



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 8  
PD159/19

Lord President  
Lord Pentland  
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the cause

COLIN MATHER

Pursuer and First Respondent

against

(FIRST) EASYJET AIRLINE COMPANY LIMITED

First Defenders and Reclaimers

and

(SECOND) DRK HAMBURG MEDISERVICE gGmbH

Second Defenders and Second Respondents

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**Pursuer and First Respondent: Di Rollo KC, Thornley; Digby Brown LLP**  
**First Defenders and Reclaimers: McBrearty KC, Pugh KC; Clyde & Co (Scotland) LLP**  
**Second Defenders and Second Respondents: Shand KC; DAC Beachcroft LLP**

10 February 2023

**Introduction**

[1] The pursuer requires to use a wheelchair. On 15 May 2017, he was injured when

disembarking an easyJet flight from Edinburgh to Hamburg. He was severely injured when he fell from a wheelchair which was being pushed along an air bridge by an employee of DRK, namely Daniel Heinz. The pursuer sues easyJet under the Montreal Convention. It is not disputed that easyJet are liable under the Convention to compensate the pursuer for his loss up to the equivalent of a specific number of Special Drawing Rights; worth about £146,000 at the time of the accident. The pursuer claims damages from easyJet in excess of that amount, again under the Convention, on the basis that Mr Heinz was an agent of easyJet. If he was not an agent of easyJet, the pursuer has an alternative case against DRK under German law, based upon DRK's vicarious liability for the actings of their employee.

[2] EasyJet accept that Mr Heinz was at fault. Their defence is that he was not their agent. EasyJet contend that they are not liable for the excess loss; the damage having been caused not by them but solely by a third party. Alternatively, if they are liable because Mr Heinz was their agent, they make a claim for a contribution from DRK under English law, which failing German law. DRK table a wide-ranging defence, which includes several permutations. At times they seemed to be maintaining that easyJet alone were responsible for the actings of Mr Heinz. They were certainly arguing that they were not vicariously liable for their employee's actings under the applicable German law. Mr Heinz had not been at fault. In any event, the claim was time barred under both the Montreal Convention and German law. The English law of limitation relative to contribution, in terms of which the claim would not be time barred, was not applicable.

[3] The Lord Ordinary determined ([2022] CSOH 40) that Mr Heinz had been acting as easyJet's agent. The accident had been caused by the negligence of Mr Heinz. EasyJet were liable for the whole damages. The law applicable to easyJet's contribution claim was

German. It was not disputed that, under German law, the claim was time barred. The issues in this reclaiming motion (appeal) are broadly whether the Lord Ordinary's conclusions are correct. In addition, it is said that the Lord Ordinary failed to address other issues which had been put before him, including DRK's vicarious liability for Mr Heinz under German law and the applicability of the English law of limitation to the contribution claim.

### **The Convention, EU Regulations, German and English law**

#### ***The Montreal Convention for the Unification of Certain Rules for International Carriage by Air***

[4] The Montreal Convention of 1999 is incorporated into domestic law by the Carriage by Air Act 1961, as amended by the Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002/263. It provides:

#### **“Chapter III (Liability of the Carrier and Extent of Compensation for Damage)**

##### **Article 17 – ... Injury of Passengers – Damage to Baggage**

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

##### **Article 21 – Compensation in Case of ... Injury of Passengers**

1. For damages ... not exceeding [113,100]<sup>1</sup> Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
2. The carrier shall not be liable for damages ... to the extent that they exceed for each passenger [113,100] Special Drawing Rights if the carrier proves that
  - (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
  - (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

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<sup>1</sup> The original figure was increased by the Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2009; that figure is now 128,821 in terms of a 2021 Order.

#### Article 26 – Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void ...

...

#### Article 29 – Basis of Claims

In the carriage of passengers, ... any action for damages, ... can only be brought subject to the conditions and such limits of liability as are set out in this Convention ... “.

[5] Article 30 provides that if an action is brought against an “agent” of a carrier, then the agent can avail himself of the limitations on liability to which the carrier is entitled.

Article 35 states that the right to damages “shall be extinguished” if an action is not brought within a period of two years. Article 37 provides that nothing in the Convention prejudices whether a person, who is liable for damages under the Convention, has a right of recourse against another person.

#### *EC Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air*

[6] The preamble to the PRM Regulation explains that its purpose is to ensure that disabled persons and those with reduced mobility have comparable opportunities for air travel as other citizens of the single market (recital (1)). Assistance to meet their needs ought to be provided at the airport and on board, including any necessary staff and equipment (rec (4)). Assistance should be from a designated point of arrival at the airport and to a designated point of departure from the destination airport, including embarking and disembarking the aircraft (rec (5)). Responsibility should be that of airports’ “managing bodies” (rec (6)), but they may contract with third parties, including carriers, to provide the

designated assistance (rec (7)). Financing is spread amongst all passengers, with a levy being charged to each carrier using the airport (rec (8)).

[7] The Articles of the Regulation detail what has to be done in relation to the designation of the point at which persons can “announce their arrival... and request assistance” (Art 5). Carriers have to inform passengers about how they can notify them of their need for assistance and this information must be conveyed by the carriers to the relevant airport (Art 6). As soon as possible after the departure of the flight, the carrier has to inform the destination airport (if it is within the EU) of the nature of the assistance required upon arrival (*ibid*). Article 7(6) states that, when a disabled or reduced mobility passenger arrives at the airport:

“... the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to reach his or her point of departure from the airport ...”.

One of the forms of assistance contained in Annex I is the provision of a wheelchair. The Articles go on to provide for the various requirements already described in the recitals. The airport is responsible for ensuring that the assistance is provided without any additional charge to the disabled or reduced mobility passenger (Art 8(1)). Instead, the cost of assistance is levied by the airport against the carriers (Art 8(4)). The airport can provide the assistance itself or it can sub-contract this to, amongst others, the carrier (Art 8(2)). Carriers are required to provide certain facilities on board the aircraft, including the use of toilet facilities (Art 10; Annex II).

***Regulation (EC) 864/2007 ... on the law applicable to non-contractual obligations (Rome II)***

[8] Recital 17 of this Regulation states that the applicable law for non-contractual

obligations should be determined on the basis of where the damage occurs. In personal injury cases this is where the injury is sustained. Article 4 therefore provides that:

“1. ... the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs ...

...

3. Where it is clear ... that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph ... 1 ... the law of that other country shall apply. A manifestly closer connection with another country might be based ... on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”

Article 15 states that the applicable law governs the basis and extent of liability (15(a)), the manner in which the obligation can be extinguished and the rules of prescription and limitation (15(h)).

### *German law*

[9] The German Civil Code, in so far as potentially relevant, provides as follows:

“Section 195

Standard Limitation Period

The standard limitation period is three years.

...

Section 199

Commencement of the standard limitation period and maximum limitation periods

(1) The standard limitation period commences at the end of the year in which:

1. the claim arose and
2. the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor ...

...

Section 823

Liability in damages

(1) A person who, intentionally or negligently, unlawfully injures the ... body ... of another person is liable to make compensation to the other party for the damage arising from this.

...

## Section 831

### Liability for vicarious agents

(1) A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is ... to manage the business activity, in the ... management, or if the damage would have occurred even if this care had been exercised."

## *English law*

### *Carriage by Air Act 1961*

[10] Section 5 of the 1961 Act, so far as applicable to England and Wales, reads:

#### "Time for bringing proceedings

- (1) No action against a carrier's servant or agent which arises out of damage to which any of the Carriage by Air Conventions applies [shall]... be brought after more than two years, reckoned from the date of arrival at the destination...
- (2) [Article 35 of the Montreal Convention] shall not be read as applying to any proceedings for contribution between persons liable for any damage to which any of the Carriage by Air Conventions relates ..."

