Neutral Citation Number: [2022] EWCA Civ 1553

Case No: CA-2022-000501

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON SECOND APPEAL FROM HHJ CLARKE**
**SITTING IN THE COUNTY COURT AT OXFORD**
**Appeal Reference No. 238**
**AND ON APPEAL FROM DEPUTY DISTRICT JUDGE ABRAHAMS**
**SITTING IN THE COUNTY COURT AT LUTON**
**H66YX389**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2022

**Before :**

**LORD JUSTICE MALES**
**LORD JUSTICE BIRSS**
and
**LORD JUSTICE SNOWDEN**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **(1) MS PAOLA DORE**<br>**(2) MS MARIA PISTIDDA** | **Appellants** |
| **- and -** | |
| **EASYJET AIRLINE COMPANY LTD** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**MEG COCHRANE** (instructed by Lovetts Solicitors) for the **Appellants**
**ROBERT-JAN TEMMINK KC** and **RICHARD TAYLOR** (instructed by the Respondent) for the **Respondent**

Hearing date: 2 November 2022

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 10.30am on 23rd November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

## Lord Justice Birss:

1. This is an appeal from the order of Her Honour Judge Clarke sitting in the County Court at Oxford dismissing an appeal from Deputy District Judge Abrahams sitting in the County Court at Luton. The case is about compensation for flight delays under Article 7 of Regulation (EC) No. 261/2004 (as amended by Part 4, section 8 of the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019). There is no dispute that, subject to one crucial point, the appellants are entitled to compensation under the Regulation for a delayed flight. The compensation due is €250 for each passenger. The appellants brought a claim in the county court against the respondent for that sum. The crucial point is whether or not the appellants complied with the airline's terms and conditions of carriage before the court action was commenced. The issue is whether they first applied for the compensation directly to the airline, using the airline's online dispute resolution system. The airline said they did not do that and accordingly, in accordance with the terms, were not entitled to compensation. The appellants' case was that they had brought a claim in the airline's online portal and therefore the claim was not barred.

2. The courts below have held in favour of the airline. By the conclusion of the hearing before us, it was manifest having regard to material which emerged over the course of these proceedings, which had either not been produced below or not drawn attention to, that the appeal should be allowed.

*What happened*

3. On 21 May 2019 the appellants made two separate bookings to fly with the airline from Milan to Alghero (also in Italy) on 1 June 2019. They took the flight, but it was delayed by 7 hours. That is why, subject to the point mentioned, the appellants would be entitled to €250 each in compensation.

4. The relevant terms and conditions of carriage contain a clause 19.6. The airline has submitted that this clause requires a passenger seeking compensation first to make their claim directly using an online portal provided by the airline and to allow the airline 28 days to respond. I will return to the precise terms of the relevant clause below. Put broadly ***Bott & Co Solicitors Ltd v Ryanair DAC*** [2019] EWCA Civ 143 holds that requiring parties to use a (well designed) online system first does not itself put material barriers in the way of compensation so as to fall foul of Article 15 of Regulation (EC) No. 261/2004, which prohibits contractual clauses that limit or waive an airline's obligations to its passengers.

5. Not long after the flight it seems that Lovetts were instructed on the appellants' behalf. How they came to be instructed does not matter, although it may be that this happened because the appellants engaged a company called Flightright GmbH to obtain flight delay compensation for them.

6. On 24 July 2019 Lovetts wrote a letter before action on behalf of both appellants directly to the airline seeking compensation for the flight delay. In response on 5 September 2019 the airline replied taking the point that no claim had been submitted directly via the airline's online portal.

7. More than a year later, on 11 April 2021 someone accessed the airline's online portal and tried to submit a claim on it on behalf of the appellants. It is now common ground that the person who did this was an individual at Flightright, acting for the appellants. One of the issues in this case is whether passengers are entitled to submit a claim this way, by having someone else use the portal for them. The evidence is unclear whether one submission was attempted for both appellants or two individual submissions were attempted.

