581093 , a decision of a Californian District Court. Technically a baggage claim, it related to a lost cat and included an allegation of negligent infliction of emotional distress. Breyer J said:
"The Warsaw Convention ... would cease to be an exclusive remedy – and the Supreme Court's opinion in [Tseng] would be gutted – if plaintiffs who could not assert state-law claims for the act itself were nonetheless permitted to sue under state law for *ex ante* representations that the act would not occur or *ex post* failure to redress the harm."

This is some persuasive authority on the temporal question.
43 I complete this summary of Mr Kimbell's global tour by simply recording his citation of the South African case of Potgieter v British Airways PLC (2005) (2) SA 133 (C) , which draws on, *inter alia* , Sidhu and Tseng and the Virgin Islands case of Sever v Liat (1974) Ltd, 16 February 2011, Case No 04/76 , another "bumping" case which resulted in a race discrimination claim. The "bumping" culminated in the physical removal of the plaintiff from the overbooked aircraft. The judgment, in rejecting the claim on Convention grounds, contains the most recent review of the authorities to which I have referred.
44 What does one take from the authorities from other jurisdictions? They plainly show a consistent approach, unequivocally applying the exclusivity principle and doing so in an expansive way... "

g. This led to a dismissal of the claimant(s)'s appeals at para 54 on the basis that the very real injuries to feelings "... were suffered at a time when the Montreal Convention governed their situations. Its exclusivity both provided and limited their rights and remedies..."

11. Stott was then appealed to the Supreme Court ("SC") whose judgment at 2014 AC 1347 was somewhat more tightly focussed on the conflict between the Montreal Convention and the disability regulations (UK and EU). However, after reference to the exclusivity provision being contained in Article 29 (see para 31), the resultant "exclusivity principle" and UK and US case-law was considered in the majority judgment at paras 34 to 43 (with para 44 referring to other instances where the case-law had been followed in general terms) as follows (with my underlining):

"34 In the *Sidhu case [1997] AC 430* the House of Lords considered the question whether a passenger who sustained damage in the course of international carriage by air due to the fault of the carrier, but had no claim against the carrier under article 17 of the Warsaw Convention , was left without a remedy. It concluded that this was so. Lord Hope of Craighead gave the only speech. He analysed the history, structure and text of the Convention, and he reviewed the domestic and international case law. He explained that the Convention was a package. It gave to passengers significant rights, easily enforceable, but it imposed limitations. He held that the whole purpose of article 17 , read in its context, was to prescribe the circumstances—that is to say, the only circumstances—in which a carrier would be liable to the passenger for claims arising out of his international carriage by air. To permit exceptions, whereby the passenger could sue outside the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier.
35 This interpretation has been accepted and applied in many other jurisdictions.
36 In the USA the leading authority is the decision of the Supreme Court in El Al Israel Airlines Ltd v Tseng (1999) 525 US 155. The plaintiff was subjected to an intrusive security search at John F Kennedy International Airport in New York before she boarded a flight to Tel Aviv. She sued the airline under New York tort law for damages for psychosomatic injury. The Supreme Court had previously held in Eastern Airlines Inc v Floyd (1991) 499 US 530 that mental or psychic injuries unaccompanied by physical injuries were not compensable under article 17, but the plaintiff argued that her claim in respect of the treatment which she suffered before embarkation was not within the reach of the preemptive effect of the Convention. The Court of Appeals

for the Second Circuit accepted that argument (1997) 122 F 3d 99. In its judgment it expressed the fear that if the Convention had the preclusive effect for which the airline contended, it would follow, for example, that a passenger injured by a malfunctioning escalator in the airline's terminal would have no remedy against the airline even if it had recklessly disregarded its duty to maintain the escalator in proper repair. The Supreme Court (1999) 525 US 155 reversed the decision of the Court of Appeals in an opinion delivered by Ginsburg J (Stevens J dissenting).

37 Applying the principle that an international Treaty must be interpreted not as if it were a domestic instrument, but so as to accord with the court's understanding of the shared expectations of the contracting parties, Ginsburg J, at p 167, referred to the French text of article 24 of the Warsaw Convention (the earlier equivalent of article 29 of the Montreal Convention):

"'(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, a quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

"'(2) Dans les cas prevus a l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs'."

38 Tseng argued that "les cas prévus a l' article 17 " meant those cases in which a passenger could actually maintain a case for relief under article 17 . El Al argued, with the support of the US government as amicus curiae, that the expression referred generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking. So read, article 24 would preclude a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy article 17 's liability conditions (perhaps because the injury did not result from an "accident" or because the "accident" did not result in physical injury or manifestation of injury).

39 The court judged that the government's interpretation of article 24 was more faithful to the Convention's text, purpose and overall structure. Its reasoning process accorded with that of the House of Lords in the Sidhu case, to which Ginsburg J referred, at pp 175–176:

"Decisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect. In Sidhu, the British House of Lords considered and decided the very question we now face concerning the Convention's exclusivity when a passenger alleges psychological damages, but no physical injury, resulting from an occurrence that is not an 'accident' under article 17. See [[1997] AC 430, 441, 447]. Reviewing the text, structure, and drafting history of the Convention, the Lords concluded that the Convention was designed to 'ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action.' Ibid. Courts of other nations bound by the Convention have also recognised the Treaty's encompassing preemptive effect. The 'opinions of our sister signatories,' we have observed, are 'entitled to considerable weight.' [Air France v] Saks (1985) 470 US 392, 404 [internal quotation marks omitted]. The text, drafting history, and underlying purpose of the Convention, in sum, counsel us to adhere to a view of the Treaty's exclusivity shared by our Treaty partners."

40 The court put to rest the Court of Appeals' fear that such a conclusion would mean that a passenger who had an accident in the terminal building through the negligence of the person responsible for its maintenance might be left without a remedy. Ginsburg J observed that the Convention's preemptive effect on local law extended no further than the Convention's own substantive scope, and that a carrier would be indisputably subject to liability under local law for injuries arising outside that scope, for example, for passenger injuries occurring before the operation of embarking.