### *Civil Liability (Contribution) Act 1978*

[11] Section 1 of the 1978 Act sets out the English law on "entitlement to contribution". It provides that:

"(1) ... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

...

(3) A person shall be liable to make contribution ... notwithstanding that he has ceased to be liable ... unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based.

...

(5) A judgment... in any part of the United Kingdom... shall be conclusive in the proceedings for contribution as to any issue determined... in favour of the person from whom the contribution is sought.

(6) References ... to a person's liability in respect of any damage are references to any such liability which ... could be established in an action brought against him in England and Wales ...".

Section 2 sets the level of apportionment as "such as may be found... to be just and equitable having regard to the extent of that person's responsibility for the damage...". The level of contribution can amount to a complete indemnity (s 2(2)).

#### *Limitation Act 1980*

[12] This Act governs the general time limit for claiming contribution as follows:

"10(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued."

Subsections (2), (3) and (4) provide that the date of accrual is when the person is held liable in a civil judgment or in a settlement.

#### **Facts**

[13] The pursuer had been rendered an incomplete paraplegic as a result of an accident in 2009. He required the use of a wheelchair. He was nevertheless an active self-employed consultant whose business caused him to be a frequent air traveller. He booked a seat on an easyJet flight from Edinburgh to Hamburg; scheduled to depart on 15 May 2017. He notified easyJet that he required special assistance. The extremely detailed terms and conditions relative to his booking included a section on "Pre-booked Assistance" (condition 12.3). This stated that the passenger was to advise a member of easyJet's staff on



arrival at the airport and they would organise assistance (12.3.1). This is consistent with the pursuer's boarding pass which noted that he had asked for special assistance and asked him to contact a member of staff (presumably easyJet staff) at the bag drop area.

[14] The terms and conditions continue:

“12.3.6 The provision of assistance through the airport, onto the aircraft and through the arrivals process at the destination is the responsibility of the relevant Airport Authority. Concerns about the level of service provided should be directed to the Airport Authority as appropriate.”

The conditions contained provisions whereby the law relating to the contract of carriage would be that of England and Wales and the parties were subject to a non-exclusive prorogation of the jurisdiction of the courts of England and Wales (condition 29).

[15] The flight was delayed, as was the pursuer's disembarkation on arrival at Gate 7B in Hamburg. His wheelchair was in the hold. He was given help in the form of two assistance personnel, including Daniel Heinz. These were employees of DRK; a non-profit organisation contracted by the airport, in terms of a “Master agreement”, to provide assistance for passengers covered by the PRM Regulation. This agreement provided (s 7) that DRK were liable for all damage incurred during the performance of their services and required to indemnify the airport against claims by third parties. DRK had to take out public liability insurance to cover personal injury losses of up to €2.5 million.

[16] The pursuer was helped first from his seat to the door of the aircraft. This was done using an aisle chair, which is kept on board the aircraft. At the door, he was lifted into an airport wheelchair and pushed by Mr Heinz up an air bridge towards Gate 7B at the terminal. The air bridge had been refurbished and returned to service about two months (or possibly a shorter period) previously. The pursuer thought he had been pushed “quite briskly”. At the point where the bridge joined the terminal, the wheelchair stopped abruptly

and the pursuer was ejected from it; landing on the floor just inside the terminal threshold. The wheelchair had struck a raised edge at that point. As a consequence of this incident the pursuer suffered serious injuries.

[17] The pursuer sues easyJet for £1m under the Montreal Convention, first in relation to their liability to pay up to 113,100 SDRs and, secondly, for the balance on the basis that Mr Heinz, for whose actings DRK were responsible, was acting as easyJet's agent. EasyJet maintain that DRK were not acting as their agents. In any event, they seek a contribution from DRK on the basis of the law of the contract (English law), which failing that Mr Heinz was at fault under section 823 of the German Civil Code. DRK are vicariously liable for his actings under section 831, but English law then governs the relevant contribution. The pursuer has an alternative claim against DRK under German law.

## **Selected Evidence**

### *German law*

[18] Dr Petra Schaaff is a German lawyer based in Hamburg. On 2 November 2021, in response to instructions from the pursuer's law agents, she reported on the concept of vicarious liability in German law; referring specifically to section 831 of the German Civil Code. Her report was adopted in her testimony. Where a person was injured unlawfully by an employee, the employer could escape liability if he had fulfilled his duty of care in the selection, supervision and training of the relevant person. The standard to be applied depended on the risk involved. A person who was selected carefully might not remain so. The employee would require continuous supervision and training. Reference was made to Palandt: *Bürgerliches Gesetzbuch* (a commentary on the Code) (78<sup>th</sup> ed) section 831 para 13).

[19] According to Dr Schaaff's understanding of the facts, the air bridge had been refurbished and put back in service on 10 March 2017. The employee had his last training session prior to that on 21/22 February. He had not worked on the new bridge prior to the accident on 15 May 2017. He had said that he had no reason to expect a difference in level at the connection between the bridge and the terminal, as this was not normal. This, according to Dr Schaaff, showed that he had not been sufficiently trained and made familiar with the new bridge's features and hazards. DRK could not rely on the exoneration provision in section 831. The accident would not have happened if the employee had been duly supervised.

[20] In her testimony, Dr Schaaff referred to the need for the employer to supervise the employee and for there to be checks and controls to make sure that he was still doing his best and doing it safely. If DRK had been unaware of the hazard on the bridge, then they should have been so aware. They had close contact with the airport and obtained regular reports of things that had changed; including any structural modifications. It was not necessary to prove negligence for section 831 to apply. All that was needed was that damage had been caused unlawfully. There was almost invariably unlawfulness if an accident had occurred. Either the employee or the employer had done something wrong.

[21] Dr Schaaff referred to the standard limitation period of three years in section 195 of the Code. That period, in terms of section 199(1), started at the end of the year in which the accident occurred. It was agreed by joint minute that the action had been served timeously on DRK by the pursuer on 30 June 2020.

[22] Marcel Hohagen is a partner in the German law firm BLD (Bach Langheid Dallmayr) and is based in Cologne. He was engaged by DRK's law agents. He provided a report

dated 2 November 2021 to which he referred during his testimony. In discussing the Montreal Convention from a German point of view, he referred to the German text, which uses "*Leute*" (people) instead of the German for "agents". Looking at Article 17 of the Convention, Mr Hohagen referred to what he described as a common understanding in the legal literature, at least in Germany, of the "gate-to-gate" principle whereby the carrier is responsible for what happens in between the departure and arrival gates, including the path over a bridge up to an arrivals' gate. Mr Hohagen's report refers, at footnote 3, to an article by Alexander, in *VersR* 2018, 939 (942). This comments on the German Federal Court of Justice case of *X ZR 30/15* on 21 November 2017 which found the carrier liable for a slip on a damp spot on an air bridge. Until he reaches the arrivals' gate, the passenger:

"has no way out, is restricted in his/her movement and needs guidance at least by the air carrier to get out. He/she is in [the] custody of the air carrier. In turn, where the air carrier uses services by third parties to provide his/her customer with its own transportation services, those third parties are consequently to be qualified as '*Leute*' in terms of Art. 30 MC, as otherwise the sharing of the air carrier's work with subcontractors could reduce responsibility and liability, which is contrary to the intention of the MC to form a unified regime of liability for the air carrier in favour of the passenger".

