

29 July 2024

EALA essay prize submission

How effective have been the measures taken by European airlines to control the ability of passengers to bring compensation claims under EU261 via third parties?

Word count: 4313

Abstract

In recent years, airlines across Europe have adopted measures to enhance direct claim handling between passengers and airlines, and to regulate the ability of third-party claims management companies to seek compensation for passengers under Regulation (EC) No. 261/2004. Low-cost carriers like Ryanair have been at the forefront of those efforts. The recent decision in *Bott & Co Solicitors Limited v Ryanair DAC* [2022] UKSC 8 demonstrates the effectiveness of those measures and suggests they have had a significant impact on the business models of claims management companies. However, the decision also highlights the limits to the effectiveness of the method adopted, including in particular with respect to claims brought by claims management companies operated by solicitors in common law jurisdictions like the UK.

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1 Introduction

Air passengers travelling within the EU, the UK and beyond are granted extensive rights under Articles 4 to 9 of Regulation (EC) No. 261/2004 ("**EU261**").¹ These rights, which include the right to financial compensation in the event of flight cancellation, lengthy delays and denied boarding, may not always be understood properly by passengers.² As such, in recent years an industry has developed across the EU and the UK, of third party claims management companies ("**CMCs**"), who usually act on a "no win, no fee" basis, assisting passengers to obtain financial compensation from airlines under EU261.³

In many cases, the assistance provided by CMCs is limited to simply contacting the airline to request the compensation owed to the passenger.⁴ CMCs typically do not provide detailed legal advice to passengers and, because airlines usually accept liability, they typically do not represent their clients in litigation.⁵ CMCs are active in all jurisdictions covered by EU261 as well as in the UK, which has implemented its own materially identical version of EU261 under the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 ("**UK261**").⁶

Airlines across the EU and the UK, in particular low-cost carriers ("**LCCs**"), have taken steps to enhance direct claim handling between passengers and airlines, and to limit the impact of CMCs claiming compensation for passengers under EU261/UK261. Since 2016 the Ryanair Group plc ("**Ryanair**"), for example, has adopted a combined approach of bypassing CMCs and paying compensation directly to passengers while simultaneously using new contractual provisions in its general terms and conditions of carriage ("**GTCCs**") to prevent passengers from engaging third parties to pursue claims until they have engaged with the airline directly first.⁷ This approach has also been adopted by a number of other LCCs, including easyJet plc ("**easyJet**") and Wizz Air Hungary Ltd ("**Wizz Air**").

This paper considers the effectiveness of these measures with particular reference to the recent decision of the UK Supreme Court in *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8.⁸ The testimony given by Bott & Co during the proceedings in question demonstrates the considerable effectiveness of Ryanair's measures, and therefore the similar methods adopted by other airlines, to date. As this paper will show, the UK Supreme Court's decision also confirms that, for the moment at least, the contractual restrictions adopted by Ryanair, as well as by other airlines, are compliant with UK and EU law, and that airlines can continue to bypass CMCs when paying compensation, albeit only if they are not operated by solicitors. This suggests that, with some limitations, the measures implemented by Ryanair and other similar airlines are likely to continue to be effective into the future.

2 EU261: passenger compensation rights

EU261 applies to all passengers departing from airports located within the territory of an EU Member State.⁹ It also applies to passengers departing from airports located beyond the EU,

¹ Articles 4 to 9 of Regulation (EC) No. 261 / 2004 of the European Parliament and of the Council of 11 February 2004

² *ibid*

³ C. Thijssen and L. Williams, "Could Confirmation from the UK Court of Appeal Allowing Airlines to Compensate Passengers Directly Help Stamp Out Ambulance-Chasing over Passenger Rights claims in the EU?", in *Air & Space Law*, Vol. 44 No. 4&5 (2019) 447

⁴ *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143, §58

⁵ *ibid*

⁶ *The Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019*

⁷ *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143, §20 - 26

⁸ *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8

⁹ Article 3(1)(a) Regulation (EC) No. 261/2004; P. Woodley, "'UK261?' Passenger rights after the Brexit transition period" (HFW, 2021) <<https://www.hfw.com/downloads/002691-HFW-UK261-Passenger-rights-after-the-Brexit-transition-period-Jan-2021.pdf>> accessed on 7 January 2024

provided both that the operating carrier qualifies as a "Community Carrier" for the purposes of EU261 and that the final destination of the flight is located within the EU.¹⁰ Similarly, UK261 applies to all passengers departing from airports located within the UK and to all passengers travelling to the UK from an airport located beyond the UK, provided that the operating carrier is considered to be a "UK carrier."¹¹ As noted above, the provisions of EU261 and UK261 are materially identical and, at present, there is little divergence between the two liability regimes in the EU and the UK: for the sake of convenience references to EU261 in this paper should therefore also be read as references to UK261.