41 In King v American Airlines Inc (2002) 284 F 3d 352, the Court of Appeals for the Second Circuit considered the question whether discrimination claims could properly be regarded as generically outside the Convention's substantive scope, so that a claim

for compensation under local law would not be affected by the Convention. The assumed facts were that the plaintiffs were bumped from an overbooked flight because of their race. Upholding an order for the dismissal of the claim, the court held that discrimination claims under local law which arose in the course of embarking on an aircraft were preempted by the Convention.

42 The argument advanced unsuccessfully by the plaintiffs was that discrimination claims fell outside the scope of the Convention because of their qualitative nature. Sotomayor CJ (now Sotomayor J of the US Supreme Court), delivering the opinion of the court, emphasised, at pp 360–361, that the preemptive scope of the Convention depends not on the qualitative nature of the act or omission giving rise to the claim but on when and where the salient event took place:

"33. ...Article 17 directs us to consider *when* and *where* an event takes place in evaluating whether a claim for an injury to a passenger is preempted. Expanding on the hypothetical posed by the *Tseng* court, a passenger injured on an escalator at the entrance to the airport terminal would fall outside the scope of the Convention, while a passenger who suffers identical injuries on an escalator while embarking or disembarking a plane would be subject to the Convention's limitations. Tseng 525 US 155 , 171. It is evident that these injuries are not qualitatively different simply because they have been suffered while embarking an aircraft, and yet article 17 plainly distinguishes between these two situations." (Original emphasis.)

"35. The aim of the Warsaw Convention is to provide a single rule of carrier liability for all injuries suffered in the course of the international carriage of passengers and baggage. As Tseng makes clear, the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered. See Tseng 525 US 155 , 171 (rejecting a construction of the Convention that would look to the type of harm suffered, because it would 'encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the Treaty'); Cruz v Am Airlines (1999) 193 F 3d 526, 531 (DC Cir 1999) (determining that fraud claim was preempted by article 18, because the events that gave rise to the action were 'so closely related to the loss of [plaintiffs'] luggage ... as to be, in a sense, indistinguishable from it')."

43 The judge noted that in a number of cases US District Courts had addressed the issue whether discrimination claims were preempted by the Convention and had all reached a similar view. She concluded her judgment with some broader observations, at p 362, which have a resonance in the present case:

"37. Plaintiffs raise the specter that our decision will open the doors to blatant discrimination aboard international flights, invoking images of airline passengers segregated according to race and without legal recourse. They suggest that, despite article 24 's plain mandate that the Warsaw Convention preempts 'any cause of action, however founded,' we should none the less carve out an exception for civil rights actions as a matter of policy. This we decline to do. 'It is our responsibility to give the specific words of the Treaty a meaning consistent with the shared expectations of the contracting parties.' Saks 470 US 392 , 399. It is not for the courts to rewrite the terms of a Treaty between sovereign nations. Cf Turturro v Continental Airlines (2001) 128 F Supp 2d 170 , 181 ('The Convention massively curtails damage awards for victims of horrible acts ***1373** [of] terrorism; the fact that the Convention also abridges recovery for ... discrimination should not surprise anyone.').

"38. Moreover, while private suits are an important vehicle for enforcing the anti-discrimination laws, they are hardly the only means of preventing discrimination on board aircraft. Federal law provides other remedies. Responsibility for oversight of the airline industry has been entrusted to the Secretary of Transportation. The Kings could, therefore, have filed a complaint with the Secretary. 49 USC § 46101. The FAA prohibits air carriers, including foreign air carriers, from subjecting a person to 'unreasonable discrimination.' Id § 41310(a). The Secretary has the authority to address violations of FAA provisions, including the power to file civil actions to enforce federal law. Id § 46106. It does not follow from the preemption of the Kings' private

cause of action that air carriers will have free rein to discriminate against passengers during the course of an international flight."

12. Lord Toulson then drew various threads together at paragraphs 59 to 64 as follows (with my omissions and underlining):

"59 To summarise, this case is not about the interpretation or application of a European Regulation, and it does not in truth involve a question of European law... The question at issue is whether the claim is outside the substantive scope and/or temporal scope of the Montreal Convention, and that depends entirely on the proper interpretation of the scope of that Convention. The governing principles are those of the Vienna Convention on the Law of Treaties...

60 The temporal question can be answered by reference to the facts pleaded and found. The claim was for damages for the humiliation and distress which Mr Stott suffered in the course of embarkation and flight, as pleaded in his particulars of claim and set out in paras 6 to 8 of the recorder's judgment. The particulars of injury to Mr Stott's feelings and the particulars of aggravated damages related exclusively to events on the aircraft. In the course of argument it was suggested that Mr Stott had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage. If so, it would of course follow that such a pre-existing claim would not be barred by the Montreal Convention, but that was not the claim advanced. Mr Stott's subjection to humiliating and disgraceful maltreatment which formed the gravamen of his claim was squarely within the temporal scope of the Montreal Convention. It is no answer to the application of the Convention that the operative causes began prior to embarkation. To hold otherwise would encourage deft pleading in order to circumvent the purpose of the Convention. Many if not most accidents or mishaps on an aircraft are capable of being traced back to earlier operative causes and it would distort the broad purpose of the Convention explained by Lord Hope in the Sidhu case to hold that it does not apply to an accident or occurrence in the course of international carriage by air if its cause can be traced back to an antecedent fault.

61 Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the Convention? As to the general question, my answer is no for the reasons given by Sotomayor CJ in King v American Airlines . I agree with her analysis that what matters is not the quality of the cause of action but the time and place of the accident or mishap. The Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation. The answer to that general question also covers the more specific question.

62 Mr Allen submitted that the consequences were unfair, because if Mr Stott and his wife had not been misled at the check-in desk into believing that their seating problem would be sorted out at the departure gate, they would never have proceeded and they would have been able to recover damages for their loss. The complaint is just, but that is not a sufficient reason to reinterpret the Convention.

63 The underlying problem is that the Warsaw Convention long pre-dated equality laws which are common today. There is much to be said for the argument that it is time for the Montreal Convention to be amended to take account of the development of equality rights, whether in relation to race (as in King v American Airlines) or in relation to access for the disabled, but any amendment would be a matter for the contracting parties. It seems unfair that a person who suffers ill-treatment of the kind suffered by Mr Stott should be denied any compensation. "

13. In her judgment, Baroness Hale expressed great concern as to the resultant effect of the Montreal Convention and its denial of compensation but held that in absence of some contravention of fundamental international law, the outcome could only be changed by international renegotiation of the treaty itself (see at para 70).