8. On the same day (11 April), the airline's online system generated an automatic email response which stated that the airline had been unable to find the booking with the information provided and asked the appellants to resubmit their "claim". Notably, given what follows, although the automatic email response contained a transaction reference number 171816452, it did not identify any particular error in what had been entered, or set out what information had been entered by the customer, but simply asked the customer to start again and enter all the information about the flight (such as their name, the booking reference, flight number, date and airports). Nor was there any facility where a customer could go back into the system and identify what information had been entered previously.

9. On 24 April 2021 Lovetts emailed the airline on behalf of both appellants, stating that a claim had been submitted directly to the airline, quoting the online transaction reference number 171816452, and seeking compensation. We now know, but it is at least unclear if the material was available in the courts below, that that 24 April 2021 message also attached copies of both appellants' boarding passes for the flight.

10. We also now know, but this was not before the courts below, that on 26 April 2021 the airline replied, refusing the claim on the basis that they could not trace any evidence that the appellants had complied with clause 19.6 of the terms. Notably the letter does show clearly that the airline had by this stage unambiguously identified both of the appellants, their booking references, and the relevant flight.

11. The Claim Form (with Particulars of Claim) was issued on 8 June 2021. The Defence did not dispute that the airline may be liable under the Regulation but took the point that the appellants had not complied with clause 19.6 by making a claim directly to the airline.

12. The claim was allocated to the small claims track and listed for a hearing in Luton on 16 December 2021 along with a number of other similar claims. Luton is one of the centres in England which handle large numbers of flight delay claims. It is the local court for Easyjet. Similarly Liverpool handles similar volumes of claims for Ryanair. These courts have developed expertise in effectively and efficiently handling the very high numbers of flight delay claims which come to them.

13. The parties' evidence was served, each side relying on a witness statement of a solicitor. Both statements included a copy of the 11 April automatic email from the airline's online system. The airline's position in the evidence was that the appellants had not provided sufficient information to process the claim, as shown by the automatic email, and so there had been no compliance with clause 19.6. The appellants' position was that they had complied with clause 19.6 by making a direct submission using the web portal which the automatic email showed had been logged. The argument on the appellants' behalf was that the information asked for in the automatic email was the

same as the information which the online portal required to be entered and so the airline would already have had the information requested.

14. Both sides were professionally represented at trial. Notably, given how later submissions developed, the appellants' representatives did not ask the airline for a record of the information which had been submitted to the online portal.

15. In his judgment DDJ Abrahams identified the issue as being whether clause 19.6 had been complied with. The judge correctly identified the case for the claimants (now appellants) as being based on an insistence that the online portal had indeed been used in order to submit a claim and that the fields in the website had been filled in correctly. The argument was that the automatic email response showed that a claim had been submitted and it followed that the right information must have been entered by the appellants or on their behalf.

16. The judge was not satisfied that the appellants had shown that sufficient information had been entered to allow the airline to identify their claim and therefore was not satisfied that they had fulfilled clause 19.6, and so held that "on this very narrow ground" the claim was to be dismissed.

17. On appeal before HHJ Clarke the appellants' case was put on the basis that the DDJ's judgment imposed requirements on claimants which went beyond the terms of clause 19.6, including by requiring them to disclose or provide a copy of what they had submitted online, when that was unfair and impossible, all the more so when the airline must have a record of that information and the airline's system did not have a save or download facility which allowed a customer to save the information which is entered. Further evidence about the operation of the online portal website was given to HHJ Clarke which had not been before DDJ Abrahams. First it was explained to the court that it had been Flightright who made the online claim on the appellants' behalf and second the court was given a demonstration of how the website worked.

18. The point of the demonstration was to support the insistence on behalf of the appellants that a valid booking reference must have been entered. The demonstration showed that the way the portal works is that the user enters data into various fields, effectively filling in a form, and then at the end can click on a final button, marked "submit" or words to that effect, and the whole "form" is accepted by the portal and the process is complete. If an invalid booking reference is entered in the relevant field, the portal will not allow the application to be completed at all, whereas if a valid reference is entered, then the application can be completed. So, it was argued, the information entered on the appellants' behalf must have included a valid booking reference in order for the portal to have accepted the application and then generate the automatic email response.

