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Note from the Editors

Welcome to the first and somewhat belated Aviation Briefs under our joint editorship. We hope you enjoy our first compilation of legal developments, news and articles from this region and beyond.

We would be grateful to consider for publication any suggested contributions (please send in word version by email) and we will attempt to be responsive to any comments and suggestions you may have to make this a valued, newsworthy and insightful publication.

Best wishes,

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Recent Cases

Leonie's Travel Pty Ltd v Qantas Airways Limited [2010] FCAFC (4 May 2010)

In a decision which could potentially cost international airlines more than $26 million, on 4 May 2010, the Full Court of the Federal Court of Australia unanimously set aside the decision of the primary judge in finding that Qantas wrongly refused to pay travel agents commission on fuel surcharges levied on international flights.

In 2006, Leonie's Travel brought a representative proceeding against Qantas and other airlines (Air New Zealand, British Airways, Cathay Pacific Airlines, Singapore Airlines and Malaysian Airlines) alleging that the airlines had breached the IATA Passenger Sales Agency Agreement (Agency Agreement) which the travel agents were parties to. At an early stage, the parties agreed that, for the purposes of determining liability, the proceeding would continue against Qantas only.

The Agency Agreement, which incorporates a number of rules, resolutions and IATA directives, outlines the relationship between the airlines and travel agents and the basis on which travel agents can sell tickets and obtain commissions. Relevantly, Section 9 of the Sales Agency Rules outlines the "Conditions for Payment of Commission or Other Remuneration".

In 2004, as a consequence of the increasing fuel prices, Qantas introduced a fuel surcharge for international and domestic carriage. At that time, Qantas told travel

agents that a base commission would be paid on the domestic surcharge but not for international travel.

The issues before the primary and appeal Courts was whether Qantas was entitled to unilaterally determine that no commission would be payable on that part of the costs of a ticket which relates to the fuel surcharge.

At the primary hearing, Qantas alternatively submitted that it was entitled not to pay the travel agents any commission on the fuel surcharge as follows:

1. The fuel surcharge was not and never had been part of the fare of transportation in accordance with Qantas' tariffs and it was not included in the express "fares applicable" in section 9.4.1(b) of the Sales Agency Rules;
2. The fuel surcharge was not included in the expression "other charges collected by the Agent" in section 9.4.1(b) of the Sales Agency Rules;
3. Even if the fuel surcharge formed part of the applicable fare pursuant for the purpose of clause 9.4, the commission was not payable because Qantas had determined pursuant to clause 9 of the Agency Agreement that the commission would only be payable on domestic itineraries.

The primary judge rejected the first and second submissions but accepted the third submission and dismissed the claim. In coming to his decision, Moore J distinguished the decision of *Association of British Travel Agents Ltd v British Airways plc* [2000] 2 All ER (Comm) 204 in which that Court of Appeal in England found that clause 9 of the Agency Agreement did not confer a power on airlines to unilaterally the rights and obligations of the parties in the Sale Agency Rules. Moore J found that in the present case the observations of the Court of Appeal on the operation of clause 9 of the Agency Agreement are probably only obiter dicta, and more importantly, there is material difference between the terms of the Sales Agency Rules considered in that case and those that must be construed in the present.

The Full Court did not agree that the *British Airways* case was distinguishable nor that the observations made by Court of Appeal in England were in obiter. In fact, the Full Court found that the *British Airways* case was correct and should be followed in the present case. Accordingly, the orders made by Moor J were set aside and the proceeding was remitted back to Moore J for further consideration and to make the appropriate declarations and orders as to damages.

Eds.

Air Tahiti Nui Pty Limited v McKenzie **[2009] NSWCA 429 (21 December 2009)**

The respondents to the appeal (the plaintiffs) claimed for injuries suffered on an Air Tahiti Nui flight from New York to Tahiti on 15th November 2007. Consequently, their claim involved international carriage by air and was argued under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) with the applicable law being Montreal Protocol No 4 (Montreal) and Guadalajara Conventions (Guadalajara) as defined in section 5(1) of the Act.

The primary issue involved establishing who the 'contracting carrier' was and who the 'actual carrier' was for the flight in question. Article II of Guadalajara provides that the contracting and actual carriers are both subject to Warsaw (under Art XXIII of Montreal this is a reference to Montreal) and hence liable, the contracting carrier for the agreed carriage and the actual carrier for the carriage performed by it.

The appellants argued that the respondents had taken action against the wrong company and that it was not the carrier. They argued that the carrier was Air Tahiti Societe Anonyme ("ATSA"), the respondent's parent company, and therefore that the plaintiffs had sued the wrong company.

In addition to this issue a secondary issue of estoppel, associated with a possible extension of the two year limitation period which expired four days after the claim was filed, was argued.

As observed in the joint judgment of Allsop, P and Handley AJA, "article III of Guadalajara provides that the acts and omissions of the contracting and actual carriers and their servants and agents bind both carriers."

On the issue of whether Air Tahiti Nui was the contracting carrier, the appellant argued that, even if it was a party to a contract with the plaintiffs, it did not contract "as a principal" because its only obligation was to procure performance by ATSA as the actual carrier. It was argued that ATSA was an undisclosed principal, and the appellant was not "a principal." Citing the *travaux préparatoires* (working papers of the Diplomatic Conference establishing Guadalajara) the majority judgment concluded that the phrase "as a principal" describes the capacity of a person who "makes an agreement for carriage" and an agent who "makes" such an agreement, such as a travel agent, is not a contracting carrier.

