**Case No: B03YP404**

# IN THE COUNTY COURT AT UXBRIDGE

**Date: 20/04/2016**

**Before**:

**DEPUTY DISTRICT JUDGE THORNETT**

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# Between:

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|  | **(1) SVEN ROSENBLATT**  **(2) MIRIAM ROSENBLATT (NEE MARENKE)** | **Claimants** |
|  | **- and -** |  |
|  | **BRITISH AIRWAYS PLC** | **Defendant** |

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**MR PANAYI** (instructed by Bott & Co) for the **Claimants MR HART** (instructed by DLA Piper UK LLP) for the **Defendant**

# Hearing date: 20th April 2016

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**JUDGMENT**

1. This is the reserved judgment in a claim for statutory compensation under Regulation (EC) No. 261/2004 of the European Parliament and of the Council (“the Regulation”). The Claimants were subject to delay when their flight with the Defendant on 27th May 2012, BA172 (“the flight”) left after its scheduled departure from JFK International Airport at 21.30 to London Heathrow. The flight was delayed by 2 hours, 58 minutes.

This in turn had the effect of causing the Claimants to miss their connecting flight, again with the Defendant, from London Heathrow to Hamburg.

1. The delay was caused because the Defendant had reallocated the Claimants’ intended aircraft for the flight to an earlier flight. The aircraft for that earlier flight had been rendered unserviceable because a bird had been found to have entered one of its engines. In short, the phenomenon of “bird strike”. Details of how the bird strike occurred are unknown; in particular, at what stage during the service of the aircraft, even whether it was during flight at all.
2. The Defendant arranged for the Claimants to travel on another flight from JFK airport. The precise sequence of events is set out in a witness statement (as adduced as hearsay evidence at the hearing) from Mr Richard Gauld dated 15.04.16. The purpose of that statement is to establish that the Defendant took reasonable measures to enable the Claimants to reach their destination(s).
3. The claim was originally pleaded on the sole basis of the Claimants having been denied boarding on their intended flight i.e. claim under Article 4(3). This had always been factually incorrect because the Defendant had never denied the Claimants boarding. It was instead a case of delay. The flight still operated, albeit at a later departure time than scheduled.
4. It was plain from the Defence through to Counsel for the Defendant’s Skeleton Argument as presented at the hearing that the Defendant understood the intended claim was one for delay by analogy with Article 5(1)(c)(iii) of the Regulation. Unsurprisingly, the Claimants proposed an amended Particulars of Claim at the hearing to confirm the point. I allowed that amendment.
5. The Regulation seeks to establish common rules on compensation in the event of “denied boarding” and cancellation of flights. It provides a fixed scheme for compensation.
6. It was agreed between the parties that the concept of a cancelled flight, or directly connecting flights, expressly referred to in the Regulation also extends to delayed flights: Sturgeon v Condor Flugdienst GmbH v Air France [2010] 2 All ER (Comm) 983, as referred to and approved by the Court of Appeal in Jet2.Com Limited v Huzar [2014] EWCA Civ 791 (“Huzar”).
7. It was further agreed between the parties that, on the facts of this case, the Claimants have a prima facie entitlement to compensation under Article 7 of the Regulation. Specifically, each to the sum of €600. There is some disagreement about whether interest is due in the event of an award of the sum fixed by the Regulation. This is, however, a comparatively subordinate point.
8. The essence of the Defendant’s position is that the bird strike fell within the exception set out at Article 5.3, which reads :