14. Mr. Carruth further relied on the earlier decision in Cowden v BA 2009 2 LIR 653 which was also a claim for mental anguish suffered due to a series of flight delays (although the flights then took place) and loss of checked. HHJ Orrell, sitting as a Judge of the High Court, held in relation to the Montreal Convention (I deal further with the common-law below) that:

    a. At paras 6 to 8 that the Montreal Convention "... provides an exclusive code of limited liability of carriers to passengers, regardless of where the claim is instituted... The Convention provides the exclusive cause of action and the sole remedy against an airline in respect of loss, damage or delay suffered by any passenger or their baggage in the course of or arising out of carriage by air..." and he then cited from Sidhu passages set out above.

    b. At paras 9 onwards he considered whether damages for loss of enjoyment or distress or injury to feelings were recoverable and concluded at para 28 that:

    "The flight... was booked under a contract for carriage. Therefor the Montreal Convention applied to the exclusion of domestic law. The binding decisions of the House of Lords and the persuasive decisions of the county courts, all of which are in harmony with the decisions of the United States and Canada, make it plain beyond further argument: (i) articles 17 and 19 of the Convention do not permit the recovery or damages for distress, discomfort or loss of enjoyment unless an actual monetary loss or physical injury can be established by expert evidence.."

    c. I am slightly puzzled by the last proviso which suggests that damages for mental distress can be recovered consequential upon proven monetary loss, and which is inconsistent with the various cited authorities (e.g in paras 12, 13, 14, 23 and 24). However, this query does not appear to matter in this case where the mental distress was due to the nature of the off-loading from the airplane rather than the requirement to expend money to purchase new tickets.

15. Each and all of the above decisions is binding upon me at least insofar as what is said forms part of the relevant *ratio decidendi*; although anything else even if mere *obiter dicta* is very highly persuasive. However, it is not at all clear (at least in relation to the Tickets Claim) whether the actual scenario of the claimants being prevented from flying at all was actually before or considered by the court in any of the various UK, US and other cases to which I have so far referred, and at least the majority of which concern somewhat incidental damage in relation to flights which actually took place with the relevant claimant passenger on board (or, in the case of the "escalator" example, were available to the hypothetical claimant to take place).

16. It seems to me that in general, the above case-law and in particular the elements which I have underlined, fully bear out, at least in a general sense, the general submissions made by Mr. Carruth which I have set out in paragraph 6 above. However, Mr. Butler has his two linked counter-arguments. The first of these is that the Montreal Convention simply does not extend at all to a situation where the carrier simply refuses to carry the passenger i.e. a situation of total non-performance of the contract of carriage. The second is that "delay" in Article 19 should be given an expansive meaning to extend to "permanent delay" where the passenger is not allowed by the carrier to fly at all. These two arguments are, of course, wholly inconsistent with each other, and only one could be right although Mr Carruth submits, of course, that both are wrong. Although the second has not been formally set out in their statements of case by the Claimants, I have allowed it to be advanced, having considered the entire overriding objective in CPR1.1 (in particular the need to resolve cases fairly) and the case-law on late amendments and as (i) this is an informal and flexible small claims case (ii) this is a pure point of law and all the facts have been pleaded (iii) there is no actual real prejudice and notwithstanding that attendant upon late amendments arising from a party expecting to meet only the pleaded case (iv) it is difficult and highly undesirable to try to construe the Convention without construing its relevant material elements which include Article 20.

17. In relation to the first argument, Mr. Carruth not only disputes it generally but contends that even if it could be correct in some general sense, if the gravamen of the relevant event is at the post-embarkation stage, then the claim is within the temporal scope of the Convention and thus subject to it. Logically the second argument should be approached first, but in the light of the form of the submissions and the authorities, and since the order of approach does not affect the outcome (as I hold, see above and below, that Cowden which is binding on me bars any claim for distress under Article 19 even if this is an actionable delay case within the meaning of Article 19) I will consider first the non-performance argument and on the assumption that Article 19 does not cover this situation.

18. In support of the non-performance argument Mr. Butler relied on both UK text-book and US (and in effect other jurisdictions') authorities, and upon the references in Morris and Stott (and Cowden) to the importance of (at least) US authority in construing the Montreal Convention to achieve uniformity and comity across the different affected jurisdictions.

19. Mr. Butler first relied on passages in the leading textbook in the area being Shawcross & Beaumont : Air Law.

    a. He cited its paragraphs [406] onwards (under the chapter heading of "Jurisdiction") and its discussion of the US case-law including Tseng in the Supreme Court and then the concluding sentence of paragraph [409] which simply says:

    "The relevant Convention will pre-empt claims for delay, but not claims based on total non-performance of the contract of carriage[19]"

The superscript "19" is to a footnote which cites the Nigeria and Atia cases to which I refer below and two earlier US cases, and then the distinction between "delay" and "non-performance" at para [1006] of the work (see below).

b. He then referred to para [410] which refers to UK case-law including both Sidhu and Stott but without mentioning the "non-performance" aspect. The text-book refers to the Convention dealing with the liability of the carrier, being exclusive, and defining "those situations in which compensation was to be available". He has also supplied para [411] which refers to cases in other jurisdictions but which also do not mention the "non-performance" aspect.

20. Mr. Butler then took me to a series of US cases, the first being Wolgel v Mexicana Airlines 821 F.2d 442 which is a decision of the Federal Court of Appeals from 1987. The passengers had arrived at the airport but were "bumped" i.e. told that there was no room for them on a the flight at, it seems, the check-in stage. They claimed compensation under contract and statute but were met with a time-bar argument under the Warsaw Convention, so the main question was whether or not it applied. The passengers succeeded for reasons given at pages 3 and 4 of the report as follows:

a. At page 3 in summary it was held that the claim fell outside the Convention "because the Wolgels seek damages for the bumping itself, rather than incidental damages due to their delay." This was explained by reference first to what is now Article 19 and a conclusion that it did not apply. The Court referred to Treaties being construed "more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties". Reference was then made to a 1929 international conference ("the 1929 Conference") which had discussed the wording which has eventually now become Article 19. An Italian delegate had proposed that that wording be expanded to provide for liability "in case of nonperformance or delay"; on discussion of this it had been common-ground that there was no need for a remedy for total non-performance as a remedy would exist in domestic law and that "The delegates therefore agreed that the Convention should not apply to a case of non-performance of a contract".

b. The Court went on to hold "This case is one of non-performance of a contract. The Wolgels are not attempting to recover for injuries caused by their delay in getting to Acapulco. Rather, their complaint is based on the fact that, as far as the record shows, they never left the airport. Because the Wolgels' claim is for total non-performance of a contract, the Warsaw Convention is inapplicable." Reference was made to other cases which differed on the point, but the court held to that conclusion.