EasyJet's duty to provide the pursuer with assistance was demonstrated by the terms of DRK's agreement with the airport. This provided that the carrier had to send a message requesting the assistance in advance. DRK acted for the airport in agreeing a service contract with the carrier and the airport was entitled to charge the carrier for DRK's services. In order to fulfil their duties, the carrier subcontracted with the airport and the airport subcontracted with DRK.

[23] Mr Hohagen described how vicarious liability operated in German law. It was covered by section 831 of the Civil Code. The principal was not liable if he exercised reasonable care when selecting the agent provided that he monitored and trained the agent

diligently. In relation to the fault of DRK's employee under section 823, the German courts would probably determine the case on the basis of whether Mr Heinz should have noticed the ridge which caused the wheelchair to stop. The German Federal Court had ruled that operators of hospitals and care homes had specific duties of care when transporting people with reduced mobility. Such activities had to be carried out "with such care that a fall of those persons is excluded". A fall indicated a breach of duty. A hospital would have the burden of proof of demonstrating that the fall was not as a result of careless conduct by the nurse. The German courts would probably require the nurse to be aware of any hazards on the path to be taken by the wheelchair. Here the ridge had been marked by a yellow strip. A German court would assess for itself whether the ridge was visible, having regard to whether the employee had previously used the path to reach the aircraft. If the employee was at fault, it was a matter of fact whether DRK had adequately monitored and trained him.

[24] In his testimony, Mr Hohagen explained that the first question was whether DRK's employee had acted unlawfully. If he had, the next question was whether DRK had a defence of having properly selected, trained and managed their employee in terms of section 831. They would also have a defence if the accident would have happened in any event. For vicarious liability to arise under 831, it was not necessary for the employee to have acted intentionally or negligently (cf s 823). It was enough that the act was unlawful in that it injured the other person in breach of the duty to keep the person safe. The German Federal Court had set very high standards for those pushing a wheelchair.

[25] In a second report Mr Hohagen explained the German law on contribution between wrongdoers. As it is agreed that any such claim is time barred, it is not necessary to set out the terms of this report or the relative testimony.

### *English law*

[26] Katherine Howells is a barrister in London. In advice given to easyJet's law agents dated 17 December 2021, she stated that apportionment of liability in English law was governed by section 1(1) of the Civil Liability (Contribution) Act 1978. The amount of apportionment was such as the court found "just and equitable" (s 2(1)) and could amount to a complete indemnity (s 2(2)). Section 10 of the Limitation Act 1980 provided that a claim for contribution must be brought within two years from the date when the right accrued. The right accrued when judgment was passed or an arbitration award was made against a person or when a person agreed to make payment in compensation for damage (ss 10(2)–(4)). Section 5(2) of the Carriage by Air Act 1961 had the effect that the limitation provisions of Article 35 of the Montreal Convention did not apply to any proceedings for contribution between persons liable for damage to which the Convention related. The operative provisions were those in the 1980 Act which permitted a claim for contribution within two years of the judgment, arbitration award or settlement.

[27] Michael Nkrumah is a barrister in London. In his advice to DRK's law agents of 5 January 2021 (*sic* 2022), he agreed with Ms Howells that contribution was dealt with by section 1(1) of the 1978 Act and that the right did not accrue until judgment or settlement. He fixed upon section 1(6) which restricted the definition of liability to that which "could be established in an action brought ... in England and Wales". A foreign, including a Scottish, judgment did not create a liability. It was unlikely that the courts in England and Wales

would have jurisdiction in an action against DRK. DRK's liability to the pursuer could not be established in the courts of England and Wales when the pursuer had sought decree in another forum. From this it followed that section 1 did not apply to provide a right of contribution.

[28] Mr Nkrumah also focused on section 1(3) of the 1978 Act, whereby liability would exist notwithstanding that the person had ceased to be liable, unless that cessation occurred as a result of the application of limitation or prescription in a manner which extinguished the right underlying the claim. If the Montreal Convention applied, Article 35 operated to extinguish the pursuer's claim against DRK after two years. The 1980 Act applied to the claim for contribution unless it had already been extinguished, which it had been.

[29] In supplementary advice dated 20 January 2022, Ms Howells commented that if Mr Nkrumah was right about a foreign judgment not creating a liability, a claim for contribution could never be made under English law in any foreign proceedings. The judgment would not be foreign in the jurisdiction in which the claim was being heard. A judgment in the present action would be conclusive, in so far as favouring DRK, in any contribution proceedings (1978 Act, s 1(5)). That would be a strange provision if no contribution proceedings could be raised under English law because the case progressed in Scotland. The same applied, given the availability of mechanisms for cross-border enforcement. Reference was made to *Roberts v SSAFA* [2021] QB 859. There was no need for the liability to be established in England and Wales or for there to be any proceedings at all. The requirement in subsection 1(6) was a reference to the type of claim; ie one of a character that could be made out in England and Wales. This was such a case. The pursuer could have raised proceedings against easyJet in England and then convened DRK.

[30] The pursuer's claim against easyJet was under the Montreal Convention, but that against DRK was under German law. Article 35 of the Convention provided an "extinctive" time bar but only in relation to the liability of the carrier for damage pursuant to Article 17. A claim for contribution, which was made against the carrier outwith the Article 35 time limit, would fail. Here the claim was not made against the carrier but by the carrier. Limitation was governed by section 5(1) of the 1961 Act. This barred rather than extinguished the claim, leaving an action for contribution open in terms of the 1978 Act.

*Testimony on the facts*

[31] Mr Heinz was not called upon to testify.

[32] Celine McGuigan, who was easyJet's Ground Ops Customer Operations Manager and formerly their Accessibility Manager, did testify. She described the responsibilities of the airport and the airline in terms of the PRM Regulation. She regarded easyJet's responsibility, apart from pre-notification to the airport of the need for assistance, as "primarily" on board the aircraft. Apart from the aisle chair, which easyJet provided on the aircraft, all the specialist equipment would be supplied by the airport or their contractors. Ms McGuigan spoke to the levying of the PRM charge; separate from the landing charge.

[33] Frank Kohlstädt was the head of DRK at Hamburg airport. He spoke to DRK providing a small loading chair for use on board the aircraft (cf Ms McGuigan) and the transfer to the passenger's own or another wheelchair at the aircraft's door. Mr Heinz had previously trained as a paramedic. He had further training by DRK on wheelchair handling and airport operations. Every year there was four hours of training on wheelchairs. There was constant, but not regular, monitoring of employees.



[34] Mr Kohlstädt had been told of the pursuer's accident in the evening, when he had been at home. Mr Heinz had told him what had happened; that the wheelchair had "caught on a rim and the passenger slid out of the wheelchair". This had occurred at a new bridge at Gate 7B. Hamburg airport had eight bridges. The new bridge had been in use since 10 March 2017 (the witness later said he did not know this). Mr Kohlstädt had not used, or been to, that bridge before. He did not think Mr Heinz had used it previously either. The next day he took photographs which showed the "ridge" and a yellow line. He had not seen such a ridge before in the airport. He had been told by Mr Heinz that the yellow tape had been put down after the accident and the ridge later eliminated. Previously, he had assumed that the surface at the join between the terminal and the bridge would be "smooth". No other bridge had a ridge. Mr Heinz had had refresher training in February 2017. He was a reliable employee.

### **The Lord Ordinary's decision**

[35] The Lord Ordinary determined that an autonomous approach had to be adopted in relation to the interpretation of the Montreal Convention. That approach had been described in *King v Bristow Helicopters* 2002 SC (HL) 59 (at paras 76 to 82). The Lord Ordinary had been referred to a series of cases in the United States and one from England, from which he determined that the test of whether a person was an agent of the carrier had initially been whether the task was one which the carrier was legally required to perform, but this had developed into whether the task had been "in furtherance of the contract of carriage".