*“3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”*

1. By Paragraph 37 in the Defence, the Defendant argues that the bird strike “*was beyond BA’s control and not inherent in the normal exercise of the activity of an airline carrier”.* Paragraphs 34 to 36 of the Defence rely upon bird strike as being included within a list published by the European Commission in 2013 of circumstances “*likely to constitute extraordinary circumstances for the purposes of the Regulation”.*
2. The Defence goes on to aver that as an airline it also had taken “all reasonable measures” in any event in response to the incident. However, this is somewhat of a collateral point. Primarily, it is alleged the bird strike was an extraordinary circumstance and so excludes the right to compensation.
3. What constitutes an “extraordinary circumstance” is not subject to any exhaustive test or definition in the Regulation. This leads to the diverging bases on which the parties respectively submit or deny that the bird strike affecting the Claimants’ flight was extraordinary.
4. The Claimants’ case was put on an attractively straightforward basis. Having regard to relevant case law, of which I elaborate below, the bird strike should be regarded as an inherent part of the operation of aircraft. Its occurrence cannot be described as extraordinary and, as such, cannot be relied upon by an airline as constituting an “extraordinary circumstance” within the exemption provided by Article 5.3.
5. No evidence was called by the Claimants to establish, or at least illustrate, the inherent nature of the problem of bird strike to an airline such as the Defendant. Neither for that matter did the Defendant adduce any evidence to suggest, for example, it was less statistically probable and therefore, at least by such process of reasoning, should more appropriately described as an “extraordinary circumstance”.
6. Mr Panayi correctly reminded me that the Claimants had no direct obligation to adduce any evidence, the burden of proof being upon the Defendant because the Defendant has to establish that the exception applies.
7. I entirely accept that. However, the absence of voluntary evidence from either party about bird strike generally as a phenomenon leaves me, as both counsel conceded, with the difficult task of having to decide upon what is essentially a question of fact (i.e. extraordinariness or not) largely in a vacuum, relying only upon such degree of judicial notice as seems appropriate. From such a factual conclusion, I then have to ascertain, as a matter of law, whether it stands to succeed or fall within the scope of the Article 5.3 exemption, drawing upon such limited guidance there is in precedent.
8. Mr Panayi did seek to invite me to consider and adopt the reasoning of an unreported decision of District Judge Iyer in the County Court at Manchester on 1st April 2015. Whilst not suggesting it was in any way binding (a point very much emphasised by Mr Hart), the following paragraphs were drawn to my attention in that judgment :
9. *For my part, I observe that the word used in “extraordinary” rather than “unexpected”, “unforeseeable”, “unusual” or even “rare”. Extraordinary to me connotes something beyond unusual. I might imagine a collision between two cars on a motorway as unusual but not extraordinary, whereas a collision between a car and a horse on a motorway would certainly be extraordinary.*
10. *I also observe that Mr Wynne told me in evidence that some airports have adopted measures to disperse birds, such as Manchester, which use a hawk. The implementation of measures to avoid bird strike appear inconsistent with the contention that they are an extraordinary circumstance. Mr Walthall complained, when I pointed this out during the hearing, that this would mean that the use of security measures to reduce or eliminate acts of terrorism might be seen as an admission that such incidents are not extraordinary. I disagree. Some events, though extraordinary in nature, may have consequences which are so devastating that steps need to be taken to protect against them, and terrorism falls within this category. The use of a hawk to avoid bird strike does not.*

And:

1. *……There are as many birds as there are human beings, they inhabit the skies at altitudes which are crossed by aircraft which are taking off or landing, they are moving (obviously) and each represents an opportunity for a collision with an aircraft which is unique to air travel, in the sense that such collision do not occur with ground and sea vehicles. They are inherently part of air travel as much the same was as aircraft wear and tear, or ordinary atmosphere hazards such a wind and rain. Bird strikes happen every day, in fact many times a day, and wold hardly be worthy of comment but for the delay which they cause. They do not fall within the same category as, for example, a horse colliding with a motor car, for the simple reason that our skies are populated by birds, whereas our roads are not populated by horses. That is not extraordinary and would hardly prompt an astonished exclamation from a bystander.*
2. *I am satisfied in this view by the fact that issues of foreseeability, lack of control and lack of blame, are not relevant. I have to ask myself whether bird strikes are an inherent part of aviation. While they might not have been half a century ago, when flights were few and far between, and a bird strike might have been practically unheard of, that simply is not the case in today’s world where aircraft take of every few minutes and bird strikes occur multiple times a day (in respect of UK flights alone).*
3. Having referred to the reasoning in the above case, the Claimants rely upon the broad proposition that bird strike cannot be described as anything out of the ordinary. For the Article 5.3 exemption to apply, there needs to be something beyond the usual; something not inherent in the normal exercise of the airline’s operation; indeed, something “freakish” as Counsel submitted.
4. The Defendant seeks to emphasise the element of control featured in Article 5.3. Whilst not submitting this element (in whatever form it could take, according to the circumstances) provides a conclusive resolution to the exemption, it submits it is an important factor that must be considered. It colours and informs the defence overall. As such, the Claimants’ submission that bird strike is self-evidently not an extraordinary circumstance, and so consideration of any interrelationship with control need proceed no further, is simplistic.
5. To illustrate the importance of the control element, I was referred by the Defendant to Paragraph 67 in Sturgeon v Condor [2010] 2 All ER (Comm) 983, in which the ECJ referred to “extraordinary circumstances” as “*namely circumstances which are beyond the air carrier’s control”.*
6. The ECJ in Nelson v Deutsche Lufthansa AG (C-581/10) cited the above passage in Sturgeon with approval and paraphrased the Article as “*that is, circumstances which are beyond the air carrier’s actual control”.*
7. The Defendant also argues that the examples provided in Recitals 14 and 15 to the Regulation provide valuable assistance in the interpretation of Article 5.3. They read:
8. *As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.*
9. *Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.*
10. The Defendant accepts that Recitals to such a Regulation are not binding and only a guide to interpretation. Moreover, the examples given at 14 and 15 cannot be treated as exhaustive.

However, the Defendant argues it remains significant that the Recitals appear to make a distinction between:

* 1. The event or circumstance itself ; and
  2. Controls or steps that might have been taken to avoid the event or circumstance that is proposed to have been “extraordinary”.

It submits that the examples at Recital 14 make this distinction clear. Save for the more opaque example of “*unexpected flight safety shortcomings”, “political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks” “and strikes that affect the operation of an operating air carrier”* are all clear examples of events that one would not naturally associate as either within an airlines control or as inherent parts of their business.

Recital 15 seems to provide an even further gloss on the above distinction: the possibility that notwithstanding reasonable steps having been taken by the airline to avoid delays or cancellation, significant delays or cancellations were incurred owing to the *“impact of an air traffic management decision”* . That is, a step taken by an unconnected third party.

1. The Defendant referred me to the guidance documentation published by the EC at the request of the National Enforcement Bodies of the EU, as would include the Civil Aviation Authority in the case of the UK. The Defendant concedes the document provides only guidance and is not authoritative. The document is entitled “*Draft List of Extraordinary Circumstances following the National Enforcement Bodies (NEB) meeting held on 12 April 2013*” [“the NEB guidance”]. Significantly, “*Bird-strikes to the aircraft during a flight which might cause damage which requires immediate compulsory checks and possible repair”* is listed as a circumstance at item 17.
2. The Claimants urge me not to give this document much weight. The starting point is the disclaimer on the opening page that makes clear the document had been published at the request of the NEB’s. “*The content of this document has not been adopted or in any way approved by the European Commission and should not be relied upon as a statement of the European Commission’s position”.* It is suggested it is therefore more of a commercial document which could be the product of lobbying. More recent versions provide similar if not more express qualifications that it is both non- exhaustive and non-binding. It was unclear whether all NEB’s endorsed the list.
3. In a supplementary note sent to me by the Defendant’s Counsel following the hearing, I was provided with the updated list dated May 2015 as too seeks to list events “*which the CAA considers may qualify as extraordinary circumstances*”. I note this revised list has taken into account case law since the 2013 list that has held that technical issues are not extraordinary: in particular Huzar, yet still repeats the same phrase at item 17 “*Bird-strikes to the aircraft during a flight which might cause damage which requires immediate compulsory checks and possible repair*”.
4. The Defendant’s point therefore is that the NEB Guidance constitutes a meaningful and considered document that continues to be revised to reflect the views of EU enforcement bodies in the light of current case law. It has considerable weight even if not binding authority.
5. Both parties refer to relevant authorities on Article 5.3, in particular Wallentin- Hermann v Alitalia-Linee Aeree Italiane SpA [2009] Bus Lr 1016, a decision of the European Court of Justice and, as above, the Court of Appeal in Huzar.
6. In Wallentin, the ECJ noted that the Article 5.3 was essentially a derogation from the principle of compensation recognised by the Regulation and, as such, should be interpreted strictly :