Articles 4 to 9 of EU261 provide passengers with extensive rights in the event of denied boarding, cancellation or the lengthy delay of a flight.¹² In the context of claims brought by third-party CMCs, the most relevant Articles of EU261 are Articles 5, 6 and 7. These articles relate to the compensation payable to affected passengers in the event of a flight cancellation or lengthy delay, which are the types of incident with which third-party CMCs are most likely to be involved.¹³ In short, following the decision in decision in *Sturgeon & Ors v Condor Flugdienst GmbH* (C-402/07), passengers whose flights have been cancelled or subject to a lengthy delay are able to claim fixed amounts of financial compensation that are calculated depending on the length of the delay and the distance of the affected journey.¹⁴ The only defence available to airlines in these circumstances is if the delay or cancellation was caused by "extraordinary circumstances" that could not have been avoided even if they had taken all reasonable measures.¹⁵

Importantly, the compensation rights afforded to passengers under EU261 are protected by Article 15 of the same regulation, which provides that any obligations imposed on airlines regarding passengers cannot be limited or waived, including by restrictive clauses within the contract of carriage.¹⁶ The practical effect of Article 15 is that it is not permitted for any carrier to attempt to restrict the compensation rights afforded to passengers under EU261 through the operation of any clause in their GTCCs. This provision is naturally significant for carriers seeking to limit the way in which passengers might seek to exercise their compensation rights to compensation, including by engaging third-party CMCs to claim them.

3 EU261: the third-party claims industry

Since the decision in *Sturgeon*, the CMC industry has developed significantly across the EU, with companies "*vigorously and sometimes aggressively*" pursuing cases for consumers.¹⁷ In 2018, the EU's Court of Auditors found that some airlines were reporting that up to 50% of claims received for financial compensation were brought by CMCs.¹⁸ Given the amount of money at stake, the extensive involvement of third-party CMCs is not surprising. By way of example, during the *Bott & Co* litigation it was revealed that the CMC in question (which is operated by solicitors) was obtaining, on average, £100,000 per month from Ryanair alone, and that Bott & Co had recovered over £62,000,000 for its clients across all airlines.¹⁹ According to Bott & Co's website that total now stands at over £77,000,000.²⁰

¹⁰ Article 3(1)(b) EU261

¹¹ Article 3(1) EU261 as amended by Regulation 8(4) Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019

¹² Articles 4 to 9 EU261

¹³ Special Report of the European Court of Auditors, "EU passenger rights are comprehensive but passengers still need to fight for them" (2018) 23

¹⁴ *Sturgeon & Ors v Condor Flugdienst GmbH* (C-402/07)

¹⁵ Article 5(3) EU261

¹⁶ Article 15(1) – (2) EU261

¹⁷ P. Mendes de Leon, *Introduction to Air Law*, 11th (Wolters Kluwer, 2022), 321

¹⁸ Special Report of the European Court of Auditors, "EU Passenger rights are comprehensive but passengers still need to fight for them", 30

¹⁹ J. Jordan, "Airlines vs. Claims Agencies... the EU261 fight continues" (HFW, 2019)

<<https://www.hfw.com/insights/airlines-vs-claims-agencies-the-eu261-fight-continues-november-2019/#:~:text=In%20response%2C%20airlines%20have%20encouraged,EU%20are%20from%20claims%20agencies>> accessed on 29 July 2024

²⁰ See (<https://www.bottonline.co.uk/flight-delay-compensation>), last accessed on 7 January 2024