The court acknowledged that travel and transport intermediaries may procure a contract of carriage as a broker or agent and that in such cases they are not acting as principals. However, where an operation undertakes a contractual obligation for carriage, even if they cannot perform the contract themselves, but have to subcontract with an actual carrier, they are acting as a principal. The court turned to the tickets, reflecting the contractual basis of the carriage, to conclude that the appellant was a principal and hence the contracting carrier.

> *"It was common ground that contracts were formed when the tickets were issued and paid for and the appellant did not argue that there was no contract until the plaintiffs first boarded an Air Tahiti Nui aircraft."*

By way of summary, the court held that ATSA was the actual carrier and that both the "actual carrier" and "contracting carrier" are subject to the Warsaw and Montreal Conventions and the acts and omissions of both carriers bind each other.

Further, the identity of a contracting party who made the "agreement for carriage" is to be determined objectively, examining and construing any relevant documents; here the air tickets for international carriage were issued by "Air Tahiti Nui" (Blue 2) for travel Sydney–New York – Papeete – Sydney. These contractual arrangements for carriage were made with the plaintiffs by a travel agent on behalf of the appellant as principal.

The court, on the estoppel issue, found that if the appellant was not the contracting carrier by the rules governing formation of contract, nevertheless, it was estopped from denying that position by its representations and those of its solicitors.

***QBE Workers Compensation (NSW) Ltd v BAe Systems Regional Aircraft Ltd* [2010] NSWSC 82 (19 February 2010)**

Between 1990 and 1993, Ms Chew flew on an aircraft manufactured by the defendant as part of her duties as an air hostess. She commenced workers compensation proceedings in 1995 alleging that she suffered an injury (Multiple Chemical Sensitivity) from exposure to fumes, which were said to contain a toxic substance (TOCP), entering the aircraft cabin. In the alternative, she alleged that her "injury" under the *Workers Compensation Act* 1987 was constituted by the aggravation of a pre-existing condition (Epstein Barr virus or glandular fever).

The plaintiff's solicitors were the solicitors on the record for the defendant (Ansett and EastWest airlines) in workers compensation proceedings. The plaintiff was the workers compensation insurer for both airlines. The employer successfully defended the prior claim as to the presence of TOCP in the fumes, at any level capable of causing harm to the health of the crew or passengers. Counsel for the airlines conceded that Ms Chew suffered an injury on the alternative basis. An award of $232,000 was made in her favour in 1999.

The plaintiff commenced proceedings in September 2003 under s151Z of the *Workers Compensation Act* 1987.

Latham J in his judgment referred to Howie J in *Compensation (NSW) Ltd v BAe Systems Regional Aircraft Ltd* [2005] NSWSC 232 where his Honour observed [at 61] that:

> *"The possibility of QBE proving that BAe ought reasonably to have foreseen the risk of injury from non toxic fumes to some person such as Ms Chew and should reasonably have taken some action to eliminate that risk seems to me to be so remote as to be realistically nonexistent."*

The plaintiff appealed to the Court of Appeal against Howie J.'s decision in *QBE Workers Compensation (NSW) Ltd v BAe Systems Regional Aircraft Ltd (formerly British Aerospace Commercial Aircraft Ltd) Co.* [2006] NSWCA 131. On 19 May 2006, the Chief Justice, with whom Tobias JA and McColl JA agreed, delivered an extempore judgment accepting that Howie J. had set aside the Statement of Claim on two alternative grounds, (1) that the proceedings had insufficient prospects of success and (2) that the proceedings were an abuse of process.

The Chief Justice noted that "an issue has arisen in this Court as to the proper interpretation of paragraphs 5 and 6" of the Statement of Claim. The word "fumes" was used in [5], whereas [6] added a reference to TOCP. The presence of those words in [6] of the Statement of Claim became central to the disposition of the appeal.

On 29 May 2006, the Court of Appeal ordered costs in the proceedings before Howie J. and on the appeal against the appellant/plaintiff : *QBE Workers Compensation (NSW) Ltd v BAe Systems Regional Aircraft Ltd (formerly British Aerospace Commercial Aircraft Ltd) Co (No. 2)* [2006] NSWCA 135. The basis of that decision was expressed at [14] to [16] of the judgment and quoted by Latham J:

> *"It can be seen that there were two elements here; the presence of TOCP and its toxicity. The submissions indicate that QBE was relying on the presence of TOCP in the fumes but, on one interpretation, it was not relying on the toxic quality of TOCP. However, the position was far from clear. Such ambiguity as existed was the responsibility of the appellant. Throughout the submissions before Howie J., QBE maintained a right to advance a case inconsistent with the findings of the Compensation Court."*

Latham J also observed that "the appellants did not at trial, in its Notice of Appeal or in its written submissions on appeal, characterise the reference to TOCP as essentially descriptive." His Honour placed emphasis on the fact that the appellants "insisted, until questioned from the Bench in the course of oral submissions on appeal, on maintaining its pleading."

Latham J emphasised that "the whole of the proceedings before Howie J. and in this Court turned on the presence of words which the appellant now accepts to have been surplusage."