*17 It is settled caselaw- that the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. Moreover, when those terms appear in a provision which constitutes a derogation from a principle or, more specifically, from Community rules for the protection of consumers, they must be read so that that provision can be interpreted strictly (see, to that effect, Case C336/03 easyCar- [2005] ECR I-1947, paragraph 21 and the -caselaw- cited). Furthermore, the preamble to a Community measure may explain the latter’s content (see, to that effect, inter alia, Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 76).*

1. Wallentin concerned the extent to which technical problems on an aircraft might constitute an “extraordinary circumstance” under Article 5.3. It was decided in that given the various technical problems that can confront an air carrier “*as a matter of course in the exercise of their activity*”, the resolution of such problems “*must therefore be regarded as inherent in the normal exercise of an air carriers’ activity”* [Paragraph 24].
2. Significantly, however, “*it cannot be ruled out that technical problems are covered by those exceptional circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control. That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism.”* [Paragraph 26].
3. This reasoning is consistent with the Defendant’s submission about the Recitals: there can be events that *“are not inherent in the normal exercise of the activity”.*
4. The court in Wallentin, having deemed at Paragraph 23 the Recitals in the Preamble to the Regulation as characterising circumstances as “extraordinary” as they relate to an event that *“is not inherent in the normal exercise of the activity of the air carrier* *concerned and is beyond the actual control of that carrier on account of its nature or origin.”*, prescribed at Paragraph 27 the following test in cases such as this :

*It is therefore for the referring court to ascertain whether the technical problems cited by the air carrier involved in the case in the main proceedings stemmed from events which are not inherent in the normal exercise of the activity of the air carrier concerned and were beyond its actual control.*

1. Given this test, the ECJ held [Paragraph 36] that it followed how the frequency of such an occurrence could not “*in itself*” constitute a factor from which the presence or absence of “extraordinary circumstances” within the meaning of Article 5.3 could be concluded.
2. This seems to me to be an important point. Crucially, even if an airline might regularly experience an event, or at least that that event might present a frequent risk to the operation of the airline, this does not of itself preclude the event from still constituting an “extraordinary circumstance”. From the above paragraphs in Wallentin, the explanation why is the element of control.
3. A non-airline industry analogous example might be the fairly regular occurrence of illegal migrant trespassers in the channel tunnel. Such events cause delay and disruption to the operation of trains within the tunnel but are clearly entirely unrelated to the normal exercise of that business activity. Neither do such events arise from a lack of control exercised by enterprises such as Eurostar (or for that matter the relevant passport and immigration controls at the respective ports). The acts of trespass would instead constitute “security risks” of the type contemplated at Recital