19. HHJ Clarke dismissed the appeal on the basis that DDJ Abrahams' finding of fact was open to him on the material he had, holding that the DDJ had had insufficient evidence that whatever had been submitted was enough to qualify as a claim under clause 19.6, and so the 28 day period before proceedings could be issued had not started to run. Although the circuit judge declined to take into account the demonstration evidence, on the basis that no ***Ladd v Marshall*** application was before her, the parties do not seem to have objected to the other item of fresh information, namely that the portal had been accessed by Flightright rather than the appellants themselves. That mattered too, because with that becoming clear, the insistence that the data had been entered correctly

came from Flightright rather than directly from the appellants (paragraph 28). One of the points made in the judgment on the first appeal was that although there was no download or save facility, the persons acting on behalf of the appellants, i.e. Flightright, who after all are an airline delay claims handling company, could have maintained a record of what had been entered e.g. by taking a screenshot.

20. The appellants sought permission to appeal to this court. They also sought permission to rely on yet further fresh evidence. Nugee LJ gave permission on the basis that although this was a second appeal, there was an important point of principle involved, whether the lower courts were right to hold that it was incumbent on the claimants to establish what were the contents of the form that had been submitted when they had no copy of it. The application to adduce fresh evidence was adjourned to the hearing of the appeal.

21. The fresh evidence which the appellants sought to rely on was the letter of 26 April 2021 which, it was said, demonstrated that the airline in fact did have all the information needed to process their claim more than 28 days before the proceedings started. The application acknowledged that this letter had been in the appellants' solicitors' possession at all times and could have been produced; but the appellants argued that the airline's case run at trial and on the first appeal, that sufficient information had not been provided, was unpleaded and different from the pleaded defence pre-trial that no online claim had been submitted at all.

22. Further fresh material also emerged in the airline's first skeleton argument before the Court of Appeal, provided by Mr Michael Duggan QC. In that document the airline set out information which had been extracted from its database, showing data which had in fact been entered on 11 April 2021. The booking reference had been entered as EX6RXNX against passenger Paola Dore, whereas in fact the booking reference for Paola Dore was EX6S2V3. In fact – although the significance of this does not seem to have been appreciated until the hearing before us – EX6RXNX was the booking reference for Maria Pistidda not Paola Dore. Thus it would seem likely that what occurred is that genuine booking references were entered by Flightright on the online portal – which would explain how the portal accepted the details and allowed the information to be entered in the first place – but the booking reference must have been erroneously transposed between the two passengers, or an attempt was made to submit claims for both appellants under the booking reference for Maria Pistidda. Thus after the details were submitted, the automatic email response was generated because the name(s) entered did not match the booking reference.

23. Very sadly Mr Duggan QC died. Mr Temmink KC was instructed to appear for the respondent and filed a replacement skeleton. He sought to withdraw the previous skeleton not least on the basis that it included fresh evidence for which no permission had been given.

24. At the hearing before us yet another important point was clarified. Clause 19.6 of the airline's terms and conditions which applies to this case is not in the same form as the terms referred to by DDJ Abrahams (without criticism then or on appeal to HHJ Clarke in this respect). The form of clause 19.6.1 which is in force today and was used by the judges is as follows:

> *In relation to claims for compensation under APR 2019 or Regulation EU 261 (as applicable): Passengers must submit claims directly to easyJet and allow us 28 days (or such time as required by Applicable Law) to respond directly to them before engaging third parties to claim on their behalf. The procedure to submit claims is here*
>
> [*"*here" is a hyperlink to the online portal].

25. However the relevant text of clause 19.6.1 applicable to this dispute is:

> *... Passengers must* [emphasis added] *submit claims directly to easyJet and allow Us 28 days (or such time as required by Applicable Law, if less) to respond directly to them before engaging third parties to claim on their behalf. Claims* may [my emphasis] *be submitted using the online form*
>
> [the word "form" contains a hyperlink to the online portal].