After a lengthy surveying of the procedural history and arguments His Honour concluded "that attempts to formulate a basis for liability in negligence essentially sought to grapple with [the] conundrum [of] how the plaintiff [could] prove

foreseeability on the part of the manufacturer of the aircraft when there were no identifiable unsafe levels of chemicals in the jet oil fumes that were capable of causing injury to anyone other than a person of unusual susceptibility?"

Latham J concluded that this could not be done "without contradicting the findings made by Moran J (in the Compensation Court) and adopting the converse of the position taken by the plaintiff's representatives in those proceedings." His Honour dismissed the plaintiff's Notice of Motion pursuant to Rule 13.4(1) of the Uniform Civil Procedure Rules.

Marshall v Fleming **[2010] NSWSC 86 (19 February 2010) - A Most Convenient Forum?**

The plaintiffs in this factually complex and challenging case, argued before Rothman J, were the wife and child of Neil Marshall, who was killed in the aircraft accident. The accident occurred over the Spencer Gulf on a Whyalla Airlines flight.

The defendants were members of a New York firm of attorneys, resident in New York, who represented the relevant plaintiffs in Proceedings in Pennsylvania. The defendants moved to dismiss the proceedings, or have them permanently stayed, because the Court was not a convenient or the proper forum for the hearing of the proceedings.

The defendants argued that the matter should be heard in New York. The substantive proceedings involved allegations of breach of contract and breach of duty (tortious, contractual and statutory) by the defendants in their capacity as legal practitioners representing, amongst other persons, the two plaintiffs in these proceedings, as plaintiffs in proceedings for damages arising from an airline crash.

The cause of action in negligence was based, in part, upon negligent advice as to the content of Pennsylvania law. The advice, which was alleged to be negligent, was drafted in New York and communicated to the agent of the plaintiffs (Turner Freeman) in Sydney.

Forum non conveniens

The defendants relied upon a number of factors to submit that the Court was not a convenient forum. Those factors were: that the defendants were uninsured for an award of damages made by the Australian Court but were insured for an award of damages made in a US court; the proper law of the plaintiffs' causes of action was not in New South Wales; the cost of proceeding in New South Wales and the residence of the lay and expert witnesses; the existence of jurisdiction in the courts of New York and Pennsylvania; the cost of the defendants attending court in New South Wales; and the residence of the plaintiffs. Further, the defendants

raised the inability of the plaintiffs, if successful, to enforce the judgment of the Court in New York

The court drew upon the test for *forum non conveniens*, approved by the High Court of Australia in *Puttick v Tenon Ltd* (2008) 238 CLR 265 which in turn had relied on its judgment in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

In *Voth* the Court held that a defendant will ordinarily be entitled to a permanent stay of proceedings if the defendant persuades the local court that, having regard to the circumstances of the particular case, and the availability of an alternative foreign forum, the local court is a clearly inappropriate forum for determination of the dispute. In *Voth* the Court pointed out that the focus must be 'upon the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum.'

The court found that the defendants' contention that the plaintiffs resided in the UK was not supported by evidence. The second plaintiff and the sole beneficiary of the estate who suffered the ultimate damage lived in Albury, in New South Wales. While the first plaintiff, the personal representative of the estate and the trustee, lived in the UK she was an Australian permanent resident at all material times during the plaintiffs' retainer of the defendants. The Court found that New South Wales was the location with the closest connection, notwithstanding the comparative nature of the test.

The defendants argued that the plaintiffs would not be able to enforce the judgment of the New South Wales Court in New York. After an analysis of the relevant law the Court was not satisfied that the New York courts would refuse to enforce a judgment rendered in New South Wales.

Ultimately, the Court dismissed the defendants' motion and ruled that the defendant bear the costs.

Eds.

A Curtain Call for DVT

The case of *Twardowski v American Airlines* 535 F.3d 952 (9th Cir. 2008) has sealed the capsule of opportunistic DVT claims once and for all. Despite the spectre of *Husain v Olympic Airways* (540 U.S. 644 [2004]), a case promising more to plaintiff lawyers than it could ever deliver, and the edict for flexible interpretation that resonates back to the words of O'Connor, J in *Air France v Saks* (470 U.S. 392 [1985], 405) the door to recovery has been shut in each of the UK, US and Australian jurisdictions.

Arguably, we have reached the point where lawyers, in a professional sense, can no longer justify encouraging claimants to turn to litigation. In fact to do so may come close to professional negligence unless the factual circumstances of the

particular case fit within the narrow reading of *Husain*, itself an unlikely possibility in the context of DVT claims.[1]

While the law has set its face against recovery for DVT claims the problems associated with the occurrence of DVT arguably require a broader response. Given that nearly 1 billion passengers are carried on international flights annually with projections of 2.75 billion passengers on all flights by 2011, the occurrence of DVT represents a substantial problem for civil society and the aviation industry. Multiple sources suggest that there are around 100,000 DVT related deaths in the US each year. While the heat may have gone out of the issue in a jurisprudential sense it is not utopian to seek another response, one governed by a humanitarian concern for people's welfare. It is doubtful whether the provision of in-flight videos warning of the dangers of DVT and urging passengers to engage in a range of stretching activities represents a sufficient industry response to this pernicious and ongoing problem. Equally, the practice of wearing compression socks or compression tights, which also reduce the risks, is arguably not widely followed among passengers. This is further compounded by the rise of low cost carriers on longer haul routes, airlines which are unlikely to provide complimentary compression socks.