Whether the growth of this industry is beneficial to passengers is not clear. On the one hand, the existence of CMCs has clearly helped to increase passengers' awareness and knowledge of the rights afforded to them under EU261. Moreover, the work of CMCs has helped to secure millions of GBP and EUR in compensation for passengers who might otherwise have lost out.²¹ However, it can also be argued that the practices of CMCs are actively detrimental to the interests of consumers. In particular, although CMCs typically charge their clients on a "no win, no fee" basis, the prices they charge consumers are proportionately very large and can sometimes amount to over 50% of the total compensation obtained from the airline.²² A summary overview of the fees charged in respect of flight delay cancellation claims by selected CMCs operating in the UK market is set out in Annex A. The fees charged by CMCs have given the EU Commission and the EU Court of Auditors cause for concern, as they have the potential to outweigh the benefits otherwise brought by CMCs in terms of facilitating the increased recovery of financial compensation for consumers, leading the EU Commission urging passengers to take their claims directly to airlines in the first instance.²³

It is also arguable that the fees charged by CMCs are disproportionate to the services they provide to consumers. In most cases, the only role played by the CMC is to assess whether a passenger has a claim under EU261 (which can be done quickly by checking the passenger's flight number against a central flight database) and then to present that claim to the airline involved, which may be through the airline's dedicated portal. By way of illustration, in 2022 the UK's Department for Transport assessed that it would take the average passenger 30 minutes to apply for compensation using an airline's dedicated webpage, and only 15 minutes for the airline to process the claim.²⁴ Where the necessary criteria are satisfied, airlines typically do not dispute liability and so the process is largely administrative in nature.²⁵ On that basis it is not immediately clear that CMCs are doing anything that passengers are not capable of doing themselves. The situation may differ in circumstances where an airline disputes liability, in which case it may be necessary to commence legal proceedings to recover financial compensation, but such cases are rare.²⁶ In the UK, only solicitors are permitted to conduct legal proceedings and this means in those circumstances that CMCs either need to instruct lawyers on the passenger's behalf, or they need to be qualified solicitors themselves.²⁷

4 EU261: the airlines strike back?

The growth of the CMC industry is naturally undesirable from the perspective of airlines. Most obviously, it has led to the growth of claims for financial compensation faced by airlines. Beyond that airlines also report that the involvement of CMCs creates additional problems for them in the shape of an increased administrative burden and the introduction of an unnecessarily adversarial element to the passenger-airline relationship.²⁸ Consequently, many airlines, including LCCs who may be disproportionately affected by EU261 claims, have taken steps to streamline the process of passenger compensation by enhancing direct communication between passengers and airlines, and to regulate the ability of CMCs to bring claims on behalf of affected passengers.²⁹ Ryanair, in particular, has been at the forefront of these measures. Since 2016 onwards, its primary method of dealing with CMCs has been to bypass CMCs and pay financial compensation directly to affected passengers, thereby depriving the CMCs of the ability to deduct their fees from the compensation recovered.³⁰ Given that, as Annex A shows, the majority of CMCs operate on the basis of a "no win, no fee" charging model, this has the potential to cause significant damage to the CMC business model. On 26 July 2016 Ryanair

²¹ See (<https://www.bottonline.co.uk/flight-delay-compensation>), last accessed on 7 January 2024

²² *Special Report of the European Court of Auditors, "EU passenger rights are comprehensive but passengers still need to fight for them"* 30

²³ *EU Commission Information Notice to Air Passengers (9 March 2017)*

²⁴ *UK Department for Transport, "Aviation Consumer Policy Reform: Compensation for delays to UK domestic flights (Regulation EC 261/2004) – Impact Assessment" (2019) 12*

²⁵ *Bott & Co Solicitors Ltd v Ryanair DAC [2018] EWHC 534 (Ch)*, §23

²⁶ *ibid*

²⁷ *Section 13(2) Legal Services Act 2007*

²⁸ *Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8*

²⁹ *D. McClean (Ed.) et al, Shawcross & Beaumont: Air Law, Issue 184 June 2023, VIIA 50*

³⁰ *Bott & Co Solicitors Ltd v Ryanair DAC [2018] EWHC 534 (Ch)*, §42

supplemented this approach by implementing a new clause at Article 15.2 of its GTCCs that aimed to manage passengers in engaging with CMCs to bring claims for EU261 compensation, ensuring that certain conditions had been fulfilled first.³¹ The precise wording of Article 15.2 is set out at Annex B.