21. Mr. Butler then referred to Re: Nigeria 520 F. Supp.2d 447, a decision of a Federal Court in 2007, where an airline stopped providing flights so that passengers with tickets simply could not travel and who then sued and were met with a Montreal Convention defence resisted

on the basis of "non-performance". As Mr Carruth points out, these passengers had not even arrived at the airports. The court dealt with the matter at pages 5 to 8 as follows:

a. It said that it was appropriate to construe this aspect of the Montreal convention by reference to the Warsaw Convention. It then noted various US cases as having held that this sort of claim was for "delay" within the Conventions, but distinguished them on the basis that the airline had "simply refused to fly them, without offering alternate transportation". Accordingly, it held that this was analogous to Wolgel.

b. The airline sought to meet this by referring to Tseng and at page 7 the court noted that Tseng covered all personal injury claims within the Convention's scope, and that such did not cover injuries falling outside the embarkation-to-disembarkation period.

c. The court then at page 7 held that it would follow Wolgel and that "The plain language of Article 19 of the Montreal Convention indicates that it governs claims for delay, not non-performance", and also referred to the 1929 conference, and held that what had happened had "not been shown to be within the scope of Article 19, or any other provision of the Convention. Thus those claims are not pre-empted."

22. Mr. Butler then referred me to Atia v Delta 692 F.Supp.2d 693 a decision of the Federal Court. Here the passenger had boarded but was then removed from the aircraft, was told that she could not buy any further Delta ticket, and sued for the cost of flying by another airline and other damages. The airline responded with the Montreal Convention and the plaintiff asserted that this was nonperformance so that the Convention did not apply. At page 6 the Court held that "Because Delta Airlines flatly refused to transport Plaintiff to her destination after the altercation onboard the aircraft..." this was a Wolgel case and which the Court found to be persuasive. It held that the Montreal Convention "was never intended to apply to claims of complete non-performance of a contract." and hence the Plaintiff succeeded with regard to claims for non-transportation and failure to refund her ticket. However, at pages 7-8 it held that a claim for emotional injury suffered by reason of being removed from the aircraft for racial reasons failed as Tseng applied as the "events took place during embarkation of an international flight" and Article 17 did not assist as there was no "bodily injury".

23. Mr Butler then referred me to the online report of Brauner v British Airways, a Federal Court case of 2012. Here the passenger was told at check-in that their first-class tickets were invalid, and instead they had to purchase economy tickets, and they sued for damages including for emotional distress and (dubiously) for physical injury. At page 11 the court applied Tseng to hold that injuries (including due to malfunctioning escalators) prior to embarkation were outside the Convention and that "Claims of non-performance of contract similarly fall outside the scope of the Convention". The Court then said that the Plaintiffs had asserted that they were not claiming for anything which had occurred during the flight, and that the airline had conceded that therefore the Convention did not apply, and that "In the light of the representations made by the plaintiffs that they are not pursuing claims for

any injuries that occurred on, or while embarking or disembarking from, the aircraft, the Montreal Convention is not implicated by the plaintiffs' claims."

24. I was also referred in the course of argument (mainly in relation to the Distress Claim) to the High Court decision of Mr. Justice Eady in Wiseman v Virgin Atlantic [2006] EWHC 1566 where a passenger had been refused boarding, probably (the report is not clear) at the check-in stage, for alleged resulting expenses and distress. No mention was made of the Montreal Convention which does not appear to have been advanced before the Court. Thus, on this point, I accept Mr. Carruth's submission that this decision is of no assistance.

25. Mr. Butler has also referred me to paras [1001-1003] of Shawcross & Beaumont and I have now been provided with (and the parties have had opportunity to make submissions upon) the following paragraphs. Pertinent aspects of these are as follows:

    a. At para [1002] it is opined that delay is different from non-performance, although reference was made to a Scottish case in the Outer House of Session which the court had held that if the passenger never by any means reached their intended destination then this was not "delay" although the court reserved the broader question as to what would be the position if the passenger proceeded to the destination by another flight or other means.

    b. At para [1003] the authors state that "delay" is to be distinguished from "non-performance" and that "An action based on non-performance is not subject to the Conventions" citing Brauner as authority for this proposition. Reference is then made to a US federal court case of Benjamin v American Airlines as holding that if the airline ultimately transports the passenger (no mention is made as to whether or not this could be for payment) then this is "delay" but if "the airline simply refuses to fly passengers without offering alternate transportation, then the claim will likely be for non-performance."

    c. At para [1003.1] it is said that the boundary between "delay" and "non-performance" is uncertain. Reference is made to French cases which are said to be unclear but to suggest that if the passengers do not fly at all then this is nonpeformance and outwith the Convention, whereas if they fly eventually then it is delay. Reference is also made to other US cases to the effect that a passenger's refusing to accept a later flight (the implication is for free) and using another carrier instead is "delay", although Mr Butler contends that the decision can be explained on the basis that the court held that partial performance had taken place in the context of a multiple flight ticket; but also to a District Court case of Tewes v Gulf Air where the provision of only a free down-graded ticket on a later flight was held to be non-performance although Mr Butler contends that the decision was based on failure to honour a free-standing promise to provide a business class ticket at a later date.

    d. At para [1004] reference is made to "bumping" and to Wolgel and Nigeria as representing US law and which has been followed in Germany. Reference is also

made to Canadian and Italian authority to the same effect but which may be based on "overbooking" not being an accepted risk of airtravel. The authors say that an English court would probably hold this to be outside Article 19 as the problem will have occurred at the check-in stage. Succeeding paragraphs deal with contrasting academic views on what is meant by "delay" with reference to such cases as Atia but no real conclusion.

e. In later paragraphs, the authors refer to the need for any claim outside the Convention, or inside it, to comply with the *lex fori* including as to causation.