Is it possible or desirable for air carriers to collectively engage in action, under the leadership of IATA, to further reduce the risks or is it the case, particularly in view of the increased incidence of obesity and diabetes, that passengers should take responsibility for their personal reaction to matters which may be neither unusual or unexpected and external to the operation of the aircraft? The jurisprudential act may be over but the curtain has not entirely been drawn on the problem in a broader sense.

Eds.

The Civil Aviation Safety Authority in the Courts

In *Trans Air Ltd and Civil Aviation Safety Authority* [2010] AATA 42 (22 January 2010), is a private company which was incorporated in Papua New Guinea, had its application for a foreign aircraft Air Operator's Certificate (FAAOC) refused by the CASA. Trans Air operates predominately medivac flights between PNG and Australia. When the Applicant applied for the FAAOC, CASA requested that it provide various documents "including but not limited to lease agreements and payments, maintenance releases (or equivalent documents), trip records, pilot records, invoices, passenger or cargo manifests and flight and duty records".

[1] The *Husain* criteria apply narrowly to the following circumstances (i) where airline personnel are given notice of a pre-existing condition, (ii) where they are capable of taking reasonable alleviating steps that will not interfere with the normal operations of the aircraft and (iii) where, in those circumstances, they elect to do nothing.

CASA gave the following reasons for refusing the application on the following basis that "*it appears [Trans Air] have conducted flights to and from Australia that were not authorized. This is a matter CASA is investigating. Therefore, I cannot be satisfied that aviation safety would not be compromised before that investigation is complete and the documents referred to above, received*." Subsequently, Trans Air applied to the AAT for a review of that decision presided over by Deputy President P E Hack SC ("Hack DP").

Hack DP observed that the documentation filed by both parties in the hearing were not satisfactory or helpful. Curious he observed that:

> "*… many of the matters ultimately relied upon by CASA were not identified in its Statement of Facts and Contentions. That document runs to some 49 pages of text of which approximately 46 pages are devoted to matters concerning the operations (and faults) of Lessbrook, the Australian company formerly operated by Mr Wright. That prompted Trans Air to lodge an equally diffuse document that added, as well, irrelevant assertions about the motives of CASA relating to the operations of Lessbrook. The pattern continued in Trans Air's written submissions and their irrelevant attacks upon CASA's decision-making processes and in CASA's somewhat truculent written submissions in reply.*"

The conduct of the proceedings as outlined by Hack DP appeared to be peculiar to say the very least.

Without getting into the detail, Hack DP found that, notwithstanding the submissions made by CASA, Hack DP "*was satisfied of the matters in s 28(1)(a) and (b) of the [Civil Aviation] Act and, there being no suggestion that paragraphs (c), (d) and (e) of the sub-section have application in the present case, a FAAOC must be issued to Trans Air.*"

Less than seven days later, Hack DP was called upon again to consider a refusal by CASA to issue a FAAOC in *Transglobal Airways Corporation and Civil Aviation Safety Authority* [2010] AATA 68 (29 January 2010). In this matter, the Applicant, the holder of an Air Carrier Operating Certificate issued by the Civil Aviation Authority of the Philippines, applied to the AAT for an order to stay the decision by CASA to refuse the FAAOC pending the determination of the application for review pursuant to section 41(2) of the *AAT Act 1975*. Counsel for CASA, Ian Harvey, submitted that the AAT did not have such a power, despite the decision of Siopis J in *Civil Aviation Safety Authority v Hotop* [2005] FCA 1023 (the Polar Aviation case).

However, Hack DP found that the facts in the Polar Aviation case had close factual similarities to this case and rejected Harvey's submission that the relevant part of the decision was in obiter. CASA also submitted that if an order under s 41(2) is made in positive terms it will have the effect that an AOC is being issued without CASA having the state of satisfaction required by s 28(1) of the CAA and

without the Tribunal having had any opportunity to consider that question and that the power in s 41(2) could not be intended by the Parliament to be used in such a way as to potentially expose an AOC holder to being in breach of a statutory condition. Hack DP rejected these submissions stating in string terms that "*It seems absurd to suggest that the Parliament could not have contemplated that the power might not be used where CASA had refused to renew an AOC*". Hack DP rejected further submission advanced by CASA as "*puzzling*". Moreover, Hack DP was satisfied that the AAT to make the interim order sought.

Curiously, Polar Aviation has recently featured in the following matters before the Federal Court of Australia:

- *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2010] FCA 367 (16 April 2010); and
- Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 2) [2010] FCA 404 (29 April 2010).

These decisions relate to an application by Polar Aviation and its director for leave to file proceedings out of time against CASA and some of its officers alleging that the respondents had wrongfully and in breached the rights given to the applicants by and pursuant to the civil aviation legislation, misfeasance in office and negligence in purported exercise of the respondents' powers under the civil aviation legislation. For varying reasons, the application was denied.

Eds.

Neck injury not caused by an Article 17 accident

The plight of economy class travellers has long been recognised by the travelling public, and in recent years have come to the attention of the Courts. Whilst there is a broadly sympathetic tone to the discourse, in a judgment at the end of 2009, the District Court of NSW dismissed a passenger's claim against an airline for personal injury, having been satisfied that an economy seat's inability to fully recline due to the positioning of a bulkhead behind was not an "accident" for the purposes of Article 17 of the Amended Warsaw Convention.

