



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 20  
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 GmbH

Second Defenders and Second Respondents

---

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

27 April 2023

**Introduction**

[1] The parties seek determinations on the incidence of expenses following easyJet's unsuccessful reclaiming motion ([2023] CSIH 8) from the Lord Ordinary's finding ([2022]

CSOH 40) that they are liable for the totality of the pursuer's loss and damage under the Montreal Convention. It is not disputed that the pursuer is entitled to his expenses, both in the Inner and Outer Houses, from easyJet. All parties are content that, if the pursuer is liable to the successful defender (DRK) in the expenses in the Outer House, these should be payable by easyJet either by an award in DRK's favour against easyJet directly or by providing the pursuer with a right of relief.

[2] Two distinct but related issues arise. First, easyJet maintain that their liability in expenses to DRK, however structured, should be modified by an appropriate percentage, perhaps 50%, because DRK had been unsuccessful in one aspect of the case both at first instance and on appeal. DRK's position had been that, leaving aside time-bar, they would not be liable to pay damages to the pursuer in respect of their, or their employee's, actions. Secondly, and flowing from that, easyJet also maintain that they should not be liable for the expenses of the pursuer's successful cross-appeal on DRK's liability to pay damages but for that time-bar. In order to understand the issues, some information on how the action progressed must be given.

### **Chronology**

[3] The pursuer's accident occurred on 15 May 2017 when he fell while being transported in a wheelchair controlled by an employee of DRK. The journey was from an easyJet aircraft along an air bridge giving access to the airport terminal in Hamburg. In July 2018, the pursuer's agents had received an email, which they regarded as an unqualified admission of liability from easyJet, although it was later found by the Lord Ordinary not to have carried that implication. At least partly on the strength of that email, the pursuer had

not sought to carry out any investigation into the potential liability of any party other than easyJet.

[4] In April 2019 the pursuer raised an action against easyJet alone, based on their responsibility as carrier under the Montreal Convention (a case which was ultimately successful). In January 2020, after a prolonged list for investigations into quantum, easyJet lodged defences. They maintained that the accident was not their responsibility, beyond the specified number of special drawing rights under the Convention, but lay with DRK, as employers of the wheelchair operative. In April 2020, the pursuer amended to add DRK as second defenders, but only on an *esto* basis (ie if it turned out that easyJet were not, as they maintained, responsible for the totality of the pursuer's loss and damage). It was accepted, ultimately, that the pursuer had brought DRK into the cause because of the nature of easyJet's defence.

[5] When the record closed, the pursuer's primary case remained that the wheelchair operative was acting as easyJet's agent within the meaning of the Montreal Convention. It was only if he was not such an agent that DRK would be liable under sections 823 and 831 of the German Civil Code. DRK responded that either the wheelchair operative, or DRK, were acting as agents for easyJet and that therefore easyJet alone were liable under the Convention. DRK themselves and their operative had fulfilled all duties incumbent upon them. They contended that their operative had been properly trained and had been entitled to expect the floor of the air bridge to be level; the presence of a ridge being a significant cause of the accident. They pled that the pursuer's claim against them was extinguished by limitation under the Convention.

[6] In December 2021 easyJet amended to claim apportionment with DRK. This was advanced as an *esto* position. If their liability was not limited, the court ought to apportion

liability between them and DRK. They argued that English law governed the apportionment and that accordingly they had two years from any judgment or settlement in which to claim a contribution. DRK responded that easyJet's claim for contribution was governed by German law and thereby time-barred.

### **The Lord Ordinary and the Reclaiming Motion**

[7] The Lord Ordinary determined that easyJet were liable for all of the pursuer's loss and damage under the Montreal Convention because the wheelchair operative had been acting as their agent and had been negligent. In relation to contribution, he held that German law was applicable and thus, as was agreed, the claim was time-barred. He did not resolve the pursuer's alternative case that, if the operative was not easyJet's agent, the pursuer had a valid claim against DRK. He did not resolve the question of what the English law of time-bar on contribution was, should he be wrong in applying German law to that issue.

[8] In that state of affairs, easyJet reclaimed on the basis that the Lord Ordinary had been wrong to hold that the wheelchair operative had been their agent. That was the main focus of the reclaiming motion. However, there was the subsidiary issue, which was raised by the pursuer in his cross appeal, of whether, in the alternative, DRK were liable for the actings of the wheelchair operative. There was also the issue raised by easyJet as to whether English law applied to their contribution case. DRK resisted the pursuer's arguments on DRK's liability for their operative's actings. They maintained that the operative had not been negligent and that, in any event, DRK were not vicariously liable for his actings. DRK resisted the contention that English law applied to apportionment; easyJet having conceded that German law applied to the pursuers' alternative claim based on negligence.