The most important sections of Article 15.2 of Ryanair's GTCCs for the purposes of managing claims made by CMCs are Articles 15.2.2, 15.2.3 and 15.2.8.³² The practical effect of these provisions is that passengers must first engage with Ryanair by submitting a claim directly to the airline and then allowing 28 days, or lesser if permitted by local law, before engaging a CMC to bring their claim.³³ Given that most requests for compensation are capable of being dealt with by airlines within a matter of days at most, this ensures sufficient time for Ryanair to properly deal with any claims for compensation it receives.³⁴ If passengers fail to abide by this procedure then Ryanair will not engage with any claims for compensation brought by a CMC because the passenger has breached its contract of carriage with Ryanair. Finally, Article 15.2.8 formalises Ryanair's practice of paying compensation directly to passengers by expressly specifying that all compensation will be paid directly to the card used to make the flight booking in the first place.³⁵

Following Ryanair's introduction of Article 15.2 to its GTCCs, easyJet and Wizz Air have both adopted very similar contractual provisions with materially identical practical effects; namely, that refunds and compensation are to be paid directly to the payment card used to make the booking, and passengers are required to engage with easyJet and Wizz Air respectively first and can only instruct CMCs to claim compensation after a certain period has elapsed. It is not clear precisely when Wizz Air adopted this wording, but easyJet appear to have adopted their formulation in or around September 2019.³⁶ Interestingly, with the exception of Air France, it appears that the major European legacy carriers are yet to adopt similar wording in their GTCCs.³⁷

5 Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8

Data concerning the success rate and number of compensation claims brought by CMCs is necessarily confidential to the airlines and CMCs involved. To assess how successful the attempts of airlines have been in thwarting the activities of CMCs it is therefore necessary to look at other sources. The most obvious other source is the reaction of the CMCs themselves, including in particular litigation brought by affected CMCs in response to the measures introduced by airlines. In this respect the recent litigation brought by Bott & against Ryanair in the UK High Court is particularly instructive: it demonstrates both the significant effect that Ryanair's measures have had on Bott & Co's business to date and further suggests how effective those measures will be in curtailing the efforts of Bott & Co and other CMCs in future.

Bott & Co's claim against Ryanair was brought on two grounds. The first ground was that Bott & Co was entitled to a solicitor's equitable lien over the compensation funds paid out to its clients by Ryanair.³⁸ Bott & Co therefore required Ryanair to reimburse it in respect of its costs in respect of all claims it had paid directly to passengers since instituting that policy in 2016, and to pay Bott & Co its costs in respect of all claims going forward. The second ground was

³¹ *Bott & Co Solicitors Ltd v Ryanair DAC* [2018] EWHC 534 (Ch), §46

³² See Articles, 15.2.2, 15.2.3 and Articles 15.2.8 at Annex B

³³ See Article 15.2.2 at Annex B; N.B. Ryanair has since updated its GTCCs to reduce the time that passengers need to wait before engaging a third party from 28 to 14 days.

³⁴ *ibid*

³⁵ See Article 15.2.8 at Annex B; N.B. Ryanair has since strengthened this position by amending Article 15.2.3 to specify that claims made by third parties must also include the passenger's contact and bank details so that direct payments can be facilitated.

³⁶ See (https://web.archive.org/web/20190801000000*/https://www.easyjet.com/en/terms-and-conditions), last accessed on 7 January 2024

³⁷ See (<https://www.airfrance.co.uk/information/legal/edito-cg-airfrance>), last accessed on 7 January 2024

³⁸ L. Moseley, "What does the recent Bott v Ryanair Supreme Court judgment mean for claims management companies handling Regulation 261 compensation claims?" (Stephenson Harwood, 2022) <<https://www.shlegal.com/insights/what-does-the-recent-bott-v-ryanair-supreme-court-judgment-mean-for-claims-management-companies-handling-regulation-261-compensation-claims>> accessed on 29 July 2024

that certain aspects of Article 15.2 were invalid, either as a result of Article 15 EU261 or because they were "unfair" within the meaning of Article 3 of Council Directive 93/13/EEC (the "**Unfair Contract Terms Directive**").³⁹ During the first instance hearing Bott & Co revealed that Ryanair's policy of paying passengers and bypassing Bott & CO entirely posed an existential threat to the CMC's business: because it no longer received its costs directly from Ryanair, Bott & Co was forced to request payment of its fees from its clients after they had been paid by Ryanair. Bott & Co confirmed that it was only successful in obtaining its fees in this way in 70% of cases, resulting in significant losses for the company. This is a clear demonstration of the effectiveness of the measures adopted by Ryanair, since adopted by other airlines, in seeking to prevent CMCs from bringing EU261 compensation claims on behalf of its customers.