14. However regular, possible or even probable, they are outwith the operation and control of the relevant businesses.

1. This analogy is compatible with the discussion in Wallentin at Paragraphs 40 and 41. Whether the circumstances can or cannot be avoided by control depends on the nature of the circumstances in question. The best example of this is the Icelandic volcanic ash held in McDonagh v Ryannair Ltd [2013] LLR 440 to have constituted an “extraordinary circumstance”.
2. Whilst recognising distinctions, Wallentin also decided that whether “reasonable measures” consequent upon an event of delay or cancellation might have been possible can be subject to questions of viability :
3. *It follows that, since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned.*
4. *That party must establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able – unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time – to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.*
5. To return to the element of control, Lord Justice Elias in Huzar made the following distinction at Paragraph 21 :

*In my judgment, it is plain from the Court’s answer to questions 1 and 4 that when considering whether there are extraordinary circumstances, the Court has to focus on the source or events which cause the problem, not its resolution. A technical problem may indeed constitute an extraordinary circumstance provided it stems from an event which is not inherent in the normal exercise of the activity of the air carrier concerned and is an event which is outside the carrier’s control.*

1. Huzar focused upon the two elements to Article 5.3 in deciding whether these constituted a single composite test (as the appellant airline submitted) or two distinct conditions. This discussion was necessary in the context of the problem that gave rise to the airlines intended Article 5.3 defence in that case: a technical defect that had developed on a flight that was unexpected and could not have been predicted by a regular system of inspection or maintenance. Therefore, the interrelationship between reasonable prophylactic control steps or measures (i.e. inspection regimes that might have led to discovery) and the inability to avoid an occurrence because it was extraordinary had to be considered.

Lord Justice Elias at Paragraphs 35 and 36 summarised the arguments and concluded:

1. *In my view, the difference between the two arguments can, without undue distortion, be encapsulated in this way. The appellant is in effect construing the test as follows: “events by their nature or origin are not inherent in the normal exercise of the activity of the air carrier because they are beyond its actual control.” The key concept, on this test, is actual control; if the event is beyond control it is necessarily not inherent in the normal exercise of the activity. By contrast, the respondent is saying; “events by their nature or origin are not inherent in the normal exercise of the activity of the air carrier and therefore are beyond its actual control.” The defining concept on this test is the notion of what is inherent in the normal exercise of the carrier’s activities; if it is not inherent, it is beyond control and vice versa.*
2. *In my judgment, a proper understanding of the inter-relationship between the two limbs should focus on the concept of “extraordinary circumstances” itself, the language used in Article 5(3). This requires that the circumstances must be out of the ordinary, as the Court noted in Sturgeon. As the CJEU recognised in paragraph 24 of Wallentin-Hermann, difficult technical problems arise as a matter of course in the ordinary operation of the carrier’s activity. Some may be foreseeable and some not* *but all are, in my view, properly described as inherent in the normal exercise of the carrier’s activity. They have their nature and origin in that activity; they are part of the wear and tear. In my judgment, the appellant’s submissions fail to give proper effect to the language of the exception. It distorts the meaning of limb 1 in defining it by reference to limb 2, and thereby renders it superfluous. It makes an event extraordinary which in common sense terms is perfectly ordinary.*
3. This reasoning provides a succinct and effective resolution of the argument about the construction of Article 5.3 because the Court was entirely satisfied that difficult technical problems are inherent in the operation of an airline’s business, regardless of whether they are foreseeable or not. They were, in short, “*part of the wear and tear*”.
4. This does not seem an unreasonable proposition, if I may say with entire deference to Lord Justice Elias. It follows that any mechanical or electrical component cannot last for ever and will ultimately fail. Therefore, technical failure should be treated as ordinary.
5. The Claimants would submit that so too should bird strike be treated. It is said to be similarly inherent in the ordinary operation of airlines. Not least because it leads to technical failure, it should as much be classified as “wear and tear”. A further analogy was with cold or icy tarmac: it was something ordinarily to be expected. Therefore Huzar has direct application and the distinction discussed above between the event and the element of control is neutralised. Mr Panayi suggested that in these circumstances the second limb was “almost redundant but not quite”.
6. By implication, this emphasis seeks conveniently to side-line what is, in my judgment, a vital distinction in the case of bird strike. In contrast to technical failures, there are no known control measures at all an airline can take prospectively to avoid bird strike. There is no such thing as an engine or plane that deters birds. Bird strike itself cannot surely be described as something within the control of an airline, only instead is its reaction in consequence.
7. I consider the element of control, or rather lack of it in the case of bird-strike, very important.
8. Because of the element of control, I do not accept the proposition that because airport authorities take measures to deter birds from flying in the vicinity of runways this provides a ready illustration of the inherency of the problem to air-carriers; at least not within the specific context of Article 5.3.