The passenger in this case was travelling by air from London to Shanghai in economy class. The passenger claimed that during that flight he suffered an injury to his neck and cervical spine which led to acute pain and ongoing disability. He received a mixture of medical treatment, including some vigorous Chinese massage and underwent further medical treatment upon his return to Australia.

The passenger sued for damages under Article 17 of the Warsaw Convention as amended at the Hague of 1955 and Montreal Additional Protocol No. 4, and under the relevant parts of the Civil Aviation (Carrier's Liability) Act 1959.

The passenger made a number of allegations, including that the seat malfunctioned and failed to recline due to some defect in the seat. He alleged that he asked to be re-seated, however was refused as the flight was full. There was some dispute as to the events that took place on the flight, with the Judge ultimately preferring the evidence of the airline, which included evidence by video link by foreign cabin crew.

The passenger was seated in the last row of economy class and the Court found that his seat was prevented from fully reclining by the bulkhead directly behind it, which separated economy class from the galley. The Court made further findings that there was no malfunction of the seat, after evidence was presented that maintenance records and other documents failed to identify any defect with the specific seat.

The Court was persuaded that had there been a problem with the mechanism of seat 40F, it is more likely than not that it would have been noted in the maintenance records of the airline. The Court accepted that the seat reclined as far as it was able. The Court also found that the passenger developed neck pain due to an underlying degenerative condition made worse by the posture he adopted in his seat, and that this did not constitute an "accident" under the Convention. The Court was persuaded that any limitation in the movement of the seat was part of the normal operation of the aircraft and there was no "unusual or unexpected event external to the passenger" which caused his injuries.

Of note were the Court's comments that, knowing his pre-existing neck and back problems, the passenger could have asked for some accommodation of his condition. The Court did not accept the passenger's evidence and whilst remaining sympathetic to the passenger's unfortunate experience, ordered judgment in favour of the airline and ordered that the passenger pay the airline's legal costs.

Whilst not a binding authority, the judgment is one more which airlines may rely upon in these types of cases. The passenger did not proceed with an appeal.

Jeanette Woollacott, HWL Ebsworth Lawyers

News from the United States

Arik v. The Boeing Co. No. 08 L 012539, slip op. (Ill. Cir. Ct. Feb. 18, 2010)

On 18 February 2010, Cook County Circuit Court ("Cook County") Presiding Judge William D. Maddux issued a decision in *Arik v. The Boeing Co.* denying a *forum non conveniens* ("FNC") motion arising out of the crash of a McDonnell Douglas MD-83 aircraft operated as Atlasjet Flight 4203 on November 30, 2007 in mountainous terrain near Keçiborlu, Turkey. Plaintiffs, who were representatives of thirty-two of the fifty-seven accident decedents on this domestic flight, alleged causes of action based on product liability, wrongful death and negligence. Defendants included Honeywell International Inc., which manufactured the Enhanced Ground Proximity Warning System ("EGPWS") at issue, as well as Boeing and McDonnell Douglas.

This decision underscores the following points. First, Cook County is the single most problematic venue in which to obtain dismissal pursuant to the FNC doctrine of actions in the U.S. that arise out of foreign aviation accidents that bear little or no connection to the U.S. Second, the problematic nature of Cook County is compounded by the fact that Boeing has its headquarters in Chicago, Illinois. Third, FNC motions filed in Cook County relating to major aviation accidents often are decided by Judge Maddux, whose rulings tend to favor plaintiffs, and plaintiffs frequently attempt to game the system to increase the likelihood that Judge Maddux will decide an FNC motion. Fourth, despite the natural desire of defendants to want to avoid litigating in Cook County, defendants should take great care when deciding whether to move for dismissal of a case on FNC grounds to an alternate U.S. state, as encouraged by the Illinois appellate courts in *Vivas v. The Boeing Co.* 392 Ill. App. 3d 644, 911 N.E.2d 1057 and *Thornton v. Hamilton Sundstrand Corp.* No. 1-08-2734, slip op. (Ill. App. 1 Dist. Aug. 31, 2009). Fifth, defendants must aggressively look for bases by which to remove lawsuits commenced in Cook County (*e.g.*, Multiparty, Multiforum Trial Jurisdiction Act) to federal court to increase the likelihood of a favorable FNC ruling.

In *Arik*, defendants moved for FNC dismissal in favor of litigation in Turkey or, alternatively, the State of Washington. In evaluating the motion, the court addressed: (1) whether the proposed alternative forums were adequate to adjudicate the parties' dispute; (2) the degree of deference to be accorded plaintiffs' choice of forum; and (3) whether the balance of public and private interest factors strongly favored dismissal.

Judge Maddux found that Turkey was an adequate alternative forum. The court noted that defendants had agreed to consent to jurisdiction in Turkey and accept service of process there, which the court found established its availability.

Furthermore, the court rejected plaintiffs' argument that the lack of pre-trial discovery under Turkish law and its requirement that a fee be paid by plaintiffs prior to filing a lawsuit rendered Turkey an inadequate forum.

