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RECENT CASES

Aircraft Technicians of Australia Pty Ltd v St. Clair; St. Clair v Timtalla Pty Ltd [2011] QCA 188

As reported in Volume 55 of *Aviation Briefs*[1] in 2010 the Supreme Court of Queensland delivered judgment in favour of Mr St. Clair, the plaintiff, against Aircraft Technicians of Australia Pty Ltd ("ATA") for $1,729,566 for personal injuries he had sustained in an aircraft accident. The Court also dismissed St Clair's claim against Timtalla Pty Ltd.

St Clair's claim related to an aircraft accident which occurred on 21 June 1994 in which St Clair had been mustering cattle by a Robsinson R22 helicopter. His wife was a passenger. St Clair pursued a claim against Timtalla, the owner of the helicopter, and against ATA who had serviced the helicopter at certain times.

The trial judge held that the accident was contributed to by the use of an incorrect upper actuator bearing ("the **bearing**"). St. Clair's case against Timtalla was that the bearing had been installed in November 1992, (and was on the helicopter when Timtalla hired it to St. Clair's company), by Choppercare Pty Ltd, ("**Choppercare**") a wholly owned subsidiary of Timtalla, which was itself liable, or was vicariously liable for its negligence. St. Clair claimed that Timtalla owed a non-delegable duty to ensure the safety of the helicopter. The Court rejected St Clair's claims against Timtalla.

ATA appealed against the judgment and St Clair cross-appealed against the adequacy of award of damages and against the dismissal of his action against Timtalla.

ATA's appeal

ATA had been found liable for the negligence of Mr Darren Fisher, its employee, in failing to observe during his July 1993 service of the helicopter that the bearing had been fitted. In particular, the Court felt that Fisher ought to have replaced the bearing with a Robinson approved bearing. This represented the breach of duty of care in negligence. After a close appraisal of the evidence produced in the initial hearing the trial judge concluded that ATA, by Mr Fisher, had negligently failed to observe that a bearing should have been fitted. Therefore, ATA's negligence contributed to the accident in the way explained by the trial judge in [94]-[95] of his Honour's reasons. As a consequence the Court affirmed the trial judge's decisions on these matters.

ATA further submitted that the trial judge erred in not finding that St. Clair was guilty of contributory negligence by flying too close to the ground in breach of *Civil Aviation Regulations* specifying a minimum altitude of 500 feet. ATA further alleged that there was a failure to employ the correct technique for autorotation. The Court was unconvinced on these issues concluding that it was likely that St. Clair did react in an appropriate way or did not exacerbate the damage done to the helicopter or to him. A further allegation that St. Clair had not accurately recorded the flying hours of the helicopter was discounted by the Court.

> *"With respect to an assertion of contributory negligence, a failure to properly record the flying time of the helicopter will not, of itself, be a contributory factor to the damage suffered."* (At [111]).

St Clair's appeal

On appeal, St Clair submitted that Timtalla was liable for the following reasons:

1. Timtalla was vicariously liable for the negligence of its servant, Choppercare, when it serviced the helicopter in November 1992;
2. Timtalla owed a non-delegable duty to see that reasonable care was taken in the work done by Choppercare and was liable because it did not use reasonable care; and

[1] Volume 55, August / November 2010, *St Clair v Timtalla Pty Ltd & Anor* [2010] QSC 296 (20 August 2010) by Andrew Tulloch & Marcus Saw, DLA Phillips Fox.

3. there was a non-delegable duty to see that ATA exercised reasonable care in the service of the helicopter in July 1993 and, consequently, Timtalla was liable for Fisher's failure to use reasonable care.

The Court of Appeal opined that the St. Clair's submissions did not come to grips with the task of establishing why, as a matter of legal principle, Timtalla should be held liable for Choppercare's negligence in supplying and/or installing the offending bearing. The trial judge did not expressly find whether the relationship between Timtalla and Choppercare was that between an employer and employee or employer and independent contractor. However, the matter was determined against St. Clair "*by reference to notions of control and direction.*"

The Court concluded that it was not sufficient to make A vicariously liable for the tortious negligence of B by designating B as A's agent. The Court found that there must be something in the relationship to show that the designation is appropriate.

In addition, the Court considered that the evidence showed that Timtalla and Choppercare were separate companies, Choppercare had its own employees, Timtalla was a customer of Choppercare, Choppercare was asked to replace the clutch assembly on Timtalla's helicopter, and did so, and Choppercare was not paid for the work in the past. The Court of Appeal held that this was no more than proof that the work was done by Choppercare at the request of Timtalla for the latter's benefit and this was insufficient to establish agency and revealed what the court characterised as a complete absence of evidence on the topic of "control".

The Court observed that, at first instance, St. Clair did not appear to have argued that there was a similar non-delegable duty owed to him by Timtalla with respect to the service undertaken by ATA in July 1993. That argument was advanced only at the appeal stage.

The Court noted that recent decisions of the High Court suggested that the imposition of non-delegable duty, or strict liability, was exceptional. They said that the categories of case in which it applied should not be expanded without some compelling reason. The Court quoted from a number of High Court and Court of Appeal cases while urging for a restrictive and careful approach. In the words of Gummow, J, who urged a cautious approach in *Scott v Davis*:

> *"In Kondis, Mason J identified (i) cases where the defendant "has undertaken the care, supervision, or control of the person or property of another" and (ii) cases where the defendant is so placed in relation to the person or property of St. Clair as "to assume a particular responsibility" for St. Clair's safety, in each case where St. Clair might reasonably expect the exercise of due care. Such an approach requires some caution in its general application. It may explain the cases on "non-delegability"; but many other cases not decided on that basis also may have answered the criteria stated by Mason J."*

Based upon these authorities, the Court concluded, at paragraph 76, that Timtalla '*did not have control of the circumstances to which the plaintiff, the beneficiary of the alleged duty, was exposed*'. It was further noted that '*it did not control the employment of the aircraft maintenance engineers, or the purchase of parts, or the performance of specialist services*.' The Court also noted that St. Clair could have commissioned his own inspection of the helicopter or otherwise tested it.