[36] The Lord Ordinary observed that there had been no suggestion that DRK had been under any contractual obligation to provide services to easyJet. Rather, they were contracted by the airport and were, in Scots law terms, independent contractors. The Lord Ordinary noted that, when a passenger required assistance, the practice was for easyJet to notify the airport in advance and for the airport to arrange the personnel to attend and to provide assistance on disembarking. Where the PRM Regulation applied, these services were paid for through a levy on each passenger, which was separate from the landing charge. This levy would form part of the ticket price. In these circumstances, the Lord Ordinary concluded that DRK were the agents of easyJet within the meaning of Article 17 of the Montreal Convention. The services were provided to easyJet in furtherance of the contract of carriage. These services were those which easyJet would have been required by law to provide, had DRK not done so.

[37] The Lord Ordinary held that the accident was due to the “negligence” of DRK’s employee, Mr Heinz. Mr Heinz had not given evidence, but Mr Kohlstädt had reported that Mr Heinz had said that the wheelchair had caught on a ridge, as a result of which the pursuer had slipped out. Mr Heinz had been under a duty to keep a look out for dangers and not to push the wheelchair too quickly. Had he been keeping a proper lookout, he should have seen the ridge and manoeuvred the wheelchair safely over it. On that basis, easyJet were liable for unlimited damages under the Montreal Convention as they had not proved that the injury was not due to their own negligence, or other wrongful act or omission, or that of its agents. On the contrary, the pursuer had proved that the accident had been caused by the negligence of Mr Heinz. The rights of a passenger under the Convention were not affected by the PRM Regulation.

[38] On easyJet's claim for a contribution from DRK, the Lord Ordinary noted that Article 37 of the Montreal Convention provided that the Convention was without prejudice to whether a person had a right of recourse against another person. He first needed to determine what law applied. DRK had not been party to the contractual choice of law clause. Applying Article 4(1) of Rome II, the Lord Ordinary held that German law applied to the contribution claim as the country in which the damage had occurred. It was not disputed that the claim for contribution had to have been brought, in terms of section 199 of the German Civil Code, by 31 December 2020. It followed that the claim for contribution was time barred since it had only been introduced by amendment in November 2021. The Lord Ordinary did not express a view on whether, under German law, DRK were vicariously liable for Mr Heinz's actions nor on what the position under English law might have been in relation to any time bar of the contribution claim.

[39] The Lord Ordinary declared that easyJet were liable to make reparation to the pursuer without limit of liability. The case would progress to a proof on quantum. EasyJet's claim for contribution from DRK was governed by German law and was barred by the expiration of the limitation period. The Lord Ordinary assoilzied DRK from the conclusions of the summons and the claim for contribution.

## **Submissions**

### ***EasyJet***

[40] EasyJet submitted that domestic law was suspended by the terms of the Montreal Convention (*Abnett v British Airways* 1997 SC (HL) 26; *El Al Israel Airlines v Tseng* 525 US 155 (1999)). The Convention governed liability according to clear, easily-determined bright

lines. The central contention was that the Lord Ordinary erred in holding that DRK were their agents. The test for whether a party was the agent of the carrier was whether the task which the person was carrying out: (i) was being done in furtherance of the contract of carriage; and (ii) was something which was capable of being carried out by the carrier. There was no dispute that the services which DRK were providing were connected to the contract. However, the Lord Ordinary had failed to apply the second part of the test. It was not easyJet's responsibility to assist the pursuer with disembarking. They could not carry out the task of disembarkation. The PRM Regulation placed responsibility for assisting the pursuer with embarking and disembarking on the airport. That was reflected in the contractual arrangements between easyJet and the pursuer. The PRM Regulation had no bearing on the meaning of agent under the Convention. Its provisions were not being used to interpret the Convention. However, as a matter of fact, responsibility for assisting the pursuer lay with the airport in terms of the Regulation. That was part of the factual background to which the Convention had to be applied. Applying the definition of agent in Articles 17 and 21 to that background, DRK were not easyJet's agent. They were a third party. The same interpretation of agent must apply where an accident occurs outwith the EU, but the result may not be the same, as different arrangements were made in different countries.

[41] The relationship between easyJet and DRK was not one of principal and agent. EasyJet had no authority or control over DRK. The Lord Ordinary failed to apply the views expressed in the courts of other jurisdictions, especially those in the United States. In contrast to the facts in the US cases, upon which the pursuer had founded (*Johnson v Allied Eastern States Maintenance* 488 A 2d 1341 (1985); *Julius Young Jewelry Manufacturing Co v Delta*

*Air Lines* 67 AD 2d 148 (1979); *Waxman v CIS Mexicana De Aviacion* 13 F Supp 2d 508 (1998) and *Baker v Lansdell Protective Agency* 590 F Supp 165 (1984)), there was no contract between easyJet and DRK. The Convention sought to limit the liability of persons who performed services in furtherance of the contract of carriage (*Johnson v Allied Eastern States Maintenance; Croucher v Worldwide Flight Services* 111 F Supp 2d 501 (2000); *Carroll v United Airlines* 325 NJ Super 353 (1999); *Waters v Port Authority* 158 F Supp 2d 415 (2001)). It was not surprising then that the courts in the US had granted the protection of the Montreal Convention in circumstances where there was a contract between the carrier and the service provider. EasyJet had no involvement in DRK's selection; that was done by the airport. They were the airport's agent. DRK could not be agents of both the airport and the carrier. The implication of the Lord Ordinary's opinion was that the airport itself was an agent of the carrier, which could not be correct (Shawcross & Beaumont: *Air Law* at 507).

[42] The Lord Ordinary failed to take the purpose of the Montreal Convention into account. This was to provide clarity and certainty on the limits of liability, so that carriers could arrange their affairs and obtain appropriate insurance. The Convention was a compromise between passengers and carriers; with the introduction of liability without fault for the benefit of passengers being balanced against a limitation of that liability for the benefit of carriers. In some cases the application of that balance could leave a pursuer without a remedy (*El Al Israel Airlines v Tseng*). That would not be the situation here, as easyJet accepted that they were liable to the pursuer up to the value of 113,100 SDRs. Liability was limited not only in the case of incidents occurring after disembarkation, but also when they were caused by a third party. The airline was entitled to the benefit of this limitation. The Lord Ordinary required to explain how imposing liability on easyJet was

consistent with the need for certainty. If easyJet were responsible for all aspects of travel, even those in which they were not involved, that would be contrary to the Convention's purpose. EasyJet's insurers would require to ascertain the extent of DRK's and the airport's losses record in order to assess their potential liability. The scheme as a whole required to be considered, including the fact that DRK had their own insurers who might have to compensate the pursuer beyond the 113,100 SDRs ceiling. This case was a good example of how the scheme was intended to work. The pursuer had suffered a bad accident and easyJet had admitted that they were liable for the amount up to the ceiling. Beyond that, the pursuer had a good case in German law against DRK. It was not necessarily the case that an injured passenger would always have to raise separate actions; it would be a rare case in which the losses sustained were above the ceiling.