Judge Maddux's decision in *Arik* highlights the continuing difficulties encountered by aviation defendants seeking FNC dismissal of foreign aviation accidents that bear little or no connection to the U.S. It also highlights a troubling trend for defendants: Judge Maddux continues to decide FNC motions in major aviation accidents filed in Cook County – even if the cases were not initially assigned to him. Plaintiffs in *Arik* gamed the Cook County court system to increase the likelihood that Judge Maddux would decide any FNC motion.

Specifically, plaintiffs' counsel filed multiple lawsuits arising out of the Atlasjet Flight 4203 accident and, although Judge Maddux was not assigned the case originally, it came before him by motion to consolidate the separate actions. He then decided the FNC motion.

The fact that Judge Maddux is deciding FNC motions in most major foreign aviation accidents filed in Cook County is particularly troubling considering his statement in *Arik* that "no single forum can be more convenient than another" when "trial witnesses and evidence are scattered in different states." If one were to apply this standard in future cases, it becomes difficult to imagine a set of circumstances where a Cook County court (likely with Judge Maddux presiding) would find another forum to be more convenient when determining whether to grant an FNC motion in an action arising out of a foreign aviation accident. Furthermore, this language provides plaintiffs further incentive to name as many U.S.-based defendants in an action with disparate allegations (*e.g.*, negligent maintenance, negligent training, product liability, lessor liability, *etc*.) to ensure that potential witnesses and evidence are "scattered."

It also should be noted that defendants' FNC motion was denied even though defendants had moved in the alternative for dismissal in favor of the State of Washington – the state where the EGPWS was designed and manufactured – as suggested by the Illinois appellate court in *Vivas* and *Thornton*. This will be an interesting issue to follow if there is an appeal. As stated in the Winter Newsletter, a defendant's most prudent strategy to increase the likelihood of a favorable FNC ruling remains to aggressively look for a good-faith basis to remove any such litigation from state to federal court.

This is an extract of an article from the Condon & Forsyth LLP publication "Special Winter Edition 2010" and, with thanks, has been reproduced on the authority of Mr Rod Margo, Partner, Condon & Forsyth. The full version of this article can be found at:
http://www.condonlaw.com/newsletters/special_edition_winter_2010.pdf

Competition News

The Qantas/British Airways "Joint Services Agreement" approved to 2015

On 31 March 2010, the Australian Competition and Consumer Commission issued a determination granting authorisation of Qantas and British Airways' Joint Services Agreement (JSA) until 2015. The JSA was first authorized 14 years ago.

Under the JSA, Qantas and BA coordinated commercial arrangements on any routes worldwide between in respect of scheduling, marketing, sales, freight, pricing, purchasing and customer service activities.

Submissions were received from Air New Zealand Limited, Emirates, the International Air Services Commission, Tourism Australia and the Department of Infrastructure, Transport, Regional Development and Local Government. Curiously, Air New Zealand provided qualified support and Emirates which neither supported nor opposed the application, submitted that airline alliances have significant anti-competitive elements and express concerns that in the coming years a handful of dominant alliances will fundamentally alter the competitive landscape in many markets.

In its analysis of previous JSA determinations and the current market share of the "Kangaroo Route", the ACCC considered that the JSA has not resulted in any significant lessening of competition, and therefore detriment in other markets potentially affected by the JSA being the international freight market, the domestic passenger market, and the sale of air travel market.

The ACCC found that the public benefits likely to result from the JSA are:

- cost savings which are likely to be passed on to consumers, especially those travelling on economy fares, as a result of strong competition on most JSA routes;
- broader availability of schedule options; and
- benefits arising from integrated yield management systems.

On balance, the ACCC was satisfied that the public benefit likely to result from the JSA outweighs the likely public detriment.

Eds.

Virgin Blue Airlines Group and Air New Zealand propose Trans-Tasman Alliance

On 3 May 2010, Air New Zealand and the Virgin Blue Airlines Group announced their proposal to apply for regulatory approval to operate an alliance on the trans-Tasman.

Air New Zealand outlined that there are four key components to the proposed agreement:

i. A broad free-sale code share arrangement covering:

   a. All Tasman sectors currently operated by either airline;

   b. Domestic Australian sectors as part of a connecting Tasman journey; and

   c. Domestic New Zealand sectors as part of a connecting Tasman journey.

ii. A revenue allocation agreement under which:

   a. Revenue generated across all Tasman sectors currently operated by either airline, or which may be developed under the agreement, will be allocated between the two carriers; and

   b. A joint trans-Tasman Network Planning & Revenue Management Team representing both airlines will oversee the Tasman operation.

iii. A frequent flyer co-operation agreement that will provide reciprocal loyalty scheme benefits to members of Air New Zealand's Airpoints loyalty programme and Virgin Blue's Velocity Rewards programme.

iv. A lounge co-operation agreement that will ensure lounge access to qualifying guests of either airline.

On 4 May 2010, acting for both airlines, Gilbert + Tobin Lawyers filed an application for an authorization pursuant to section 88(1) of the *Trade Practices Act 1975*. Much of the application is meaningless to the public because the substance and detail are contained in a confidential submission filed concurrently with the ACCC.

Eds.