In this case, the exemption is sought by the “air-carrier” and not to an unconnected third party such as an airport authority that controls where an air-carrier lands or takes off. The element of control (that cannot be entirely separated or ignored) has to be applied to the party relying upon Article 5.3 and not others. It would be unfair to import into the test considerations felt appropriate by third parties whose business enterprise is entirely different, even if as coincides with the enterprise of air carriers. Indeed, it fairly could be said that airport authorities have an obligation to take reasonable steps to prevent or discourage bird flight across runways precisely because the airlines in contrast do not have the means to prevent bird strike in the course of landing or take off. To the contrary, the airlines are passive to any possible such presentation. They lack the “actual control” contemplated in Wallentin [Para 23]. A further observation is that air-carriers are subject to the control of the airport authorities in terms of permission to land and take off.

1. In short, this factual observation wrongly seeks to impose the arguable inherency of a “circumstance” in one type of business to an unrelated and quite different business.
2. I have reached the following conclusions.
3. The word “extraordinary” in Article 5.3 should be interpreted as carrying only its pure meaning of simply that that is not ordinary ; hence the prefix “ex”.

As with any English word, it is capable of meaning more depending upon context and perhaps the age of the deponent. In some contexts, it might well be used to express things that are unexpected, unforeseeable, unusual or rare. That said, the word can also be used simply to describe something that may be different or distinct but not to the extreme of it being unexpected, unforeseeable, unusual or rare; still less freakish. For example, a music critic describing an excellent performance might describe it as having been “extraordinary” but not for one moment intend to suggest it as having been unexpected, unforeseeable or unusual.

I do not therefore accept that unless an event is at the extreme or periphery of expectation, it can never be extraordinary.

1. The proposition that bird strike is inherent to the operation of aircraft has to be assessed within the controls provided by the relevant dicta and in the context of the Regulation. It is not appropriate to incorporate the impressionistic approach of the layman that the propensity of birds coming into contact with planes can be judged by taking into account the number of birds and aircraft there are in the sky.
2. Such an impressionistic approach is in my view simplistic.
3. Although I am not bound by the County Court decision in Ash, I think it is relevant to analyse further the conclusion that because (apparently) the skies are fully populated by birds and there are more aircraft flying than there used to be “whereas our roads are not populated by horses”, then bird strike to aircraft should not be treated as extraordinary whereas cars colliding with horses should.
4. This, with respect, works on the false premise that the greater the statistical presence, then the greater the risk of occurrence: therefore the greater the risk of occurrence, the more ordinary or inherent should that risk be regarded to the activity.
5. This logic has an ostensible attraction but is by no means of reliable universal application. Take for example the everyday feature of cars, cyclists and pedestrians moving in close proximity at rush hour in, say, the West End of London. In this scenario, there are clearly more pedestrians than cars and possibly at least as many cycles. However, the incidence of them colliding is comparatively rare. I do not suggest it is unknown and, without doubt, the consequences can be extremely serious. However, I would struggle to accept that cars striking cycles or pedestrians is “inherent in the normal exercise of the activity” [i.e. driving]. It is not ordinary: ex hypothesi, it is extraordinary.
6. Analysing the statistical comparator approach above further, I think I am entitled to take note that birds generally do not fly much higher than about 500 feet ; unless they are a species that migrate, which are capable of flying higher. At 500 feet or less, I accept birds are potentially more likely to come into contact with aircraft and the impressionistic approach seems to establish the proposition. However, I think I am also entitled to take judicial note that aircraft frequently travel at altitudes of up to 30,000 feet, even a little more, and that birds do not ordinarily fly at that height. At this level (speaking both figuratively and literally), the above conclusion seems quite remote and unforeseeable. Perhaps even “freakish” to use the words of the Claimants.