[43] If easyJet's contention that DRK were not their agents was wrong, and they were liable to the pursuer, the question of a contribution from DRK arose. DRK were relying upon the contract of carriage between easyJet and the pursuer to invoke the protection of the Montreal Convention. That contract said that the applicable law was English. Since the Convention did not provide an answer to the choice of law question, the matter became one of private international law (*Zicherman v Korean Air Lines* 516 US 217 (1996)) which the Convention "passed through". Rome II applied (*Silverman v Ryanair* [2021] EWHC 2955 (QB) at paras 64 to 67). The existence of a choice of law clause, which was connected with the airline's domicile, satisfied the test for an exception in terms of Article 4(3). The fact that the accident occurred in Germany was irrelevant. The delict was "manifestly more connected with the law of the contract". Although DRK were not a party to the contract, it was that contract which had allowed them to argue that they were agents of easyJet. DRK

could not rely upon the contract to gain a benefit but then avoid any consequences of a term of that contract which they did not like. It was accepted that, if German law applied to the issue of contribution, easyJet's claim for that from DRK was out of time, but the Lord Ordinary had erred in holding that German law applied.

[44] If English law applied, since the Lord Ordinary had failed to address it, this court had to do so. There had been competing views from two barristers. That from Katherine Howells was correct. The time limit for a contribution claim was two years from the date when the right to a contribution arose; that is when there was a judgment or settlement in civil proceedings.

*Pursuer*

[45] The pursuer responded that the Lord Ordinary had applied the correct test for agency within the Montreal Convention; whether the service was in furtherance of the contract of carriage, which the carrier would have been required to perform himself. There was no basis for the contention that there was an additional aspect; that the service must have been capable of being carried out by the carrier. Even if easyJet had to be capable, they had not discharged the onus of demonstrating that they were not. There had been no evidence of the arrangements which easyJet made with the airport.

[46] The carrier was *prima facie* liable for injury in the course of disembarkation unless Article 21(2) applied. The Montreal Convention was intended to be exhaustive in relation to the contract of carriage. It was not intended to require passengers to pursue different defenders. The arrangements which the carrier made with others were not determinative of liability. The pursuer had contracted with easyJet to be transported safely to the arrivals gate at Hamburg Airport. Anything done in the course of helping him to disembark was

covered by that contract. Anyone assisting in the operation of disembarkation did so as an agent of the carrier. In support of this contention, the pursuer sought to rely on the analysis of the US cases which he had cited to the Lord Ordinary. These were as referred to by easyJet (at para [41]), but included also: *Vumbaca v Terminal One Group Association* 859 F Supp 2d 343 (EDNY 2012); *Kabbani v International Total Services* 805 F Supp 1033 (1992); *Atlantic Merchandising Group v Distribution by Air* 778 A 2d 607 (2001); and *McCaskey v Continental Airlines* 159 F Supp 2d 562 (2001).

[47] The PRM Regulation provided a framework for the practical arrangements within the EU. Its provisions did not prevent a carrier from assisting in any disembarkation. For example, easyJet would normally have provided the pursuer with his own wheelchair on disembarkation. They had equipment for his use on board the aircraft, such as an aisle seat. The pursuer made the request for special assistance to easyJet at the time of booking and that assistance was arranged through them as a particular aspect of carriage.

Condition 12.3.6 of the terms and conditions could not mean that easyJet had no responsibility to the pursuer on disembarkation. If that condition was in conflict with Article 17(1), it was null. *Vumbaca v Terminal One Group Association* made it plain that an airport was capable of being an agent depending upon the services which it was providing. The airport was easyJet's agent; so was the airport's contractor, DRK.

[48] The pursuer cross-appealed on the basis that the Lord Ordinary had not determined his alternative case against DRK. The Lord Ordinary had assoilzied DRK without resolving the issues raised. If easyJet's reclaiming motion were successful, this court would have to determine that case. The evidence from the experts on section 831 of the German Civil Code was that the employer was liable for any damage unlawfully inflicted by his employee



unless he demonstrated that he had carefully selected, trained and supervised the employee. It was not necessary to prove that the damage was inflicted negligently in order to meet the test of unlawfulness. The Lord Ordinary found that Mr Heinz had been negligent. A very high degree of care was required in training and supervising an employee who was entrusted with transferring a reduced mobility passenger in a wheelchair from aircraft to terminal. The employers would have to demonstrate that they had supervised the employee continuously. There had been no evidence of what training DRK had provided to Mr Heinz. There was no evidence that he had been given training to deal with the particular problem which he had encountered. There had been evidence that an employee could assume that surfaces throughout the airport were level, but there had been no evidence that Mr Kohlstädt had taken any steps to find out about the refurbished air bridge or to instruct Mr Heinz about it. This was despite Mr Kohlstädt accepting that the hazard had been visible.

### **DRK**

[49] DRK accepted that they (DRK) were easyJet's agents. The Lord Ordinary had applied the correct test for agency under the Montreal Convention. There was no support in the US cases for the proposition that the task must also have been capable of being carried out by the carrier. Even if there were, there was evidence that special assistance was provided by carriers, or their contractors, in countries where the PRM Regulation did not apply (see eg *Moss v Delta Air Lines*, unreported, 7 December 2005, ND Georgia (1:04-CV-3124-JOF); and *Johnson v Allied Eastern States Maintenance*). The Convention was not modified by the PRM Regulation. If easyJet were responsible to all able bodied passengers when disembarking, it would not make sense for them to owe a lesser duty to passengers of

reduced mobility. The purpose of the Convention was to achieve uniformity between jurisdictions, and the Lord Ordinary had taken that into account. The economic and other arrangements in place at individual airports could not be considered. There was no requirement for a carrier to have control of the agent (*Waxman v CIS Mexicana de Aviacion*; and the German Federal Court decision in *I Zr 135/98/2000*). There was no evidence on whether easyJet had influence or control over DRK or the airport. An airport could be an agent of a carrier (*Vumbaca v Terminal One Group Association*).

[50] As DRK were easyJet's agents, the Montreal Convention was engaged and easyJet's claim for contribution had to be considered. The Lord Ordinary was correct to hold that German law applied. That fact was not disputed. That being so, it applied to all issues arising from the delict. A different domestic law could not be applied in the context of contribution (Dickinson: *The Rome II Regulation The Law Applicable to Non-Contractual Obligations* at para 4.8.9; Anton: *Private International Law* (3<sup>rd</sup> ed) at para 14.120; Cheshire, North & Fawcett: *Private International Law* (15<sup>th</sup> ed) at 858; *ICDL GCC Foundation v European Computer Driving Licence Foundation* [2011] IEHC 343 at para 9.7). In any event, Article 4(3) did not apply because the claim was not "manifestly more closely connected" to English law. The accident occurred in Germany and DRK were a German company.

[51] If English law was applicable to contribution, easyJet could still not claim a contribution because of section 1(6) of the 1978 Act. The evidence of the barrister, Michael Nkrumah, ought to be preferred. For a contribution claim under the 1978 Act, the liability of DRK had to be capable of being established in an action in England and Wales. It could not be so established now. An action having been raised in Scotland, any action brought in England and Wales would fail as the matter would be *res judicata*. A foreign judgment did

not give a right of contribution (Clerk & Lindsell: *Torts* (23rd ed) para 4.14; *Roberts v SSAFA* at paras 54-55; Dugdale: *The Civil Liability (Contribution) Act 1978* (1979) 42 MLR 182 fn 4; cf *Comex Houlder Diving v Colne Fishing Co* 1987 SC (HL) 85 at 122-123). In any event, Articles 29, 30 and 35 of the Montreal Convention made it clear that no claim against DRK by the pursuer was available after two years from the date of his arrival in Hamburg. The implication of that was that any claim for contribution by easyJet against them under English law must fail, as a result of the operation of subsection 1(3) of the 1978 Act. To the extent that section 5(2) of the 1961 Act could be read as providing easyJet with two additional years from the date of any judgment, that ran contrary to Article 35 of the Convention. If that were so, the section breached Articles 26 and 27 of the Vienna Convention on the Law of Treaties (1980), which required the United Kingdom to perform its obligations under every international treaty in good faith and prohibited it from using the provisions of its internal law to justify its failure to perform those obligations.

