

## Judgment

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### COURT IN THE HAGUE

Subdistrict section

Location The Hague

AmO

Case number: 773096\RL EXPL 08-17394

#### Judgment in the case of:

**the private company with limited liability EUclaim B.V.,**

with offices and principal place of business in Brummen,

Plaintiff,

representative *ad litem*: initially *mr. J.M. van Meggelen*, currently *mr. R. Bos* and *mr. C.W.J. de Bont*,

and

**the private company with limited liability TUI Airlines Nederland B.V., also acting under the name ArkeFly,**

with offices and principal place of business in Rijswijk,

Defendant,

representative *ad litem*: *mr. R.L.S.M. Pessers* and *mr. A.K. Sjouw*.

The Parties will hereinafter be referred to as: "EUclaim" and "ArkeFly".

#### Proceedings

1. The subdistrict court has taken cognisance of the following documents which shall be deemed repeated and incorporated herein;

- the interlocutory ruling of 22 April 2009 and the documents referred to therein;
- the additional statement of ArkeFly with exhibits;
- the additional statement of EUclaim with exhibits;
- the statement of defence of ArkeFly;
- the order of the case list judge of 19 May 2010, requesting ArkeFly to submit translations of documents in a foreign language which it submitted to the court;
- the deed of ArkeFly with exhibits.

### **Further assessment**

2. The subdistrict court persists in its interlocutory ruling of 22 April 2009, which shall be deemed repeated and incorporated herein.
3. In that interlocutory ruling, it was established that EUclaim is authorised to enforce this claim against ArkeFly. Furthermore, it was established that EC regulation 261/2004 (hereinafter: the Regulation) applies to this case. The assessment of the question whether ArkeFly, in view of the provisions of such regulation is under an obligation to pay compensation to [XXX] and [YYY] because they arrived at the destination airport about 28 hours later than the scheduled arrival, was deferred in this interlocutory ruling pending the ruling of the European Court of Justice (hereinafter: the European Court) in response to the requests for preliminary rulings in cases numbers C-432/07 and C 402/07.
4. Meanwhile, the European Court has given the decision referred to above in its ruling dated 19 November 2009, NJ2010/137, LJN: BK4714 (hereinafter: the Sturgeon ruling). In this ruling, insofar as it is relevant for this case, it was decided that the right to compensation granted under the Regulation as referred to in Article 7, also applies in the event of a prolonged delay, unless the airline proves that the delay is a consequence of extraordinary circumstances which, although all reasonable measures have been taken, could not be prevented, i.e. circumstances beyond the actual control of the airline. According to the European Court, a prolonged delay is concerned if the final destination is reached three or more hours after the arrival time originally scheduled by the airline.
5. In response to this ruling, ArkeFly argued that requests for a preliminary ruling should be made again, among other things because the Sturgeon ruling is contrary to the IATA ruling of an earlier date, 10 June 2006 given by the European Court (NJ 2006/372, LJN: AU9523) and because the interpretation of the European Court of the Regulation in the Sturgeon ruling is contrary to the Montreal Convention (dated 28 May 1999, Trb. 2001/91) and various principles of Community law.  
 In this regard, it is considered that the national court is bound to that which the European Court has ruled in regard to the interpretation or validity of an act of an institution of the community (such as the Regulation). Although the national court is free to turn to the European Court again with further requests for preliminary rulings if it deems this necessary, in such a case the validity of the ruling cannot be addressed (European Court 5 March 1986 (Wünsche), LJN BE6107). Submitting the questions formulated by ArkeFly to the European Court would in fact mean addressing the validity of the Sturgeon ruling, which, as stated above, is not permitted. Furthermore, according to the subdistrict court, the Sturgeon ruling is sufficiently clear and does not leave any room for doubt in regard to the validity of the Regulation. Therefore, the Sturgeon ruling does not constitute a reason for the subdistrict court to submit any further requests for preliminary rulings to the European Court. Therefore, the subdistrict court will now settle this case and use the decisions in the Sturgeon ruling as a basis.

6. The defence of ArkeFly, in which it alleges that not a cancellation, but rather a delay was concerned in this case does not succeed. For, it follows from the decision of the European Court in the Sturgeon ruling that in the case of [XXX] and [YYY] – in which the final destination was reached approx. 28 hours later than originally planned – the compensation referred to in Article 7 of the Regulation can also be claimed.
7. This brings the subdistrict court to the force majeure invoked by ArkeFly on the basis of Article 5 (3) of the Regulation. In the Sturgeon ruling, the European Court decided in fact that this article applies by analogy in the event of a prolonged delay.
8. ArkeFly invokes the following circumstances in regard to the situation of force majeure. The delay was caused by technical problems, namely a fault in the computer system and a hydraulic fault with regard to a part of the flight controls of the airplane to be used for the flight of [XXX] and [YYY]. The problems were discovered at the Puerta Plata airport (Dominican Republic) during a flight preceding to the flight of [XXX] and [YYY]. In order to be able to solve the technical problems, parts and technical staff had to be flown in, which was impeded by a tropical storm. Eventually, another plane of ArkeFly was used for the flight booked by [XXX] and [YYY].
9. Based on settled case law of the European Court, a technical problem of an airplane is not included in the notion of “extraordinary circumstances” referred to in Article 5(3) of the Regulation, unless this problem is caused by events which, because of their nature or origin are not inherent to the ordinary activities conducted by the airline involved and beyond its actual control. (European Court 22 December 2008 (Wallentin-Hermann), NJ 2009/230-, LJN BG9388). According to the subdistrict court, the interrelated circumstances alleged by ArkeFly should be deemed to have arisen from events that are inherent to the ordinary activities of ArkeFly. Therefore, its plea of force majeure does not succeed.
10. In view of the considerations described above, the defence of ArkeFly does not succeed. Since the other conditions for awarding of compensation based on Article 7 of the Regulation have been met, the claim for the payment of twice the amount of €600,00 is allowable. The requested statutory interest on this amount is allowable with effect from 15 June 2008, because ArkeFly has been in default since that date pursuant to a letter by EUclaim dated 30 May 2008, as evidenced by allegations by EUclaim which have not been contested. Any other applications in regard to interest will be dismissed.
11. The extrajudicial collection costs claimed are not allowable, since ArkeFly has disputed the claim up to now and EUclaim has not responded to the defence by further substantiating its allegations.
12. ArkeFly will be ordered to pay the costs of the proceedings as the party found to be at fault.

## **Decision**

The subdistrict court:

- I. orders ArkeFly to pay to EUclaim, upon due receipt, an amount of €1,200.00 increased by statutory interest on this amount from 15 June 2008 until the day of full payment.
- II. orders ArkeFly to pay the costs of the proceedings, up to now estimated at €575.30 for EUclaim, €300.00 of which is salary for the authorised representative;

- III. declares this ruling to have immediate effect to this extent;
- IV. dismisses all other applications.

This judgment was pronounced in open court by subdistrict judge *mr.* H.S. Wiarda on 14 July 2010.

[illegible signatures]