On fuller analysis then, the statistical ratio approach can in fact lead to diverging conclusions that are difficult to know how to resolve. Applying this ratio test accurately, it would seem that to decide whether the exemption should apply might depend upon (a) what type of bird struck the aircraft (b) at what altitude and perhaps(c) whether this was unusual for that type of bird. Such a test would clearly be evidentially fraught with complexity.

1. Moreover in cases such as the one in hand, where the bird strike was observed to have occurred only upon inspection of the plane following landing and so the point of its occurrence was never known, this approach would fail to assist at all.
2. Therefore if in Huzar [Paragraph 46] the Court of Appeal rejected any suggestion that technical problems may or may not constitute extraordinary circumstances depending upon whether they were foreseeable, because this would “*open up endless debate about whether a particular technical problem should have been foreseen or not*”, then so too should it be objectionable to apply a proposition that the notional extent of the bird population in relation to the number of flights makes bird-strike foreseeable and hence ordinary. I do not think this follows as a matter of logic.
3. I therefore decline to adopt an impressionistic approach. It is prone to allowing in factors such as frequency or foreseeability into the balance that dicta has held as irrelevant.
4. In the absence of any other evidence, I instead look for any guidance from the industry itself. This is clearly has to be the NEB Guidance. This document represents the considered views of those within the industry who have direct responsibility for safety standards. It follows from the source of the publication that it seeks to set out, or at least attempt, a harmonised and consistent approach to the application of the Regulation within the EU ; even if, as I accept, it does not represent the views of the EU itself but rather a group of un-named enforcement bodies.
5. That attempt at consistency is self-evident from the way the document has changed since 2013. It illustrates how the relevant enforcement bodies seek to adapt and incorporate changes in the law. This strikes me as a rational and realistic approach and therefore carrying an applicable degree of authority, even taking into consideration reservations expressed by the Claimants about the precise progeny of the contributions to the document and perhaps their motivation.

This latter point seems pure speculation. Given, as I find, the document presents in a rational and informed way, and seems consistent with a logical analysis of the problem, I am unable to apply such speculation further.