[52] Even if a claim for contribution under the 1978 Act was permissible, the court could not assess DRK and easyJet's relative blameworthiness and the causative potency of their respective roles in the accident. EasyJet had failed to exonerate themselves under Article 21. They had failed to lead evidence that the injury had not been caused by their fault and negligence or that of their servants or agents, or that it had been solely due to an act of a third party. These were matters for easyJet to negate; not for others to raise. They had led no evidence about what they knew of the condition of the bridge. They were under an obligation in terms of Article 19 of the PRM Regulation to train their personnel, including any sub-contractors, but they had failed to do so.

[53] If DRK were not easyJet's agents, the pursuer's alternative case against DRK could not succeed. The Lord Ordinary had not found that DRK were liable to easyJet under German law; it being for the domestic court to decide what negligence or wrongful act or omission meant. Mr Hohagen had testified that section 823 of the German Civil Code did not impose vicarious liability, but related to the unlawful conduct of the person who was said to be in breach of section 831. It had not been proved that Mr Heinz had "unlawfully" inflicted damage on the pursuer. The essence of vicarious liability in German law was that the principal had done something wrong in selecting or managing (including training) his employees. Mr Kohlstädt had spoken to the qualifications and training of Mr Heinz. The accident would have occurred in any event. The Lord Ordinary did not find that sections 823 or 831 had been breached. If he had, then he was in error.

## **Decision**

### *General*

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

[55] The Montreal Convention followed its predecessor, signed at Warsaw in 1929 and amended at The Hague by a Protocol of 1955. It is intended to unify certain of the rules applicable to carriage by air, but it does not provide a comprehensive code (*Abnett v British*

*Airways* 1997 SC (HL) 26, Lord Hope at 36). It sets out the extent to which airlines can limit their liability contractually and represents a balance or compromise in the interests of certainty and uniformity (*ibid* at 45; *El Al Israel Airlines v Tseng* 525 US 155 (1999), Ginsburg J, delivering the opinion of the majority of the US Supreme Court, at 169-170). Such certainty and uniformity is an important element in enabling insurers to gauge the risk which they undertake when providing cover (*Reed v Wiser* 555 F 2d 1079 (1977), Mansfield CJ (Circuit Judge), delivering the judgment of the US Court of Appeals, Second Circuit, at para [4]). The Articles of the Convention, like any international treaty, have to be given a purposive construction (*King v Bristow Helicopters* 2002 SC (HL) 59, Lord Hope at para 76) but, as distinct from the Warsaw Convention, the English text alone governs in the United Kingdom. The words must be given an autonomous meaning (*ibid* Lord Steyn at para 16). The jurisprudence of other contracting states should be considered, with a view to promoting consistency, but appropriate care should be taken when doing so (*Abnett v British Airways*, Lord Hope at 43). Any construction of Article 17 of the Montreal Convention must provide a bright, clear line which can be applied by passengers, airlines and their insurers. Where the Convention does not apply, domestic remedies will remain available.

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

terms, of what was to become Article 30 of the Montreal Convention, were included (Article XIV adding Article 25A into the Warsaw text) to make it clear that the airline's servants or agents were entitled to the protection of the limits on liability which the airline enjoyed.

*The pursuer's claim against easyJet*

[57] The Montreal Convention does not define "agent". *Quantum valeat*, it does not have a precise legal meaning in Scots law either, although agency might generally be described as arising when a person (the agent) has the power (whether express or implied) to create a legal relationship between the principal and a third party (see Lord McEwan: *Agency* in *Stair Memorial Encyclopaedia* Vol 1 para 601; cf Macgregor: *Agency and Mandate* in the *Stair Re-issue* at para 1.1). Given the need for international uniformity, the domestic concept ought to be of peripheral relevance. In looking to see what autonomous meaning should be applied to the use of "agent" in the Convention, regard must be had to the significant cases on the subject, particularly those in the United States.

[58] The most recent of the cases cited by the parties on this subject is *Vumbaca v Terminal One Group Association* 859 F Supp 2d 343 (EDNY 2012). This is a first instance decision of the Eastern District Court of New York in which the senior district judge (Weinstein) helpfully set out the US jurisprudence in the context of passengers being trapped on board a snow-bound aircraft said to have been caused by the airport operator (TOGA). Like several of the US cases, *Vumbaca* is potentially distinguishable from the pursuer's case because TOGA had a contract with the airline (Alitalia). Nevertheless, Judge Weinstein's *dictum* can be used to summarise the US authorities, analysed by hierarchy. This has the advantage of it being a US interpretation by a US judge rather than a Scottish court.

[59] Judge Weinstein stated (at 363):

**“B. Terminal is an Agent of Air Carriers**

The Convention does not define ‘agent.’ The Supreme Court has provided no guidance.

The Court of Appeals for the Second Circuit has held that the airline employees are agents covered by the Convention. *Reed [v Wiser]* 555 F.2d [(1977) 1079] at 1089-93. In so holding, the *Reed* panel concluded that the Convention’s ‘basic principle’ required that air carriers be ‘protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters ‘...

The court did not rule on whether other entities might also be considered agents, or establish a test by which it could be determined when an entity is an agent covered by the Convention.

Lower courts have held that an entity is an agent of an air carrier if it ‘performs[s] services in furtherance of the contract of carriage, and services ... within the scope of the Convention that the airline is otherwise required by law to perform.’ *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 776 F Supp [710 (EDNY 1991)] at 714. They have found that the Convention’s limits on liability apply to subcontractors which provide airport security [*ibid*]); clean planes, *Waxman [v CIS Mexicana De Aviacion]* 13 F Supp 2d [508 (SDNY 1998)] at 515; or facilitate passenger’s boarding of the aircraft, *Chutter v KLM Royal Dutch Airlines*, 132 F Supp 611, 613 (SDNY 1955) (holding, in a pre-*Reed* case, that the service company which provided the plane’s entrance ramp was covered by the Warsaw Convention because its services were a part of the ‘contract of transportation’); *see also Johnson v Allied Eastern States Maintenance Corp.* 488 A 2d 1341, 1345 (D.C. 1985) (finding that a skycap company was covered by the Warsaw Convention because putting a passenger on a plane was a service performed in furtherance of the contract of carriage).

Convention limits have also been found to apply to air carriers’ ground handling agents. *Am. Home Assur. Co. v Kuehne & Nagel...* 544 F Supp 2d 261, 263-266 (SDNY 2008) (holding that the Montreal Convention’s two year statute of limitations barred recovery from ground handling company, since that company was an agent of the air carrier under Article 30). By contrast, the Convention does not apply to companies performing terminal maintenance services, as these services are not ‘flight related’ and could affect individuals not covered by the Convention. *Alleyn v Port Authority of New York*, 58 F Supp 2d 15, 24 (EDNY 1999).”

Judge Weinstein held that TOGA were acting as agents for Alitalia because the services provided to them were “a necessary part of the air carrier’s relationship with its passengers [as] demonstrated by the fact that ...TOGA... were contractually indemnified by Alitalia for their services”.