An overview of the Airline Cargo Cartel cases

Below is a useful outline of the current status of the various airline cargo cartel proceedings and prosecutions:

Chronology of proceedings

- On 11 January 2007, Auskay International Manufacturing & Trade Pty Ltd commenced a representative proceeding in the Federal Court of Australia against various airlines including Qantas Airways Limited, Deutsche Lufthansa Aktiengesellschart, Singapore Airlines Ltd, Singapore Airlines Cargo Pte Ltd, Cathay Pacific Airways Ltd and Air New Zealand Limited;
- On about 31 October 2007, the ACCC issued notices under section 155(1)(a) of the Trade Practices Act against various airlines;
- On 15 December 2008, the New Zealand Commerce Commission commenced proceeding in the High Court against 13 airlines and seven airline staff, including Air New Zealand Limited, British Airways plc, Cargolux International Airlines S.A, Cathay Pacific Airways Limited, Emirates, PT Garuda Indonesia, Japan Airlines International Co Limited, Korean Airlines Co Limited, Malaysian Airline System Berhad Limited, Qantas Airways Limited, Singapore Airlines Cargo Pte Limited, Singapore Airlines Limited, Thai Airways International Public Company Limited and United Airlines Incorporated;
- On 28 October 2008, the ACCC commenced its first proceedings in the Federal Court against Qantas Airways and British Airways;
- On 11 December 2008, the Federal Court ordered Qantas Airways Limited and British Airways PLC to pay penalties of $20 million and $5 million respectively, as jointly submitted by the parties
- On 16 February 2009 the Federal Court ordered Société Air France, Koninklijke Luchtvaart Maatschappij NV, Martinair Holland NV and Cargolux International Airlines SA to pay penalties of $3 million, $3 million, $5 million and $5 million respectively, as jointly submitted by the parties.
- On 23 December 2008, the ACCC commenced against Singapore Airlines Cargo Pte Ltd;
- On 30 April 2009, the ACCC commenced against Cathay Pacific Airways Ltd;
- On 18 August 2009, the ACCC commenced against Emirates;
- On 2 September 2009, the ACCC commenced against PT Garuda Indonesia Ltd;

- On 28 October 2009, the ACCC commenced against Thai Airways International Public Company Limited;
- On 5 March 2010, the ACCC commenced against Korean Air Lines Co. Ltd;
- On 9 April 2010, the ACCC commenced against Malaysian Airline System Berhad and its wholly-owned cargo subsidiary Malaysia Airlines Cargo Sdn Bhd; and
- On 17 May 2010, the ACCC commenced against Japan Airlines International Co., Ltd and Air New Zealand Limited.

Report decisions:

- Korean Air Lines Co Ltd v Australian Competition and Consumer Commission [2008] FCA 265 (7 March 2008);
- Korean Air Lines Co Ltd v Australian Competition and Consumer Commission [2008] FCA 265 (7 March 2008);
- Korean Air Lines Co Ltd v Australian Competition and Consumer Commission (No 2) [2008] FCA 449 (4 April 2008);
- Korean Air Lines v Australian Competition and Consumer Commission (No 3) [2008] FCA 701 (15 May 2008);
- Auskay International Manufacturing Trade Pty Ltd v Qantas Airways Ltd [2008] FCA 1458 (29 September 2008);
- Australian Competition and Consumer Commission v Qantas Airways Limited [2008] FCA 1976 (11 December 2008);
- Australian Competition and Consumer Commission v British Airways PLC [2008] FCA 1977 (23 December 2008);
- Emirates v Australian Competition and Consumer Commission [2009] FCA 312 (2 April 2009);
- Australian Competition and Consumer Commission v Cargolux Airlines International SA [2009] FCA 342 (14 April 2009);
- Australian Competition and Consumer Commission v Societe Air France [2009] FCA 341 (14 April 2009) ;
- Australian Competition and Consumer Commission v Martinair Holland NV [2009] FCA 340 (14 April 2009);
- Australian Competition and Consumer Commission v Singapore Airlines Cargo Pte Ltd [2009] FCA 510 (20 May 2009);

- Assistant Treasurer and Minister for Competition Policy and Consumer Affairs v Cathay Pacific Airways Limited [2009] FCAFC 105 (31 August 2009);
- Singapore Airlines Ltd v Australian Competition and Consumer Commission [2009] FCAFC 136 (2 October 2009);
- Auskay International Manufacturing Trade Pty Ltd. V Qantas Airways Limited (No 5) [2009] FCA 1464 (11 December 2009);
- Auskay International Manufacturing Trade Pty Ltd v Qantas Airways Limited (No 6) [2009] FCA 1465 (11 December 2009).

Eds.

Airport Performance Report 2008-09

On 11 March 2010, the ACCC released its annual airport monitoring report for the 2008–09 on Adelaide, Brisbane, Melbourne (Tullamarine), Perth and Sydney (Kingsford Smith) airports.

The report outlines a range of matters including quality of service, prices, costs, profits and investment levels.

On the release of the report, the ACCC Chairman Graeme Samuel said that:

> "*This year's report has found the performance of Sydney Airport to be of greatest concern. The indications are that Sydney Airport has increased profits by permitting service quality to fall below that which the airlines reasonably expect*".
>
> "*Airport users, including passengers and airlines, rated Sydney Airport last amongst the monitored airports for the fourth consecutive year and it appears that investment in the international terminal has been slow. And while Sydney Airport was the only airport to report a fall in passenger numbers, its revenue and profit margins still increased. Sydney Airport also recorded the highest average prices at $13.63 per passenger, compared to the lowest of $7.96 at Melbourne Airport*."