Ultimately, Ryanair was successful in defeating each of Bott & Co's grounds both at first instance and in the Court of Appeal of England and Wales.⁴⁰ The Court of Appeal upheld that the contractual restrictions in Article 15.2 (now widely adopted by other airlines) were consistent Article 15 EU261 and, further, that Bott & Co had no equitable right to receive its costs from Ryanair because it had not provided its clients with "litigation services."⁴¹ Ryanair was therefore free to continue paying compensation directly to passengers without facing the risk of double exposure to Bott & Co in respect of their costs. Although the Court of Appeal did not find it necessary to rule on this specific point, it did not overrule the High Court's findings that Article 15.2 of the GTCCs did not breach the Unfair Contract Terms Directive on the basis that it did not create significant imbalance in the rights and obligations of the parties.⁴² The obvious effect of the Court of Appeal's decision was that Bott & Co and, by extension, other CMCs, faced being deprived of a significant amount of their revenue, as airlines would be free to continue bypassing them to pay passengers directly without the risk of being forced to pay CMCs their costs. This led some legal commentators to conclude that a decisive blow had been struck against the business practices of CMCs.⁴³

However, such conclusions were premature. In 2022 the UK Supreme Court overturned the Court of Appeal's decision and ruled that Bott & Co was, in fact, entitled to a solicitor's equitable lien over its costs.⁴⁴ This decision was reached on the basis of an extension of the lien following another recent decision by the UK Supreme Court in *Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited* [2018] UKSC 21.⁴⁵ In the Supreme Court's view, to qualify for a solicitor's equitable lien, a solicitor simply needed to show that it contributed significantly towards the recovery of a fund on behalf of a client.⁴⁶ The threshold for the solicitor's "significant contribution" was left deliberately unclear, albeit very low.⁴⁷ The Supreme Court did not, however, offer any view on the legality of Article 15.2 of Ryanair's GTCCs, meaning that this part of the Court of Appeal's judgment was left intact. Additionally, the Supreme Court did not provide a binding view on whether the solicitor's equitable lien might be available to other forms of CMC not operated by solicitors.⁴⁸

6 Bott & Co v Ryanair: far-reaching implications?

Compensation payments: bypassing CMCs

³⁹ *Thijssen and Williams*, "Could Confirmation from the UK Court of Appeal Allowing Airlines to Compensate Passengers Directly Help Stamp Out Ambulance-Chasing over Passenger Rights claims in the EU?", 455

⁴⁰ *Bott & Co Solicitors Ltd v Ryanair DAC* [2018] EWHC 534 (Ch); *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143

⁴¹ *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143, §58

⁴² *Bott & Co Solicitors Ltd v Ryanair DAC* [2018] EWHC 534 (Ch), §137

⁴³ *Thijssen and Williams*, "Could Confirmation from the UK Court of Appeal Allowing Airlines to Compensate Passengers Directly Help Stamp Out Ambulance-Chasing over Passenger Rights claims in the EU?", 459

⁴⁴ The Supreme Court, "*Bott & Co Ltd (Appellant) v Ryanair DAC (Respondent)* [2022] UKSC 8 on appeal from: [2019] EWCA Civ 143 – Press Summary" (UKSC, 2022) <<https://www.supremecourt.uk/press-summary/uksc-2019-0054.html>> accessed on 7 January 2024

⁴⁵ *Gavin Edmondson Solicitors Limited v Haven Insurance Company Limited* [2018] UKSC 21

⁴⁶ *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8, §88

⁴⁷ I.A. Mousinho, "*Bott & Co Solicitors Ltd v Ryanair DAC*" in *Air & Space Law*, Vol. 47 No. 4&5 (2022), 518

⁴⁸ *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8, §129

The first important implication of the UK Supreme Court's decision in *Bott & Co* is that Bott & Co is entitled to its costs incurred in bringing claims for compensation for affected passengers under EU261. The decision puts airlines on notice of Bott & Co's equitable lien over those costs, which exposes them to the risk of double payments in the event that they choose to pay compensation directly to passengers. In the UK at least, this principle can be extended to cover all claims brought by CMCs operated by solicitors. In that respect, it can be said that Ryanair's practice of paying passengers directly is no longer as effective to prevent passengers from using third party CMCs to bring EU261 compensation claims.