[60] The Lord Ordinary also used *Vumbaca* to summarise the US jurisprudence. He did so having described the circumstances in *Johnson v Allied Eastern States Maintenance* 488 A 2d 1341 (1985). These bore a striking resemblance to the pursuer's case, other than that the skycap who was pushing the plaintiff's wheelchair was going down rather than up the bridge when it hit a metal strip. The judgment of the District of Columbia Court of Appeals (Associate Judge Terry at 1345) was that:

“the purposes underlying the Convention would best be served by a construction which brings under its aegis not only the carrier's employees, as in *Reed*, but also those agents who perform services in furtherance of the contract of carriage”.

The court's reasoning was that the limitation provisions would thereby apply, regardless of the person whom the pursuer elected to sue. Reference was made, *inter alios*, to *Julius Young Jewelry Manufacturing Co v Delta Air Lines* 67 AD 2d 148, 414 NYS 2d 528 (1979).

[61] The Lord Ordinary considered a number of other decisions, including *Carroll v United Airlines* 325 NJ Super 353 (1999). This involved another wheelchair bound passenger suffering injury on being disembarked by the employee of a company which was held to be an agent because it was acting “in furtherance of carriage” (at 615). The phrase “in furtherance of the contract of carriage” was used by the Superior Court of New Jersey in *Atlantic Merchandising Group v Distribution by Air* 778 A 2d 607 (2001) (at 389-390) and by the US District Court for the Southern District of Texas in *McCaskey v Continental Airlines* 159 F Supp 2d 562 (2001) as a test to determine whether a person is an agent of the airline. It provides a neat, clear, and easily understood principle. If the person sued does or omits to do something which is in furtherance of the contract of carriage, such as assisting the disembarkation of passengers, then he is deemed, for the purposes of the Convention, to be an agent of the airline, whether or not he is an agent in accordance with domestic law. This



court endorses that test essentially for the reasons given by the Lord Ordinary. The reasoning in *Phillips v Air New Zealand* [2002] EWHC 800 (Comm) (Morison J at para 18) is equally sound.

[62] The question becomes whether what Mr Heinz was doing was in furtherance of the contract of carriage. There is little difficulty here because it is conceded that the transportation of the pursuer to at least the arrivals gate was part of the operation of disembarkation in terms of Article 17 of the Montreal Convention. It is part of the contract of carriage. The gate-to-gate principle, as described by Mr Hohagen, is a sound one. It too neatly and clearly defines the limits of the contract of carriage for the benefit of airlines, passengers, and insurers. Although there may be minor variations from airport to airport, the contract of carriage for all passengers commences, at the latest, when the passenger is checked through the gate at the airport of departure. It is at that point that the passenger for a particular flight, operated by a particular airline, is isolated from other airport users. The contract continues until the opposite occurs at the destination and the passenger is released into parts of the airport used by, amongst others, the passengers of other airlines. In between those points, as Mr Hohagen said in his November 2021 report, the passenger has “no way out, is restricted in his/her movement and needs guidance at least by the air carrier to get out. He/she is in [the] custody of the air carrier” (see generally Havel & Sanchez: *Principles and Practice of International Aviation Law* at para 7.9.10). The airline is responsible for the actions of all those assisting passengers along this route. These assistants are the airline’s agents for the purposes of the Convention. Thus the agent may be the airport or the airport’s contractors depending upon the circumstances.

[63] This approach promotes the objectives of certainty and consistency which lie at the heart of the Montreal Convention. The court rejects the submission that this will cause difficulty for insurers in assessing risk. On the contrary, the extent of the airline's liabilities will be clearly delimited. When setting premiums for airline's insurance, underwriters will (as they always do) have to apply judgement to appraise risk; they will do so on the basis that the airline's responsibility towards its passenger under the contract of carriage by air extends from gate-to-gate.

[64] The PRM Regulation (EC 1107/2006) "concerning the rights of ... persons with reduced mobility when travelling by air" cannot and does not diminish the airline's responsibilities under the Montreal Convention. This is a public law measure which does not seek to affect private law rights. The Regulation's purpose is to strengthen the protection afforded to disabled and reduced mobility passengers; not to alter or diminish the Convention rights. Even if that were its purpose, it could not do so. The EU has ratified the Montreal Convention (Regulation (EC) No 889/2002 of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents). The EU's international obligations take primacy over the provisions of EU legislation. The imposition of a dual responsibility for the provision of assistance to PRMs simply adds another layer of responsibility on the airport, which it may, or may not, choose to delegate to a third party contractor including the relevant airline. The fact that at Hamburg, and at many other airports, the airport has made an arrangement with a contractor to provide the pre and post flight PRM Regulation assistance has no material bearing on the issue. It may be that easyJet thought, optimistically, that the Regulation removed or diminished their responsibilities for PRM passengers under the Montreal Convention. If they did, then they were in error.

Similarly, easyJet's terms and conditions do not, and cannot, override or circumvent the responsibilities placed on them by the Convention. In so far as condition 12.3.6 states that the airport is responsible for the provision of assistance through the "arrivals process", it is correct as a matter of public law. If the condition is intended to remove easyJet's responsibility under the Montreal Convention for passengers disembarking the aircraft and making their way to the arrivals gate, it is null and void (Convention, Article 26).

[65] For these reasons the court adheres to the Lord Ordinary's finding that easyJet are liable to make reparation to the pursuer without limit of liability.

*The pursuer's alternative case against DRK*

[66] The pursuer has an alternative case against DRK under German law, in the event that Mr Heinz was not easyJet's agent, based solely upon DRK's vicarious liability for his actings. EasyJet accept that Mr Heinz was at fault; DRK do not. DRK table a wide ranging defence, which includes multiple alternative permutations; not all of which are easy to follow. The first of these appears to be that, under the Convention, it was easyJet who were responsible not only for the safe disembarkation of the pursuer, but also for the actings of Mr Heinz as easyJet's agent. The second is that Mr Heinz was not at fault and did nothing unlawful. The third is that, even if he was at fault and acted unlawfully, DRK are not vicariously liable for his actings.

[67] Whether or not easyJet were responsible under the Convention for disembarking the pursuer has no bearing on whether DRK are also liable to the pursuer under German law. The categories of liability are different, even if the damage is the same. The pursuer's case against DRK is framed in the alternative as a matter of practicality because, if easyJet are found liable on the basis of DRK and/or Mr Heinz being their agent, there will be no need

for the pursuer to demonstrate DRK's liability under German law. Rather, easyJet would be left to bring themselves within the exoneration provisions of Article 17(2). That claim is one which the Lord Ordinary should have determined by deciding what the German law was in relation to vicarious liability for the actings of an employee and then applying that law to the facts which he found proved. Had this court not adhered to the Lord Ordinary's declarator that easyJet were liable without limit under the Convention, it would have required to determine the alternative case. It would therefore have been helpful to have had the Lord Ordinary's views on that case rather than deciding it as if this court were sitting at first instance (*Hogan v Highland Regional Council* 1995 SC 1, LJC (Ross), delivering the opinion of the court, at 2).

[68] The reports and testimony of Dr Schaaff and Mr Hohagen make it clear that the applicable provision is section 831, rather than 823, of the German Civil Code. First, there must be an unlawful infliction of damage by a person. This does not need to be an intentional act or a negligent one. The pursuer had a right not to be injured when being transported in the wheelchair by Mr Heinz. The fact that he was demonstrates an unlawful act on Mr Heinz's part. This means, in terms of section 831, that DRK are *prima facie* liable. Even if proof of negligence had been required (see section 823), that element would have been made out. Allowing a person to fall from a wheelchair in the manner described is *prima facie* negligent; *res ipsa loquitur*. Even if the yellow strip had not been in place at the time of the accident (and the pleadings of both the pursuer and DRK say that it was), the photographs of the locus, and the fact that Mr Heinz must have traversed the ridge with the wheelchair on the way to the aircraft, demonstrate that Mr Heinz was either aware or ought to have been aware of the hazard and taken steps to avoid the consequences of hitting the

ridge at a sufficiently excessive speed to cause the ejection of the pursuer. The Lord Ordinary was correct to hold that this constituted negligence on the part of Mr Heinz.