*The appeal in this court*

26. Appellants' grounds 1 to 4 are directed to challenging the finding of fact that whatever had been entered into the online portal was insufficient so as to prevent the airline from processing it or to be a proper claim. Appellants' grounds 5 and 6 address the burden of proof and the submission that it was unfair to require a claimant to prove what they had entered into the computer when the airline will have had a record of it and could produce it.

27. The appellants submitted that the fresh evidence should be admitted, and that the appeal should be allowed (with or without the fresh evidence). The respondent submitted that the fresh evidence should not be admitted and the appeal should be dismissed. Part of the respondent's case on appeal was the emphasis that the appellants' case was being handled by a claims handling company and had to be seen in that light, and to draw attention to the repeated errors in the paperwork produced on the appellants' behalf including misstated flight numbers and, in places, a flight number being given instead of a booking reference.

28. I will deal with the fresh evidence first. The legal principles are not in dispute. CPR Part 52 rule 52.21(2) provides for the general rule that an appeal court will not receive evidence which was not before the lower court. However, the appeal court has a discretion to permit fresh evidence to be admitted, which is to be exercised in accordance with the overriding objective. The principles in ***Ladd v Marshall*** [1954] 1 WLR 1489, which were founded on a different basis in the rules, do nevertheless remain relevant not as rules but as matters which must necessarily be considered in the exercise of the court's discretion (***Terluk v Berezovsky*** [2011] EWCA Civ 1534 (paragraphs 31-33)).

29. Analytically there are at least six items of fresh material before this court which were either not before DDJ Abrahams or not drawn to his attention. Taking them in chronological order: first there is the correct form of clause 19.6; second there is the fact that it was Flightright who accessed the web portal on the appellants' behalf rather

than the appellants themselves; third there is the record in the judgment on the first appeal of what the web portal will and will not accept; fourth there is the information from the airline's database which shows data which had actually been entered; fifth there is the letter of 26 April 2021; and sixth is the confirmation that the attachment to the message of 24 April to which the 26 April letter is a reply, was the two boarding passes for Ms Dore and Ms Pistidda. Only the fifth of these is the subject of an application, and in fact the respondent on appeal seeks to withdraw the fourth.

30. In terms of ***Ladd v Marshall*** factors, it is manifest that all of this material is credible and would probably have an important influence on the result but also it could all have been produced or drawn to the court's attention at or before the trial. Nevertheless in the highly unusual circumstances of this case I would permit this material as a whole to be admitted on appeal and by the same token would not allow the respondent to withdraw the information, from its database, which was produced in its first Court of Appeal skeleton. By the time the matter came to this court both sides had sought to supplement their case by reference to material which had not been available at trial, although the respondent thought better of it recently. Some material, such as the identity of the person who actually made the purported claim on the online portal, came into the case after the trial without objection. The time is long past for the respondent airline to take a stand based on ***Ladd v Marshall*** when it places such emphasis on the involvement of Flightright at the online portal stage as part of its submissions on this appeal, something which only emerged after trial.

*The law*

31. The leading authority in this area is ***Bott v Ryanair***. At paragraph 1, Lewison LJ explained that airline passengers are entitled to be compensated by airlines if a booked flight is substantially delayed. At the time of ***Bott v Ryanair*** this was a matter of EU law but now ***Lipton v BA CityFlyer*** [2021] EWCA Civ 454 has confirmed that this remains the law following the UK's exit from the EU.