26. Mr Carruth accepts that the facts of Atia are analogous to this case, but contends that (1) these are US and other foreign cases and, at most, inconsistent with Sidhu and Stott (2) most of the cases are at the latest at check-in and therefore outside the temporal scope whilst this case is not (3) the US cases are first instance apart from Wolgel; and Tseng is the only US Supreme Court case and which affirms the temporal scope test which he says is satisfied here.

27. The questions of law in relation to the Tickets claim of whether this non-performance is (a) outside the Convention or (b) within the Convention and Article 19 "delay" or (c) within the Convention with no remedy; seem to me to be very difficult. The main arguments, although I have borne in mind all the submissions, seem to me to be as follows:

a. What happened here in terms of factual events is clearly within the "temporal scope" as it relates to events on the boarded aircraft and their aftermath. Thus Sidhu and Stott (and in the US the only Supreme Court authority of Tseng) hold, at least in principle, that the Convention should apply.

b. Sidhu and Stott (and Tseng) make clear that the Convention applies notwithstanding the apparent injustice of the consequences of applying it to impose a limitation period or no remedy at all or odd results (such as a claim existing prior to check-in but not at the boarding gate). This is because of the wording of the Convention, its incorporation into English law, and the fact that this international treaty is a balance between carriers and carried which limits the freedom to contract of both.

c. The Convention being a treaty, it has to be given somewhat of a purposive interpretation; and cautious use can be made of the negotiating history of the Conventions but only if that points to a "definite intention on the part of the delegates as to how the point at issue should be resolved". I think that this was common-ground between counsel, but in any event these principles were set out in Sidhu @ 1997 AC 442C-G (and I note that in that cases at pp448D-449H a negotiations argument failed on the basis of insufficient clarity of ultimate intention).

d. Sidhu and Scott (and Tseng) make clear that the court should closely scrutinise any attempt to create exceptions to the Convention including by the way in which a claim is pleaded or formulated.

e. However, Sidhu and Stott also make clear that authorities from other jurisdictions are relevant (in particular the US Supreme Court), and that international comity and public policy lean towards the Convention having a uniform international interpretation. As to the authorities from other jurisdictions:

   i. The only authority which supports the Defendant is Tseng. It is the only US Supreme Court decision, and its statements of principle are wide-ranging, but it does not address either of the "non-performance" or "delay includes refusal" points as such.

   ii. Atia is a clear US authority in favour of the non-performance argument, i.e. that even post-embarkation non-performance is outside the Convention. It forms part of a series of US cases which proceed on that basis (even though the other cases are pre-embarkation) and that non-performance is not "delay" within the Convention. They are based both on the wording and on what happened in the 1929 Conference negotiations. However, they are all only lower judicial levels, and they have not been considered by the US Supreme Court.

   iii. There seems, according to Shawcross & Beaumont to be some support for the Wolgel/Atia approach in the French case-law although I do not have the reasoning and "post-embarkation" arguments may not have been advanced. The authors of that work take the same approach.

f. Wolgel does set out material which appears to contain an agreement by the 1929 Conference delegates along the lines of the Atia approach. I do not have the material; and it is somewhat unsatisfactory that the delegates' apparent decision was not recorded in specific express terms as such in the wording of the Conventions (but see below) although I bear in mind that the fact that the delegates came from different legal systems may well have meant that they regarded that as being unnecessary. I have no material regarding the negotiation of the Montreal Convention, but its framers may well have looked back to the 1929 Conference and/or also at Wolgel and its line of decisions.

g. The Wolgel/Atia approach to some extent echoes the discredited (see Photo Production v Securicor 1980 AC 827) "fundamental breach" argument i.e. that a fundamental failure to perform a contract should enable an evasion of its exclusion clauses. One would have expected any exception to the Convention to appear within its own wording, something which is emphasised in effect in Sidhu and in Stott, although this point is somewhat lessened by this being an international agreement of different countries with different legal systems. Also English law has some circumstances where a non-performance of the relevant function may mean that exclusive provisions (e.g. an expert determination being binding) have no application.

h. In terms of the Convention wording:

i. The wording is introduced by Articles saying that the Convention is concerned with "... carriage by aircraft performed..." – see Article 1 (my underlining) and likewise in Article 2. That affords some support for a contention that on its own wording the Convention does not apply where there is total non-performance. Likewise the Article 29 exclusion of other remedies begins with the words "In the carriage of passengers, baggage and cargo..." which can be said not to apply to a refusal to carry. This supports the arguments based on what happened at the 1929 Convention as delegates may have simply looked at the equivalent words in the (then draft) Warsaw Convention . On the other hand, it is difficult to rationalise this with the reasoning in Tseng regarding accidents on post check-in escalators which prevent the passenger flying (although there is a danger in extending the reasoning of what was only an hypothetical point which did not consider such a ramification).

ii. Articles 19 and 22 only refer to "delay" and not to "non-performance". I accept that the usual meaning of "delay" is in terms of a limited period of time, but the word does not of itself prohibit its interpretation as extending to total delay in the form of total non-performance. However, that would be a strained interpretation and was and is rejected in Wolgel and by Shawcross & Beaumont.

i. In terms of purpose, and bearing in mind that the Convention is seeking to provide a regime aiming at striking a balance between airlines and passengers without unduly favouring the airlines:

i. It would seem odd that the Convention can both apply and not apply in a specific situation. This is what happened in Atia in that it was held not to apply to the non-performance claim but to apply to the mental distress claim. However, a distinction can be drawn between an event which was linked to embarkation and a simple refusal to fly.

ii. It would also seem odd that a refusal to allow a passenger to progress beyond check-in would be outside the Convention (as Mr. Carruth appears to accept) but a refusal to allow a passenger to progress beyond the boarding gate (or a removal from an aircraft) would be inside the Convention. However, Tseng and its approval in Scott and Sidhu, which is binding on me, proceed on the basis that it is simply a question of the start of the "temporal scope" which in effects sets the balance.

iii. It would seem odd that, as the Defendant contends, the airline can simply (as long as it chooses to do this after check-in) refuse to carry a passenger who has paid for their ticket for no reason at all and without having to give any refund or other remedy. In some ways one might have expected the