On the other hand, the decision of the UK Supreme Court is clearly limited in its application. First, it does not affect CMCs not operated by solicitors, and this means that there is nothing to prevent Ryanair and other airlines from continuing to bypass those CMCs, which constitute the majority of CMCs, when paying out compensation. Given Bott & Co's evidence regarding the significant difficulties it experiences in recovering costs from passengers, it is likely that this method will continue to be effective in limiting the ability of third parties to bring EU261 compensation claims, as it is clearly highly damaging to the business models of the majority of CMCs, which operate on a "no win, no fee" charging model.⁴⁹ One of the reasons for the UK Supreme Court's decision to recognise Bott & Co's equitable lien was to bolster access to justice by protecting the ability of solicitors to bring claims on a "no win, no fee" basis, safe in the knowledge that they will be able to recover their costs.⁵⁰ However, one unintended consequence of the decision is that non-solicitor CMCs operating in the UK may be motivated to change their charging models either to increase costs or so that passengers are forced to pay some kind of fee up-front, as those CMCs cannot have the same confidence that they will eventually be able to recover their costs. Such an outcome would constitute a further barrier to passengers claiming EU261 compensation through CMCs, and would clearly be contrary to the UK Supreme Court's intention of assisting affected passengers to vindicate their legal rights. To prevent this eventuality it would be necessary for the UK government to legislate to entitle CMCs to similar protective measures over their costs.⁵¹

It is, however, important to recognise that the decision of the UK Supreme Court is only applicable in the UK. Additionally, because the concept of the solicitor's equitable lien arises in equity, it does not apply in most European jurisdictions, with the exception of the Republic of Ireland, in any event. This imposes a significant geographical restriction on the decision's impact. The practical effect of this is that *Bott & Co* is unlikely to alter the effectiveness of the practice of airline's paying compensation directly to passengers in the majority of European jurisdictions.

Airline GTCCs: restrictions on the use of third-party CMCs

The second important implication of the decision in *Bott & Co* is that it left untouched the finding of the lower courts that Article 15.2 of Ryanair's GTCCs does not breach Article 15 EU261.⁵² This means that, in the UK at least, the contractual restrictions imposed by Ryanair and other LCCs do not infringe upon passengers' EU261 compensation rights. The decisions therefore confirm that airlines are legally entitled to insist that passengers engage directly with them first before they can engage a third party to claim for them. Although the decisions are limited in

⁴⁹ Jordan, "Airlines vs. Claims Agencies... the EU261 fight continues" (n 19)

⁵⁰ *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8, §111; J. Sher, L. McArdle, R. Tookey and R. Dickinson "Bott & Co v Ryanair: The Impact on Direct Compensation in High Volume Low Fee Claims" (DLA Piper, 2022) <<https://www.dlapiper.com/en/insights/publications/2022/03/bott--co-v-ryanair-the-impact-on-direct-compensation-payments-in-high-volume-low-fee-claims>> accessed on 29 July 2024

⁵¹ *Bott & Co Solicitors Ltd v Ryanair DAC* [2022] UKSC 8, 140

⁵² *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143, §64

their application to the UK, it is possible that, given the thoroughness of the Court of Appeal's ruling on this point, European local courts and even the Court of Justice of the European Union might, in future, adopt a similar approach when considering whether Article 15.2 of Ryanair's GTCCs infringes Article 15 EU261.⁵³ At present the only major legacy carrier that has adopted a similar contractual provision in its GTCCs is Air France but, now that their legality has been confirmed in the UK, it is perhaps likely that other legacy carriers in the UK and the EU will look to introduce similar measures.

Although the UK courts have confirmed that there is no issue with Article 15 EU261, it should be remembered that the question of whether Ryanair's contractual measures infringe upon the Unfair Contract Terms Directive has not been answered definitively. In *Bott & Co* both the High Court and the Court of Appeal found that they did not need to answer this on the facts in front of them, although the High Court did speculate that if it did have to decide the matter then it would have found Article 15.2 to be compliant.⁵⁴ It is therefore possible, albeit perhaps unlikely in light of the High Court's comments, that another claimant could be successful in challenging the validity of a contractual provision like Article 15.2 on the basis of there being a significant imbalance in the rights and obligations of the parties for the purposes of Article 3 of the Unfair Contract Terms Directive. Whether the outcome of any such action would be any different is open to speculation: again, the reasoning provided by the Court of Appeal in *Bott & Co* is thorough and there is no obvious reason to presume another court would decide differently, particularly because, in Ryanair's case, the amount of time that passengers now have to wait before instructing a third party CMC has been reduced by 14 days.⁵⁵ However, one advantage that a new claim would have is that it could deal with the issue of standing: in *Bott & Co* the Courts recognised that the claimant was not in fact a party to the contract of carriage, and so the claimant's position in challenging the validity Article 15.2 of the GTCC was questionable.⁵⁶ If an affected consumer were to bring the claim then there could be no question as to standing, and it is perhaps foreseeable that the court hearing the claim might also then be more sympathetic to allegations of unfairness. Until then, the net result of the decision in *Bott & Co* is that contractual restrictions on the way in which affected passengers may bring EU261 claims akin to those found in the GTCCs of Ryanair and other GTCCs are effective in law.