32. Importantly, as was explained in ***Bott v Ryanair***, there are restrictions on the ability of an airline to derogate from or limit passengers' rights under the Regulation. The situation in that case was that the airline had introduced a claims handling portal similar to the one in this case. As Lewison LJ explained:

> "22. [*Ryanair*] introduced a policy under which passengers entitled to compensation under the Regulation would receive the whole of that compensation within 28 days of submission of a claim online. In practice claims submitted via the online form are dealt with more quickly than that. Once a claim has been submitted, there is an immediate automatic acknowledgement by way of email, if the passenger has provided an email address. The claim is assessed by Ryanair, and Ryanair provides its substantive response to the claim to the same email address within 24 to 48 hours of submission. *[…]*"

33. Ryanair had then included terms in its conditions of carriage which required passengers to submit claims directly to the airline and gave a link to Ryanair's online portal. Those terms are set out in the judgment at paragraph 26. They are materially the same as the first version of Easyjet's conditions of carriage in the present case.

34. The main argument in ***Bott v Ryanair*** was about whether Bott, a firm of solicitors making a business handling airline delay claims, could exercise a lien for their fees over the compensation which Ryanair paid directly to a passenger in an undisputed claim before proceedings were issued, when the matter had been handled on the passenger's behalf by the solicitors. The Court held that there was no such lien in that case. The reason why not was that whatever services Bott provided, they were not litigation services given that making a claim under the Regulation was largely mechanical and formulaic, see Lewison LJ at paragraphs 58-59.

35. That led to the second issue on the appeal, namely the lawfulness under Article 15 of the Regulation of the term in Ryanair's conditions of carriage which prescribed a process by which passengers should submit their claim directly to the airline before the airline is obliged to pay out compensation. The decision on this in ***Bott v Ryanair*** was strictly obiter but both sides urged the court to decide it.

36. The court held that the legal question is whether those terms limited or waived the passenger's right to compensation contrary to Article 15 of the Regulation and (at paragraph 64) that Article 15 is concerned with matters of substance. Nevertheless there is no bright line between procedure and substance and therefore if a prescribed procedure is to fall foul of the Regulation it would have to put a material or real obstacle in the passenger's path. An immaterial obstacle will not have that effect.

37. The court noted that the UK and EU regulatory bodies encourage direct contact between the passenger and the airline (paragraphs 65-68) and found (paragraph 70) that there was nothing obviously objectionable to a clause which channels a complaint at least in the first instance through a process backed by the regulators.

38. In ***Bott v Ryanair*** the judge below had held that the airline's scheme was a straightforward and easy-to-use process. This was upheld on appeal and led to the conclusion that it did not present a material obstacle. Therefore the conditions of carriage were not contrary to Article 15.

39. In the present case neither party challenged this reasoning in ***Bott v Ryanair*** and I agree with all of it.

40. A particular issue before us is the extent to which the airline's terms permit a passenger to have help filling in the online form. A long running submission by the respondent in the present case was that since the appellants had employed Flightright to access the online portal for them they had not submitted their claim "directly" (as required by clause 19.6) and had "paid no attention to the contractual term at all" (Respondent's second appeal skeleton paragraph 21).

41. In my judgment Lewison LJ dealt with this, and explained why such a submission is wrong in paragraph 72 of ***Bott v Ryanair*** as follows:

> 72. *[…]* If a passenger needs help in filling in the on-line form there is nothing to prevent that. On the contrary, clause 15.2.7 permits it. All that the passenger has to do is to press the send or submit button. And even that could be done by a third party, provided that the claim is made in the name of the passenger. At most the delay in processing a claim is 30 days, which is no

> longer than the response time that Bott itself requests. After that, a passenger is free to process a claim in any way he chooses, with or without the assistance of third parties."

42. Even if the matter was free from authority, I would hold that passengers are entitled to have someone else access the online portal on their behalf and thereby make a claim in their name. That other person could be a friend or family member, or it could be a claims handling company or solicitor engaged for that purpose. A claim made that way would be "direct" as that word is used in the conditions of carriage. Furthermore if the true construction of the word "direct" would not permit this activity, then it would be a material obstacle in passenger's path and would be unlawful and ineffective. The fact that an airline may prefer it for passengers not to engage a claims handling company at that early stage to use the online portal is irrelevant.