Convention to say that expressly, although, of course, it is effectively Mr. Carruth's submission that Article 29 does do that, and if an airline had formed a pre-existing policy to do that (which is not the case here) then some remedy might exist in the law of mis-representation albeit that Tseng may suggest the contrary.

iv. It would seem odd that "delay" does give rise to a remedy under the Convention, whilst "total non-performance" (on the Defendant's case) gives rise to no remedy at all whether inside or outside the Convention. The concept of a remedy (albeit limited in amount by Article 22) existing for a lesser wrong i.e. delay, but not for the greater i.e. no carriage at all, seems bizarre. On the other hand the nature of the damages remedy might be rather different.

v. It would seem odd that "non-performance" would governed by whatever were the negotiated contract terms, and which might involve an airline having excluded any remedy, although the relevant domestic law might have its own rules (and as appears to have been contemplated at the 1929 Convention). Further, the Convention in Article 22 sets down a financial cap for claims, and in Article 20 an exoneration provision, and in Articles 31-35 a regime for the bringing of claims, which might have been thought to be intended to strike a general balance and be universally applicable as between carrier and passenger, and which would support non-performance falling (if it gave rise to any remedy at all) within Article 19.

vi. With regard to matters such as flight security etc. there would be a strong policy reason that the airline and its staff (especially the aircraft crew) should have full discretion whether or not to allow a passenger to fly (or their baggage to be carried), and for such not to be capable of challenge. However, somewhat similar points might be made with regard to a flight being delayed and which does give rise to Convention compensation.

28. I have come to the conclusion, albeit only on balance and notwithstanding the counter-arguments set out above and in counsel's submissions, that I should follow the Wolgel/Aita approach i.e. that non-performance is outwith the Convention and is not "delay" within Article 19.

29. The main points in its favour and which cause me to reach that conclusion are:

a. It receives some real support from the wording of the Convention itself which states that it applies to performed carriage. Thus it can well be said not to amount to the creation of an exception or pleading device or "fundamental breach" type argument which is not justified by the actual wording.

b. It derives very substantial support from what happened at the 1929 Conference and which, on the material before me (i.e. Wolgel and the subsequent US cases) seems

to amount to a clear decision by the delegates as to the meaning of the Convention wordings that they do not extend to total nonperformance.

c. The interpretation contended for by the Defendant does have consequences which seems bizarre in terms of (i) allowing an airline to charge a price but not to carry without any or any good reason at all and then to retain that price (and which are the facts of this case, at least in relation to some of the Claimants) and (ii) providing for a remedy in relation to lesser "delay" but no remedy in relation to greater "non-performance". The 1929 Conference appears to have decided upon the Wolgel/Atia approach when considering these very questions, and while the outcome does not accord (at least with hindsight and from an English perspective) with best drafting technique, the Convention is, unlike a contract, to be interpreted in the light of what happened in the negotiations process.

d. None of Tseng, Sidhu and Scott deals with this argument, situation or remedy. However, there is a consistent line of US (and perhaps also French) case-law which does and to which I must have respect. For me to decide in favour of the Defendant would result in a substantial divergence in interpretation as between different jurisdictions which would potentially infringe comity.

e. While I can see the force of the proposition that holding that this is a form of "delay" within Article 19 and subject to the financial cap in Article 22 and the Convention's exoneration, time–limits and other claims' regimes, that involves a straining of the words, and was rejected at the 1929 Conference, and in the US (including in Wolgel and probably also in other cases of Ratnaswamy v Air Afrique (ND Ill, 1988) and Paradis v Ghana Airways 348 F Supp2d 106), and probably also the French authorities. Thus while I think that it would in some ways be a more attractive result, and more consistent with the idea of a "balance", I do not think that I should adopt it.

f. While there are other incongruities, various are inherent in the Convention itself, and the other authorities which might be said to generate them either regard them as acceptable or do not deal with non-performance.

30. For those reasons, I conclude that the Tickets Claim is outside the Convention and governed by domestic law. In principle there is a breach of contract, with the obvious remedy being the cost of the replacement tickets. The Claimants' case, which I accept, is that it was the First Claimant who purchased all the tickets (and who had bought the original tickets) but I also find, as is pleaded, that she was acting for all four Claimants (rather than making a personal gift) and so I do not think that anything turns on that. There was no suggestion of any counter-vailing benefits having been received which should be taken into account.

31. However, the Defendant has raised two or perhaps three counter-arguments in relation to the domestic legal position.

32. The first argument relates to the Second Claimant. The Defendant contends that its General Rules were incorporated into the conditions of the tickets, and I think that Mr. Butler was correct on the evidence (of the witness statement of Gulshan Dhanjal) not to contest this and which I find to have been the case. As the Tickets Claim falls outside the Convention, the general domestic law applies and the Defendant contends that there was a justified refusal to allow the Second Claimant to fly under General Rule 75 II, and which appears to carry a discretionary sanction of removal and refusal to transport. However, to succeed the Defendant must prove that the Second Claimant has engaged in "Prohibited Conduct" within Rule 75.II.A with a justified sanction under Rule 75.II.B. As to this:

    a. The clause opens with the words "Without limiting the generality of the foregoing..." This seems to refer to matters in the preceding Rules, and which Mr. Carruth does not contend in any way apply.

    b. The opening part of the clause appears to require something within sub-clauses (1)-(12) "where it may be necessary in the reasonable discretion of the carrier" "to take action" to achieve one of a number of objectives including "to ensure the physical comfort or safety of... other passengers, the unhindered performance of the crew members in their duty aboard the aircraft...". It is not entirely clear whether those words are part of the definition of "prohibited conduct" or are conditions of the exercise of a sanction, but taking all the words together, in my judgment, the Defendant must establish:

        i. Something within sub-clauses (1)-(12) And

        ii. A reasonable exercise of discretion as to its being necessary to take a particular action [here, causing to leave the aircraft] in order to achieve one of the identified objectives. A wide margin of appreciation should be given to the Defendant as to "reasonableness" but such is in the context of "necessary" which is a stronger word than, say, "appropriate". I note that "necessary" does not appear in Sub-Rule B, but B must be subject to A (although my conclusion would be the same even if it were not).