[9] The court refused the reclaiming motion on the basis that the Lord Ordinary had been correct in holding that the wheelchair operative had been acting as easyJet's agent in the sense that what he had been doing was in furtherance of the pursuer's contract of carriage with easyJet. That disposed of the main issue. The court went on to consider the pursuer's alternative case against DRK. It observed that DRK had tabled a wide ranging defence, which included multiple permutations, not all of which were easy to follow. The court rejected all of DRK's propositions on this part of the case. The Lord Ordinary had correctly held that the wheelchair operative had been at fault, applying German law. DRK were vicariously liable for his actings. Had the pursuer failed in his contention that easyJet were liable for the totality of his damages, the pursuer would have had a good case against DRK for the balance above the special drawing rights figure. That case was, however, time-barred under the applicable German law even although it would not have been under English law.

### **Decision**

[10] Although the making of an award is a matter for the court's discretion, the most important principle in determining the incidence of expenses is that the cost of litigation should fall upon the party who has caused it. Whoever resists the vindication of a party's rights is *prima facie* to blame (*Shepherd v Elliot* (1896) 23 R 695, LP (Robertson) at 696). In both the Outer and Inner Houses the pursuer was successful in his case against easyJet. He is therefore, as was readily accepted, entitled to an award of expenses against easyJet.

[11] DRK were successful in resisting the pursuer's case against them at first instance. There is no difficulty in finding the pursuer liable to DRK in their expenses in the Outer House. Although the matter is again discretionary, if, as here, a pursuer has had to convene

a second, and ultimately successful, defender because of the position adopted by the principal defender, the court may grant the pursuer a right of relief in respect of his liability to the second defender (*Morrison v Waters & Co* (1906) 8 F 867, LJC (Macdonald) at 68-69). It is not disputed that this is an appropriate course here even if a direct alternative was proffered. The pursuer will be found liable to DRK in their expenses in the Outer House but will be afforded a right of relief in respect of these expenses against easyJet.

[12] DRK successfully resisted the reclaiming motion and are entitled, as a generality, to an award of expenses in the Inner House proceedings against easyJet. EasyJet contended that their liability in expenses in both the Outer and Inner Houses ought to be modified because, the pursuer having convened DRK, DRK unsuccessfully resisted the case of fault against them. They did not need to go that far; they could just have depended upon the application of German law to that question and their consequent, and successful, plea of time-bar in respect of the apportionment claim against them by easyJet.

[13] As a generality, if a party pursues or resists a claim and succeeds only on one of several grounds, he has been entirely successful in practical terms and is entitled to an award of expenses (*Elliot v J & C Finney (No 2)* 1989 SLT 241, Lord Sutherland at 242, 1989 SLT 605, LJC (Ross) at 610). Having regard to the procedural background and the timing of easyJet's claim for apportionment and contribution, the court agrees with DRK that it was not unreasonable for them to advance a number of defences at first instance; even if some of these might ultimately have been perceived as weak. In the Outer House, DRK were entirely successful and there is no basis upon which their expenses (for which the pursuer is liable) should be modified.

[14] Different considerations apply in the Inner House so far as the pursuer's cross appeal is concerned. The pursuer raised the issue of fault on the part of DRK because the

Lord Ordinary had not dealt with it. DRK staunchly resisted the cross appeal by deploying a wide range of fire. They maintained that the Lord Ordinary had erred in finding that their operative had been at fault and, even if he had been, DRK were not vicariously or otherwise liable to the pursuer. As distinct from the position in the Outer House, by the time of the reclaiming motion, these issues had become severable from the principal contention on the Montreal Convention. In his opinion, the Lord Ordinary had made it clear that the operative was at fault. EasyJet did not take issue with the cross appeal but DRK elected to do so on a range of substantive and detailed grounds. There is no sound reason why easyJet should bear DRK's expenses (or indeed those of the pursuer) for that element of the reclaiming motion attributable to the cross-appeal.

[15] The court is conscious, however, that an attempt to separate out the cross-appeal in any award may make the Auditor's task a difficult one. In all the circumstances, and applying the customary broad axe with the blunt edge, it will modify the award of expenses due to DRK by easyJet in respect of the reclaiming motion by one third.