7 Conclusion

Following the growth of the CMC industry in recent years, LCCs like Ryanair have been at the forefront of efforts to increase direct claim handling between passengers and airlines and to regulate the ability of third parties to bring claims for EU261 compensation on behalf of passengers. In the case of Ryanair in particular, the primary method used to combat CMCs has been a combination of paying compensation directly to affected passengers, regardless of whether a claim has been brought by a CMC, and the implementation of contractual requirements that encourage passengers to engage directly with the airline before bringing claims using third parties.⁵⁷ These methods have been adopted by other LCCs and, in at least one other case, by a major European legacy carrier.

The evidence given by *Bott & Co* in the recent litigation before the courts of the UK reveals that these measures have historically been very effective in limiting the revenues of CMCs and, consequently, in threatening their viability as business models. The recent decision of the UK

⁵³ *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143, §64: *N.B. the Court of Appeal of England and Wales has already followed the reasoning adopted in Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143 in respect of the standard required by Article 15.2 EU261 in the recent case of *Dore v easyJet* [2022] EWCA Civ 1553.

⁵⁴ *Bott & Co Solicitors Ltd v Ryanair DAC* [2018] EWHC 534 (Ch), §137

⁵⁵ See (https://www.ryanair.com/gb/en/useful-info/help-centre/terms-and-conditions/termsandconditionsar_197583062), last accessed on 8 January 2024

⁵⁶ *Bott & Co Solicitors Ltd v Ryanair DAC* [2019] EWCA Civ 143, §60

⁵⁷ *ibid.*, §20 – 26

Supreme Court in *Bott & Co* has largely vindicated Ryanair's method of paying compensation directly to passengers, and it has also confirmed the legality of the contractual restrictions imposed in Ryanair's GTCCs.⁵⁸ Although the recognition of *Bott & Co*'s right to a solicitor's equitable lien has made some inroads into the ability of airlines to pay compensation directly to passengers, bypassing CMCs, those inroads are themselves limited. First, the decision of *Bott & Co* is only strictly relevant to CMCs operating in the UK, and as a result it should have no impact on the effectiveness of CMCs operating in civil law systems in EU. Second, the recognition of the solicitor's equitable lien is not applicable to CMCs not operated by solicitors, and so airlines are still perfectly capable of bypassing non-solicitor operated CMCs. On that basis it is currently possible to conclude that the measures taken by European airlines, in particular LCCs like Ryanair, are still effective to restrict the ability of affected passengers to claim EU261 compensation using third parties.

It is, however, possible that this situation may change again. Although the Court of Appeal of England and Wales has speculated that there is no breach, the decision in *Bott & Co* has not answered definitively the question of whether the contractual restrictions imposed by Ryanair and other LCCs may be contrary to the Unfair Contract Terms Directive.⁵⁹ It is possible, albeit arguably unlikely, that a claim brought by a consumer, rather than by a CMC, before another Court in either the UK or the EU, might reach a different conclusion.

⁵⁸ *Mendes de Leon, Introduction to Air Law*, 321

⁵⁹ *Bott & Co Solicitors Ltd v Ryanair DAC* [2018] EWHC 534 (Ch), §137

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Annex A – CMC charging models and fees