33. Thus the first question is whether anything occurred within sub-clauses (1)-(12) and the Defendant relies on sub-clauses (2) and (4):

    a. In relation to Sub-Clause (2), the relevant words are that "the person's conduct... is or has been known to be abusive, offensive, threatening, intimidating, violent or otherwise disorderly, and in the reasonable judgment of a responsible carrier employee there is a possibility that such passenger would cause disruption... to the physical comfort or safety of other passengers or carrier's employees... or otherwise jeopardise flight safety operations". Mr. Carruth says that I should find this to have occurred. I consider this in the context of my previous findings of fact.

        i. I do not find the Second Claimant to have been "abusive, offensive, threatening, intimidating, violent". While I have held that he raised his voice

as did the female cabin supervisor her voice, and that he was vigorously complaining about his non-working touchscreen, I do not find that wording to have been satisfied. His vigorous pressing of the touchscreen does not seem to me to amount to his having been "violent".

ii. The question more is whether the Second Claimant was "otherwise disorderly". While this is only on balance, I do find, in view of the degree of annoyance expressed by the passenger sitting in front of the Second Claimant, that the Defendant has proved this. Although the wording "disorderly" is unspecific, it takes some meaning from the preceding words in terms of interference with others, and there seems to have been real such interference.

iii. However, the Defendant also has to provide the "possibility" of disruption to the physical comfort or safety of others, and that only within the "reasonable judgment of a responsible carrier employee". Here this is a low test with a wide margin of appreciation for the Defendant's staff member. Again I find that it was, only by a limited margin, within the bounds of reasonableness to conclude that (on the basis of matters remaining as they were) such a possibility existed with regard, at least, to the passenger in front. The Second Claimant had disrupted that comfort and had not said that he would not, but seemed keen to defend his position.

iv. It therefore find that sub-clause (2) was satisfied.

b. Sub-clause (4) is that "the person fails to observe the instructions of carrier and its employees, including instructions to cease prohibited conduct". I do not find conduct within this sub-clause to have been proved. Even if the cabin staff told the Second Claimant not to continue to try to use the touchscreen, the Defendant has not proved that any such subsequent using occurred so as to contravene such instruction. The other "instruction" relied upon is that the Second Claimant failed, as I have already held, to answer affirmatively or at all to requests to agree that he would comply with instructions. I do not think that sub-clause (4) contemplates as an "instruction(s)" a demand that someone expresses that they will comply with instructions, or that the persons "fails to observe" by not making such a statement. Sub-clause (4) appears to me to apply to acts or omissions of conduct (which could include types of speech) but not pure assents.

34. The second question is whether the action of removing the Second Claimant from the aircraft was within the reasonable discretion of the Defendant through its staff in seeking to ensure an identified objective. Here the relevant objectives were the physical comfort of the passenger in front, and possibly general orderliness and flight safety. I have sought to give the Defendant a wide margin of appreciation as to this, albeit within the context of "necessary", but do not see that the removal was within the bounds of reasonableness (and whether or not the context of "necessary" is relevant), and in particular as:

a. The cause of the problem was the malfunctioning touchscreen, being a matter which was the fault of the Defendant.

b. The Second Claimant was simply protesting about the malfunctioning apparatus, and which could, and probably would, severely impact upon his enjoyment of the flight, and which was apparatus which he had every reason to expect both would be provided and functional. In this context it should be expected by the Defendant's staff that a reasonable passenger in the position of the Second Claimant would complain vigorously, and would raise their voice especially as the staff member raised their voice.

c. The obvious solution was to move the Second Claimant to another seat (with a functioning touchscreen) on the flight. I have found on the balance of probabilities that such a seat(s) existed, and that this proposal was advanced by one or both of the First and Second Claimants but was not considered or explored by the Defendant's staff. There was nothing to suggest that such a solution would either be unacceptable to the Second Claimant or would not work.

d. The Defendant's staff's proceeding being based on a failure by the Second Claimant to refuse to say that he would comply with instructions, where no instruction had been given, seems unreasonable. I accept that it would have been better for the Second Claimant to have said something along the lines of "Yes, of course I will" and then to have continued his complaints, but that seems to me to be something of a matter of perfection, influenced by hindsight.

e. The forced removal of the Second Claimant from the aircraft seems to me in such circumstances to have been precipitate in those circumstances. No warning was given, and there was no exploration of the suggested, and obvious, option of a seat change or of any other options. The captain's involvement was cursory. This seems to me also to be borne out by the fact that the Defendant did not object in any way to the Second Claimant flying with it on another flight soon afterwards.

35. I therefore find that this defence is not made out. The defence is not advanced against the other Claimants, correctly in view of my findings that they did nothing to fall within the sub-clauses at all.

36. The second argument advanced by the Defendant is in relation to the First, Third and Fourth Claimants whom it alleges left the aircraft voluntarily and not under any compulsion. It would be a question of law, which I do not have to decide, as to whether they could contend that the Defendant was in breach of their ticket contracts in wrongfully removing their fellow passenger and that their leaving fell within causation and remoteness rules. However, this defence fails on the facts as I have found that they were all removed by the Defendant from the aircraft.

37. The third argument advanced by the Defendant is that the Second Claimant should have his damages negated or reduced and that he should have to indemnify the Defendant with

regard to the other Claimants by reason of his having been at fault and/or under the application of Article 22 of the Convention. In my judgment these arguments and the relevant counterclaim fail for the following reasons:

a. As a matter of domestic contractual law as to damages and contract, there is no scope for a reduction in damages for the events being in part as a result of the conduct of the Second Claimant. Even if the Second Claimant can be described to have been in breach of contract there was no direct damage caused to the Defendant and the conduct of the Defendant of removing the other Claimants wrongfully was not in my view reasonably foreseeable and in any event was wholly outside the relevant scope of the breach and too remote.

b. Article 22 of the Convention has no application in these circumstances. Article 22 applies: "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... 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... This Article applies to all the liability provisions in the Convention." However, in this case the Second Claimant's claim is outwith the Convention, and Article 22 clearly only applies to compensation (and damage) within the Convention.

c. It is correct that Article 37 allows (by way of non-prohibition) the Defendant to bring a claim for monies it has to pay persons (the First, Third and Fourth Claimants) against "others" (here the Second Claimant) but there has to be a contractual or Convention basis for such a claim and here there is none.