[69] The next question is whether, again following the terms of section 831, DRK had exercised reasonable care when selecting Mr Heinz and thereafter in managing his activities in the course of his employment. Included in the equation of reasonable care, again following the evidence of Dr Schaaff and Mr Hohagen, is a requirement that the employee be properly trained and supervised. Applying that to the testimony of Mr Kohlstädt, it is apparent that reasonable care was not taken to train Mr Heinz in the hazards on the refurbished bridge at Gate 7B. Such training would have been bound to involve DRK telling Mr Heinz of the existence of the ridge hazard and of how to negotiate it. Since his supervisor, Mr Kohlstädt, had not even looked at the bridge, he had been unaware of the hazard and Mr Heinz could not have been warned of its existence. Mr Heinz's last training session had been before the bridge's refurbishment had occurred. Since DRK had thereby not exercised the reasonable care required by section 831, they are unable to escape being responsible for Mr Heinz's unlawful act. DRK's proposition that the accident would have happened anyway, had Mr Heinz been advised of the ridge hazard, is reasonably described as fanciful. There is no basis, especially in the absence of testimony from Mr Heinz, for a conclusion that, had he been properly instructed, he would have ignored that instruction and culpably approached the ridge at speed. In these circumstances, and essentially accepting Dr Schaaff's and Mr Hohagen's evidence on this (*supra*), the pursuer's alternative case against DRK under German law is a sound one and an express finding to that effect ought to have been made by the Lord Ordinary.

### *Contribution*

[70] The first question is which law governs easyJet's claim for contribution from DRK since that will determine which limitation regime applies. Regulation (EC 864/2007) "... on the law applicable to non-contractual obligations" (Rome II) is relevant, as contribution in this case depends upon such an obligation. Article 4(1) provides that the law should be that of the country in which the damage occurs. On the face of this, German law would apply unless Article 4(3) were engaged because the delict was "manifestly more closely connected with", in this case, England. It is important to bear in mind that Article 4(3) does not refer to the delict having a closer connection with a particular law (eg English) but with a country.

[71] The delict involving the pursuer had no connection with England, other than easyJet having their registered office at Luton airport. It occurred in Germany after a flight from Scotland. EasyJet attempt to link it with the choice of law clause in their contract of carriage with the pursuer. DRK were not a party to that contract. The fact that they are agents of easyJet in terms of the Montreal Convention does not mean that they are their agents for other purposes, including the existence of a right to a contribution. The clause cannot compel a third party German company, operating in Germany, into a situation whereby any delictual act which they might commit at Hamburg airport becomes subject to English law.

[72] It is not disputed that German law applies to whether, in relation to the pursuer, DRK's actings or those of Mr Heinz were delictual. That being so, it would conflict with Article 15 of the Montreal Convention were a different law to be applied to the issue of contribution or limitation. Dépeçage (the splitting of the applicable law) is not available for the reasons given in *ICDL GCC Foundation v European Computer Driving Licence Foundation* [2011] IEHC 343 (Clarke J) at para 9.7, citing Dickinson: *The Rome II Regulation – The Law*

*Applicable to Non-contractual Obligations* at para 4.79; see on appeal [2012] IESC 55). It is not disputed that, if German law applies, which it does, then the claim for contribution is time barred under sections 195 and 199 of the German Civil Code. These provide that the claim has to be made within three years from the end of the year in which the claim arose. That would be by the end of 2020. Easyjet only made their claim in November 2021. It is therefore time barred.

[73] The court therefore adheres to the Lord Ordinary's declarator that the claim for contribution is governed by German law and is time barred. That results in the claim for contribution being dismissed but it ought not to have resulted in absolvitor from the conclusions (or rather the first conclusion) of the summons. The pursuer's alternative case against DRK was not time barred, even if it may go nowhere given the establishment of easyJet's liability for the actings of their agent.

### *English law*

[74] The court may have decided that, in accordance with easyJet's submissions, the applicable law was that of England and Wales. That being so, for the reasons given above under reference to *Hogan v Highland Regional Council*, the Lord Ordinary ought to have determined, as a matter of fact, what that law was and how it might have been applied to the established facts. This court must now do so.

[75] The court prefers the evidence of Ms Howells to that of Mr Nkruma. Her testimony and reports are more compelling in their interpretation of the statutory provisions. In particular, it is clear that, in enacting section 5 of the Carriage by Air Act 1961, Parliament was not attempting to circumvent the terms of the international Conventions which were being given effect by the Act (the Warsaw Convention and the Hague protocol) and its

subsequent amendment (Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002).

[76] In its original form, section 5(2) stated that Article 29 of the Warsaw Convention (the two year limit on claims for damages) was not to be read as applying to any proceedings for contribution. The amendments introduced by the 2002 Order (para 2) included Article 35 of the Montreal Convention within section 5(2)'s ambit. The important feature is that Articles 29 and 35 respectively are intended to apply to claims made by passengers, or the consignors of baggage and cargo, against airlines. As Article 37 of the Montreal Convention makes clear, the Convention does not prejudice whether an airline has a right of recourse against someone else. It is that which the 1961 Act seeks to make clear. The time limits in the Convention do not apply to easyJet's claim for a contribution. That claim is not one which arises out of damage to which the Convention applies. The terms of section 5(1), which limit valid claims against an airline's servant or agent to those raised within two years of the aircraft's arrival, do not apply.

[77] This leaves the general English law on contribution to be applied. It is agreed by both Ms Howells and Mr Nkrumah that section 1(1) of the Civil Liability (Contribution) Act 1978 governs contribution generally, but Mr Nkrumah advises that it is not applicable in the circumstances here where: (a) the time bar under Article 35 of the Convention had already extinguished the claim in terms of section 1(3); and (b) there could be no liability established in England and Wales as required by section 1(6). Both arguments are, for the reasons given by Ms Howells, in error. Article 35 does not apply to a claim which is not made by a passenger, or a consignor of baggage and cargo, against an airline. Section 1(6) is to the effect that to make a valid claim for contribution it must be one which, as a generality,



would be entertained by the courts in England and Wales. There is no difficulty with this. The absence of jurisdiction is irrelevant as is the application of a plea of *res judicata* flowing from a Scottish decree. EasyJet's claim for contribution is an easily recognisable one whereby easyJet say that DRK were vicariously liable for the fault of their employee under English law or, failing that, under German law. DRK ought therefore, in terms of sections 1 and 2 of the 1978 Act, to make a just and equitable contribution to easyJet. There is no practical issue on the level of contribution. If the vicarious liability is made out (which it is), DRK ought, in effect, to indemnify easyJet for the damages found due to the pursuer. The whole fault was that of Mr Heinz (and possibly DRK). Such a contribution is what would have occurred had English law applied; but it did not.

[78] The court will, other than in relation to absolving DRK, adhere to the Lord Ordinary's interlocutor of 18 May 2022. It will allow the pursuer's cross appeal, find and declare that under German law DRK would (but for time bar) have been liable to contribute to easyJet the full amount of the pursuer's damages. The second defenders' cross appeal is refused. It will dismiss the action in so far as it is directed against DRK.