In response, Sydney Airport criticized the ACCC report stating that the report is out of date as it covers the period July 2008 to June 2009 and does not take into account the $500 million upgrade of the Sydney Airport International Terminal and precinct.

Specifically, the ACCC report made the following observations in the following topics:

- *Airport parking*: Combined airport car parking revenue was $278 million in 2008–09, accounting for approximately 12 per cent of the airports' total revenue of $2.3 billion. All of the airports reported higher car parking revenue in the period. The ACCC considered that the results indicate that car parking prices reflect an element of monopoly rent with some car parking charges increased at all of the monitored airports during the 2008–09 financial year.
- *Aeronautical services*: Despite the economic slowdown, around 93.3 million passengers passed through the five major airports in 2008–09, all airports other than Sydney Airport reported in increase over the previous period, with a net increase of above 1 per cent.
- *Overall ranking*: Using a range of indicators including: the availability of check-in counters for airlines to service passengers and surveys of passengers' experiences in passing through security screening points, the ACCC determines an overall rating of the airports' quality of service and ranks the airports relative to each other. Brisbane Airport maintained the best overall ranking, while Sydney Airport was ranked last for the fourth consecutive year.

Eds.

Aviation Finance

Personal Property Security Regulations released for comment

The Australian Federal Government has released for consultation and comments the Exposure Draft and Commentary to the Personal Property Security Regulations.

Relevant to aviation, in the Draft PPS Regulations the terms ‘aircraft engine’, ‘airframe’, and ‘helicopter’ are given the same meaning as those given in the *Protocol on Matters Specific to Aircraft Equipment* (Aircraft Protocol), which is a Protocol to the *Convention on International Interests in mobile Equipment 2001* (Cape Town Convention). It has been noted in the Exposure Draft that the Australian Government is considering whether to accede to the Cape Town Convention and that adopting the same definition for these items would assist in any transition to the Cape Town Convention rules.

The due date for submissions is 4 June 2010.

It remains unclear when the Australian Government will provide its position to the consultation paper issued in February 2008 on whether or not Australia should accede to the Cape Town Convention.

The aftermath of Allco

A short note to draw your attention to the Federal Court of Australia decision in *HNA Irish Nominee Limited v Kinghorn* [2010] FCA 311 (31 March 2010). The Applicant, HNA Irish Nominess acquired certain assets of the aviation business of Allco Finance Group Limited (Allco) from the receivers and managers of Allco. Whilst the substance of the proceeding concerned the rights of the holders of ordinary shares and holders of preference shares in thirty five companies, each of which were defendants in the proceeding, the case sheds some light, or creates more confusion, about the convoluted structure of the Allco asset companies. The constitution of each of the RILAs is either identical to all of the others or substantially similar. The names of the RILAs are derived from Record Investments Limited, the former name of Allco Finance Group Limited (**Allco**).

New Zealand to Accede to the Cape Town Convention and Aircraft Protocol

In contrast to the position in Australia, On 24 March 2010, the New Zealand Minster for Transport Steve Joyce announced that New Zealand will by mid-2010 introduce legislation to accede to the Cape Town Convention and Aircraft Protocol. In making the announcement, Minster Joyce said that:

> "*The move will improve certainty for investors in high-value mobile equipment such as aircraft, and reduce financing costs of aircraft operations. Joining the convention means New Zealand will become part of an international system to protect commercial security interest in mobile equipment*."

Eds.

Transport Department News

Australia

- The Australian Government has announced the following development in bilateral air service agreements:
    - On 12 February 2010, the signing of a new agreement between Australia and the United Arab Emirates under which, airlines such as Emirates and Etihad will be able to operate up to an additional seven services a week into Australia's major gateway airports (Sydney, Melbourne, Brisbane and Perth), provided these services go via a regional centre such as Cairns, Darwin or Adelaide.
    - On 14 February 2010, the signing of a new bilateral air service agreement between Australia and China which will increase the

available seats on routes between the two countries by 70 per cent by the end of 2010.

  - On 21 February 2010, the signing of the first bilateral air service agreement between Australia and Turkey. Australian and Turkish airlines can now begin operating up to five direct flights per week.

- On 29 March 2009, the Department announced that from 1 September 2010 marginally noise compliant Chapter 3 aircraft will be banned from Australia's major airports. This will affect hushkitted 727-200, Antanov A124 and DC86 aircraft.
- On 19 April 2010, the Department announced that the Office of Transport security and the Australian Federal Police will conduct an evaluation trial at Adelaide Airport of an 'airport watch' system which will test new procedures to help identify and respond to suspicious activity at airports.

New Zealand

- The New Zealand Government has announced the following development in bilateral air service agreements:
  - On 22 July 2009, the signing of a new bilateral air service agreement between New Zealand and Canada, which removes previous limitations on the frequency of flights that can be provided and now allows New Zealand and Canadian carriers to operate to and beyond each others' country over any routing.
  - On 27 October 2009, an expansion of the air service arrangements between New Zealand and South Africa which will allow the airlines of each country to pick up and drop off passengers and freight in Australia, and to operate daily flights between each other up from three flights per week. The ban on New Zealand airlines uplifting passengers in Australia for South Africa, and vice versa, was lifted.
- On 13 April 2010, Associate Transport Minister Nathan Guy has announced two new initiatives by the Civil Aviation Authority (CAA) to improve the monitoring of commercial pilots with drug and alcohol issues.

Eds.