38. If I am wrong as to the "delay" argument and the Tickets Claim is within Article 19 then the relevant loss would again seem to be the amount of the price of the replacement tickets both as direct loss and because in my view the Claimants acted entirely in reasonable mitigation in paying those monies as required and demanded by the Defendant. However, in that event my analysis of this third argument would have been as follows:

a. Article 22 has potential to apply with regard to the Second Claimant's own claim. It seems to me that the Second Claimant did act wrongfully, albeit understandably, in his degree of pressurising the touchscreen so as to cause discomfort to the passenger in front. In all the circumstances, being that and his raising his voice, it seems to me that in one sense he did contribute to the damage in the form of his removal which was consequential upon that. However, the vast majority of the responsibility should rest upon the Defendant principally because it was responsible for the malfunctioning touchscreen, and it did not seek to resolve matters reasonably but instead chose to remove, wrongfully, the Second Claimant from the aircraft.

b. This would then give rise to further questions of construction of Article 22 which is similar to but not in the same terms as section 1 of the Law Reform (Contributory Negligence) Act 1945 which gives the court a discretion to reduce damages as may

be "just and equitable" in such circumstances. The question would arise as to whether the Article provides for proportionate reductions generally or only if there is a causing or contributing to a distinct part (and so that if there is a contributing to the total then the claim simply fails – and I note that the old rule at common-law was that the last causer or contributor lost completely and which rule was reformed by the 1945 Act). The wordings "contributed... partly... to the extent " could fit with either interpretation.

i. If the outcome was to exonerate the carrier completely in relation to any damage contributed to by the negligence or wrongful act of the passenger, then I would be inclined to construe Article 22 restrictively and hold that the wrongful over-reaction of the Defendant here overrode or broke the chain of causation (effectively applying the old common-law last wrongdoer rule) so that there would be no reduction.

ii. However, I would have thought that the more appropriate construction of Article 22 would be in line with the 1945 Act providing for a proportionate reduction based on global degree of responsibility, and which in this case I would have held would have resulted in a 20% reduction in the Second Claimant's claim.

c. However, in any event, I do not think that this would assist the Defendant in its counterclaim against the Second Claimant regarding the other Claimants. That would still require a relevant cause of action and relevant causation and absence of remoteness, and which I have already held does not exist.

d. However, none of this arises on my finding as to the non-applicability of the Convention in this non-performance case.

39. I therefore hold that the Tickets Claims succeed in full in the total sum of £3219.24.

40. The second claim is the Distress Claim. The Defendant contends in effect that (i) it is excluded by the Convention and (ii) in any event it would not exist at common-law. In my judgment Mr. Carruth is correct as to both of his contentions for the following reasons:

a. It is clear on the authority of Stott (and Tseng and Atia) and Cowden that a mental distress claim cannot exist under the Convention.

b. The event which caused the distress took place at and even following the embarkation stage. It is thus clearly within the Convention, and as was held in Cowden (which is binding on me) and in Atia.

c. I have asked myself whether the exclusion for the Convention non-performance could mean that the Article 29 exclusion (held by Stott to exclude a mental distress claim) does not apply. This does create a logical difficulty notwithstanding that the courts in Atia (and probably Brauner although incompletely argued) did not see it that way. I have already held that this inconsistency does not prevent my finding for

the non-performance exception, and it seems to me that the apparent inconsistency may be resolved by holding that the Convention applies for one purpose but not for another. However, in any event it does not matter in relation to the Distress Claim for my next reason (i.e. that the claim does not exist at common-law in the first place).

d. I accept that Cowden and also Wiseman are clear authority binding upon me that a mental distress and inconvenience claim does not exist in domestic law for breach of an airline contract to carry as a passenger, at least (as here) in the absence of any physical injury or false imprisonment claim. This is not one of the limited classes of contract whose objective purpose is to provide mental enjoyment or peace of mind (such as contracts for the provision of a holiday – and this is not a case of a holiday or where the carrier is also the relevant holiday provider). Mr. Butler points me to academic comment e.g. in Chitty, that this rule is open for review by the higher courts. However, I am not such a court and am bound by the other decisions. This is a pure contract claim (and if brought in tort then questions of correct jurisdiction and local law would arise) and, as far as the Defendant was concerned, an ordinary air travel trip. In case this case should go further, if such a claim could be made, in the light of the escorting off the aircraft in full view of the other passengers and the taking before the Canadian policy, I would have held that the claimed compensation of £250 per Claimant did properly reflect and quantify the resultant damage (and notwithstanding that such awards are to be low and carefully controlled). If this had arisen then so would have my analysis of the Article 22 exoneration claim with regard to the Second Claimant (including that Article 22 would not have applied as the compensation would not have been under the Convention).

41. The third claim is the loss of Baggage Claim. It is common-ground that it is within Article 17 paragraphs 2-4 of the Convention. I have already accepted the First Claimant's evidence (which is not actually seriously contested) that:

a. The relevant baggage was checked in and put into the care of the Defendant

b. The relevant baggage did not arrive within 21 days after when it should have arrived (so that Article 17.3 applies to deem the First Claimant entitled to compensation) or at all, and I find that it has been lost by the Defendant.

c. Therefore there is a Convention right to compensation, and notwithstanding the non-performance (and resultant inconsistency, in effect on the basis of the same reasoning as above), although there would be an equivalent common-law remedy in any event.

d. It being accepted that the Convention applies, so does the Convention limit in Article 22 to the amount of compensation and which is therefore £1033.86. I accept the First Claimant's evidence that the actual value of the items was £1473 (she having provided and verified a detailed schedule) and that she provided a substantial number of the relevant receipts to the Defendant which appears to have mislaid

them. I do not think that Mr. Carruth really contests this outcome but in any event in my judgment the result is that I award the amount of the £1033.86 cap.

42. The result therefore is that:

    a. I award £3,129.24 in relation to the Tickets Claim.

    b. I dismiss the Distress Claim

    c. I award £1033.68 in relation to the Baggage Claim.

    d. I dismiss the Counterclaim.

43. I am handing down this Judgment at ~~9.45~~ 10.00 am on 22 January 2016, and having received written submissions from the parties and having dispensed with the need for their attendance will then give an oral judgment dealing with (i) interest (ii) costs (iii) permission to appeal and (iv) time for appeal.

DD Bagshaw
22.01.2016.