CMC	Charging model	Fees charged
Bott & Co ⁶⁰	"No win, no fee." Flat fee.	Under 1,500km and delayed more than 3 hours: GBP 112 1,500 to 3,500km and delayed more than 3 hours: GBP 180 Over 3,500km and delayed between 3-4 hours: GBP 135 Over 3,500km and delayed more than 4 hours: GBP 270
AirHelp ⁶¹	Choice of "No Win, no fee" or "AirHelp Plus" (annual subscription to AirHelp). "No Win, No Fee" based on percentage of compensation recovered.	"Standard Fee" corresponds to 35% of compensation obtained. "Legal Action Fee" corresponds to an additional 15% of amount of compensation obtained (i.e., a total of 50%). ⁶² "AirHelp Plus" annual charge of EUR 24.99.
Flightright UK ⁶³	"No win, no fee." "No Win, No Fee" based on percentage of compensation recovered.	"Success Fee" corresponds to 20-30% of compensation obtained. If necessary to instruct lawyers, additional fee of 14% of compensation obtained is deducted (i.e., a total of 34-44%).
Flightclaimer.com ⁶⁴	"No win, no fee." Flat fee.	Under 1,500km and delayed more than 3 hours: GBP 92 1,500 to 3,500km and delayed more than 3 hours: GBP 106 Over 3,500km and delayed between 3-4 hours: GBP 133 Over 3,500km and delayed more than 4 hours: GBP 187 ⁶⁵
AirAdvisor ⁶⁶	"No win, no fee." "No Win, No Fee" based on percentage of compensation recovered.	"Success Fee" corresponds to 30% of compensation obtained. If necessary to instruct lawyers, additional fee of 20% of compensation obtained is deducted (i.e., a total of 50%).

⁶⁰ See (<https://www.bottonline.co.uk/flight-delay-compensation/fees>), last accessed on 7 January 2024

⁶¹ See (<https://www.airhelp.com/en-gb/our-fees/>), last accessed on 7 January 2024

⁶² A "Legal Action Fee" is charged if AirHelp is required to commence legal proceedings against the airline in question.

⁶³ See (<https://www.flightright.co.uk/hp3>), last accessed on 7 January 2024

⁶⁴ See (<https://www.flightclaimer.com/how-it-works>), last accessed on 7 January 2024

⁶⁵ According to the Flightclaimer.com pricing page on its website, these fees are chargeable on the basis that no lawyer is involved.

⁶⁶ See (<https://airadvisor.com/en/pricelist>), last accessed on 7 January 2024

CMC	Charging model	Fees charged
Travelrefund.com ⁶⁷	"No win, no fee." Flat fee.	Under 1,500km and delayed more than 3 hours: EUR 75 1,500 to 3,500km and delayed more than 3 hours: EUR 115 Over 3,500km and delayed between 3-4 hours: EUR 85 Over 3,500km and delayed more than 4 hours: EUR 165 ⁶⁸

⁶⁷ See (<https://travelrefund.com/prices/>), last accessed on 7 January 2024

⁶⁸ According to the Travelrefund.com pricing page on its website, these fees are chargeable on the basis that no lawyer is involved.

Annex B – Article 15.2 of Ryanair's GTCCs introduced on 26 July 2016 (emphasis added)

15.2

15.2.1 EU261 Compensation Claims This Article applies to claims for compensation under EU Regulation 261/2004 .

15.2.2 Passengers must submit claims directly to Ryanair and allow Ryanair 28 days or such time as prescribed by applicable law (whichever is the lesser) to respond directly to them before engaging third parties to claim on their behalf. Claims may be submitted here.

15.2.3 Ryanair will not process claims submitted by a third party if the passenger concerned has not submitted the claim directly to Ryanair and allowed Ryanair time to respond, in accordance with Article 15.2.2 above.

15.2.4 Articles 15.2.2 and 15.2.3 above will not apply to passengers who do not have the capacity to submit claims themselves. The legal guardian of a passenger who lacks capacity may submit a claim to Ryanair on their behalf. Ryanair may request evidence that the legal guardian has authority to submit a claim on the passenger's behalf.

15.2.5 A passenger may submit a claim to Ryanair on behalf of other passengers on the same booking. Ryanair may request evidence that the passenger has the consent of other passengers on the booking to submit a claim on their behalf.

15.2.6 In any event, save for Article 15.2.4 and 15.2.5 above, Ryanair will not process claims submitted by a third party unless the claim is accompanied by appropriate documentation duly evidencing the authority of the third party to act on behalf of the passenger.

15.2.7 Passengers are not prohibited by this clause from consulting legal or other third party advisers before submitting their claim directly to Ryanair.

15.2.8 In accordance with Ryanair's procedures, any payment or refund will be made to the payment card used to make the booking or to the bank account of a passenger on the booking.

15.2.9 Ryanair may request evidence that the bank account is held by the passenger concerned.