*Are the appellants entitled to compensation?*

43. Whatever the rights and wrongs of the argument about the legal effect of the abortive attempt to use the online portal made on the appellants' behalf by Flightright on 11 April 2021 looked at solely on its own, as matters have now emerged, that is not the whole story. 13 days later on 24 April 2021 and after the automatic email response had been sent, full and accurate details of the two appellants' flights were provided, by means of the copies of the appellants' boarding cards. Apart from anything else these attributed the correct booking references to the correct individuals. Moreover on 26 April 2021 (albeit that the airline was refusing to pay compensation at that stage on the basis no direct claim had been made), the airline's response showed that it had correctly identified the appellants and their flight, including the right booking references. The Claim Form was issued more than 28 days later.

44. I would hold that on these facts the appellants satisfied the conditions of carriage. An attempt had been made to submit a claim or claims directly to the airline for both appellants using the online portal provided by the airline. We now know, for example, that at least one genuine booking reference was entered – which is why the portal accepted the claim initially, albeit that it then generated an automatic email response. If gibberish had been entered the attempt would not have got that far, and the fact that all this was done on the appellants' behalf by Flightright is no answer. Whether Flightright made one joint or two separate attempts to use the system for each of the appellants does not alter the conclusion, since the entire proceedings have always been approached on the basis that the two claims stand or fall together.

45. Moreover, shortly afterwards, full and accurate information was provided to the airline, sufficient to identify the claim of each appellant on any view. In these circumstances, the fact that this information was provided by solicitors acting on behalf of the appellants is also irrelevant. The relevant conditions of carriage in force at the time make expressly clear that using the online portal is not mandatory for anyone. The word used is "may". Therefore at the latest by 26 April 2021 when, it is now clear, the airline had all the necessary information, the requirements of clause 19.6 were satisfied. After 28 days the airline had no defence to the claim for compensation.

46. On the other hand I can see no real basis for criticising the trial judge or the first appeal judge. Before the former the appellants' case was being advanced simply on the paradoxical basis that an automatic email which asked for the claim to be resubmitted

because the airline had been unable to find the booking based on the information provided, was supposed to prove positively that a proper claim had been made. As was also held on the first appeal, I would hold that it was open to the trial judge in those bare circumstances to reject the submission that a claim really had been made. This is all the more so when one bears in mind that these are small claims which cry out to be determined in a proportionate manner. After all it was clear that something had gone wrong, but without the benefit of the various pieces of evidence which have come in subsequently, it was impossible to say before DDJ Abrahams whether what had been entered was just gibberish or something sensible which could amount to a genuine claim. If all that had been entered really was nonsense then I do not see why that has to be held to amount to compliance with the conditions.

47. What ought to have happened once the issue emerged in the way it did was that the appellants should have asked for an adjournment and asked for the airline to produce the data actually entered, if there was going to be a dispute about it. In the Court of Appeal the appellants criticised the airline for "failing to disclose" or "withholding" that data – but that was unfounded, because there was no automatic disclosure obligation on the airline, and the data had never been sought by the appellants before the trial. Even if the point only emerged fully at trial, it would still have been possible for the appellants to seek an adjournment, but it was not done. The wrong approach was then to take the matter on appeal and start drip feeding further evidence into the dispute as it went along.

48. On the first appeal the point was made that Flightright could have taken a screenshot of the data which had been entered. I sympathise with that sentiment given that the claim was being handled in the way it was, but in principle I think that is the wrong way round. If in another case the airline sought to take a point on the inadequacy or inaccuracy of the data which had been entered prior to an automatic email response being generated, then I cannot see how the airline could resist a properly formulated request to produce whatever relevant data it had retained on its system. That is in effect the merit in grounds 5 and 6 of the appeal but those grounds suffer from the difficulty that such a request was never made.

49. In conclusion, as in ***Bott v Ryanair***, I agree that airlines are entitled to require the use of a well designed online dispute resolution portal for those passengers who are capable of using them.