1. I am satisfied that the acceptance at Item 17 in the Guidance that bird strike is an extraordinary circumstance constitutes the best and most reliable guidance on the subject.
2. To return to the test of “reasonable measures”, I note that Eglitis v Latvijas Republikas (C-294/10) and Wallentin [Paragraph 41] held that the word “which” in Article 5.3 applies to the cancellation or the delay and not the extraordinary circumstances. That case decided that “reasonable measures” means those “*appropriate to the situation….measures which..meet, inter alia, conditions which are technically and economically viable for the air carrier concerned”.*
3. The Claimants criticise the Defendants’ reliance upon Mr Gauld’s written statement because it prevented him from being cross-examined. It was not clear from his statement what were matters within his direct knowledge and what was not. He fails to explain why an attempt to repair the intended plane first or sooner might have remedied the problem quicker and thus avoid or mitigate the delay.
4. Despite the comparative complexity of the law in this case, I remind myself that this is a Small Claim Track case and the evidence has to be tempered accordingly.
5. However, beyond such point of principle, I am satisfied on the evidence of Mr Gauld that all reasonable measures were taken in respect of the delay. I can find nothing in this evidence that seems obviously irrational or unreasonable. The commentary in Eglitis neatly corresponds with, by analogy, common law dicta on the concept of reasonableness in mitigation of loss in damages claims: reasonableness is to be assessed in the context of the time it took place and not strained with the benefit of retrospective fine analysis.
6. I find that the Defendant has established that event that gave rise to the delay of the Claimants’ flights exempts it from compensation under the Regulation because of the application of Article 5.3.
7. I therefore dismiss the claim.
8. Nonetheless, in deference to the arguments on interest and quantum, I find as follows.
9. Section s69(1) of the County Courts Act 1984 provides : “*Subject to rules of court, in proceedings (whenever instituted) before the county court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as may be prescribed, on all or any part of the debt or damages in respect of which judgment is given…”*
10. This is a claim for regulatory compensation as prescribes fixed amounts according to the strict criteria at Article 7. It cannot reasonably be described as conferring an entitlement to damages within the common law sense, as contemplated for the purposes of s.69(1) of the County Courts Act 1984. It provides compensation for delay, which is not a head of loss ordinarily recoverable in damages, as distinct from damage that might be caused by delay. The Regulation is not couched in terms of fault but instead whether objective circumstances have arisen as give rise to specific compensation. I also respectfully adopt the reasoning of HHJ Platts in the County Court at Manchester in the case of *Goel and Trivedi v Ryanair Ltd* (Unreported, 14 August 2015) at [17]-[40].
11. As to whether the entitlement can be classified as a debt, there is no binding authority that an action for Article 7 compensation is an action for the recovery of a debt for the purposes of s69(1) of the County Courts Act 1984. I am entitled to decide the matter according to principle.
12. The justification to treat an entitlement as if it were a debt and hence to interest does not have to be express.

For example, in Trustees of the Dennis Rye Pension Fund and Another v Sheffield City Council [1998] 1 WLR 840 the Court of Appeal held at 851, in respect to improvement grants under section 101 of the Local Government and Housing Act 1989: “a refusal to approve an application for a grant gives rise to no right to damages. Discretions are also involved, for example section 115 (discretionary approval) and section 118 (determining a specification). However, once an application is approved a duty to pay it arises upon compliance by the applicant with the statutory requirements and the duty is in my view enforceable by an ordinary money claim.”

So too in Murdoch v Department for Work and Pensions [2010] EWHC 1988 (QB) Walker J, obiter, considered that the principle in Trustees of the Dennis Rye Pension Fund could be applied in respect of incapacity benefit and income support and that where a legislative provision “imposed a statutory obligation to pay benefit [and] neither those regulations nor any other statutory provision provide an express remedy for the recovery of unpaid benefit. It follows that it is open to a claimant who can prove that there is an award of benefit in his favour which is unpaid to sue for the unpaid amount in the County Court.” [79].

1. Whilst the Regulation clearly does not impose strict liability, the commentary at Paragraph 17 in Wallentin clarifies that the Article 5.3 exemption should be treated as a “derogation” from “*a principle or, more specifically, from Community rules for the protection of consumers*”, hence why it should applied strictly.
2. In my judgment, particularly given the emphasis in Wallentin, once the objective criteria under the Regulation are made out, a claimant is entitled to treat the air-carrier (as here) as under an obligation to pay. There is no further element of discretion, restitution or contingency. A claimant either is or is not entitled to payment. As with any debt, there may well be an antecedent process by which the entitlement crystallises. However, once entitled, then for the purposes of s.69 it should be treated as a debt. The question of how and when that obligation to pay might be recognised goes to the rate and duration of any interest awarded as a matter of discretion, depending upon the ability of the jurisdiction applying the Regulation to so award.
3. Whether interest should have been awarded in this case, however, is another matter. The claim was not correctly presented until an amendment allowed on the morning of trial. Until then, there was no entitlement to compensation by relying on the concept of having been denied boarding. Regardless of anticipation by the Defendant, it seems to me that until a party correctly formulates their claim, they cannot reasonably expect to receive payment; and so, it follows, neither interest on that sum. I would not have awarded interest on the facts of this case.