50. However, this dispute has shown that even people who are experienced in using such systems can make mistakes, and the automatic email response in this case was not helpful because it did not spell out what data had actually been entered in the first place. Had it done so, the submitter could have rechecked and correctly entered the data, and this litigation would likely have been avoided. No doubt the airline would rather not go to the effort of coding the system to do that, but I cannot imagine that it would be difficult to do. One could simply set out all the entered data in the same email, or allow a user to go back into the portal and see what data has been entered. A system which produces automated response emails which do not allow a user to see what data had been recorded as entered so as to facilitate the correction of errors, risks itself amounting to a material obstacle in the way of passengers making claims, contrary to the Regulation.

*Conclusion*

51. I would allow the appeal but I will say now that this may be a case in which the costs do not follow the event.

**Lord Justice Snowden:**

52. I agree that the appeal should be allowed for the reasons given by Lord Justice Birss and Lord Justice Males. I also associate myself with their observations that to avoid the risk of contravening Article 15 of EC Regulation 261/2004 (as retained and amended following Brexit), any automated online claims system which an airline requires passengers to use in the first instance should provide an accessible record of data entered to assist passengers to correct any input errors and make their claims for compensation.

**Lord Justice Males:**

53. I agree with the judgment of Lord Justice Birss. EasyJet's terms and conditions in force at the relevant time did not make use of its online system compulsory, but only provided that a claim "may" be made in this way. Moreover, if what the appellants submitted using the online system was not a "claim", it is hard to see what it was. EasyJet's own automated response described it as a "claim". In any event, the appellants did submit a claim more than 28 days before commencement of proceedings.

54. Mr Robert-Jan Temmink KC for EasyJet insisted that in order to be able to deal with a high volume of flight delay cases at proportionate cost it is essential for an airline to be able to automate the process of complaint submission and handling in a way which avoids unnecessary legal intervention and fees; and that, in practice, this can only be achieved by a fully automated claims procedure. That is likely to be true.

55. However, we need not have too much sympathy for EasyJet. Its computer knows which flights have been subject to delay and knows the identities of the passengers on those flights. Although there was no evidence about this, it ought not to be difficult for it to contact passengers (or at any rate, those who have made the booking for passengers) who are entitled to compensation, but no doubt it suits EasyJet that a certain percentage of passengers will never bother to claim. So although EasyJet is not required to contact passengers in this way, in a sense any costs incurred in handling the claims of those passengers who do claim can be set against the savings achieved as a result of deciding not to pay compensation unless a claim is made.

56. Nevertheless I accept that it is strongly in the interests of passengers and the public that airlines should have an automated online system for handling flight delay claims which is easy for passengers to operate. That is in the interests of passengers because it will enable them to claim the compensation to which they are entitled without difficulty, and to receive prompt payment without incurring legal fees or needing to pay claims companies. It is in the public interest because such claims should be capable of resolution in this way and court proceedings should only be necessary where there is some issue which only a court can decide.

57. If an online system is to achieve these objectives without putting material obstacles in the passenger's way, it seems to me that a number of requirements would need to be satisfied, not least to take account of the inevitability that in some cases, as a result of human error, passengers will make mistakes in using such a system: (1) the airline's

terms and conditions must make clear to the passenger that the use of the online system is compulsory, and must be used before court proceedings are commenced; (2) the passenger should have the ability to save the claim which is submitted and should be strongly advised to do so in case of any issue arising; (3) if it is the case that a claim can only be processed if some or all of the claim details are correctly entered on the online form which is submitted, and that an error in one or more fields will lead to the claim being rejected, that must be explained to the passenger; and (4) if a claim is rejected on the ground that the claim details have not been correctly entered, the automated response sent by the airline must make this clear.

58. It is now clear (although the position was anything but clear in the courts below) that the version of EasyJet's online system which operated in this case did not satisfy any of these requirements.

59. While I would allow the appeal for the reasons given by Lord Justice Birss, I would endorse his comment that costs will not necessarily follow the event in this case. I would urge the parties, in this low value claim where the costs far exceed the amount claimed, to reach some sensible agreement about costs in order to avoid yet further expense.