On issue of negligence, the Court agreed with the trial judge's rejection of St. Clair's arguments that Timtalla owed it a duty to ensure that Choppercare and/or ATA exercised reasonable care in servicing the helicopter. St. Clair's appeal of the dismissal of his action against Timtalla was dismissed with costs.

St. Clair's appeal on quantum

St. Clair challenged the amount of the award for past economic loss from the date of the accident in 1994 until judgment in August 2010. He further argued that the trial judge ought to have awarded interest on the amount of his special damages for which he outlaid money. After an exhaustive analysis the Court varied the

quantum in entering judgment for St. Clair in the sum of $2,313,846. The Court also ordered ATA pay St Clair's costs of and incidental to the cross-appeal to be assessed on the standard basis.

Dr Vernon Nase & Nick Humphrey, *Editors*

Nicholls v Airways Corporation of New Zealand HC Tauranga **CIV-2010-470-586 [2011] NZHC 895 (15 August 2011)**

This case was heard in the High Court of New Zealand by Justice Woodhouse.

Background

Mr Nicholls is a pilot who owns and operates his own aircraft flying out of Tauranga aerodrome. Airways Corporation of New Zealand (Airways), a state owned enterprise, provides aerodrome control services for Tauranga Airport. Under the *State-Owned Enterprises Act 1986,* Airways is required to operate on a commercial basis. It charges for the services it provides in accordance with a published schedule of fees.

In a somewhat novel action Mr Nicholls contended that Airways was not entitled to recover any sum from him for aerodrome control services while maintaining that Airways was still subject to an obligation to provide him, or another pilot of his aircraft, with aerodrome control services.

Plaintiff and defendant positions

Mr Nicholls objected to the use of the word "*services*" when referring to aerodrome control activities for his aircraft. On the basis of the principles espoused in *Airways Corporation of New Zealand v Geyserland Airways Ltd*[2]*,* Nicholls argued that in the absence of express acceptance of Airways standard charges they cannot recover any sum for aerodrome control services provided to an aircraft, such as Nicholls' aircraft operating by visual flight rules (VFR). He further argued that all past invoices from Airways were improperly issued, which amounted to false representations that there was a commercial relationship between the parties and that money was owed by Nicholls to Airways. Nicholls argued that issuing the invoices constituted breach of the *Fair Trading Act* 1986 and the *Unsolicited Goods and Services Act* 1975. Nicholls sought to recover payments made.

Because Airways had withheld its services to Nicholls on two occasions, he argued that Airways is not lawfully entitled to withhold aerodrome control services for an aircraft operating by VFR. Consequently, the withholding or withdrawal of services on these two occasions in January 2010 was unlawful.

Airways accepted that, because Mr Nicholls has communicated an objection to its published charges, Airways could not, from the date it received the objection, recover charges on a contractual basis for aerodrome control services provided to Mr Nicholls. However, Airways argued that it could sue Mr Nicholls on a *quantum meruit* basis. In the alternative, it argued that it is entitled to withhold its services unless and until Mr Nicholls agreed to pay the standard charges. This was a central issue in the case.

The Court's contemplations

Woodhouse J focused on the basis for Airways exercise of control and issuing of invoices where it was admitted by Airways that no contract existed between the parties.

In addition, in respect of Nicholls' claim for a declaratory judgment on how [Airways] was lawfully able to deny Civil Aviation Authority (CAA) clearances to the plaintiff on commercial grounds when it has been agreed that none existed, the Court first looked to the applicable legislative scheme and, in particular, the *Civil Aviation Act 1990* (the Act) and its long title where its purpose was outlined as including '(a) to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety; and (b) to ensure that New

[2] [1996] 1 NZLR 116 (HC)

Zealand's obligations under international aviation agreements are implemented.'

The Court noted that the *Civil Aviation Rules* empower the Director of Civil Aviation (the Director) to designate the different types of airspace, here controlled airspace was designated. The Court also noted the role of the air traffic control service as being to prevent collisions between aircraft and between aircraft and obstructions in the maneuvering area and expediting and maintaining safe and efficient flow of traffic. Under the applicable rules the Court said that an aerodrome control service was an air traffic control service provided for the control of aerodrome traffic. The airspace around Tauranga aerodrome, as already alluded to, was a control zone. Under Rule 71.55 the Director may designate, as a control zone, that portion of airspace around an aerodrome that the Director determines is necessary if (1) the Director determines that an aerodrome control service or an aerodrome and approach control service is required; and (2) the traffic density and pattern requires controlled airspace.

Rule 71.55 also specifies that the control zone should be as small as practical consistent with the need to protect the flight paths of IFR flights arriving at and departing from the aerodrome.

Historically there had been a determination in the 1960's that the Tauranga aerodrome required an aerodrome control service and its 75,615 movements in 2010 exceeded the 60,000 threshold currently applicable. As a consequence there is a control zone around the aerodrome of class D airspace. Class D airspace, under Rule 71.107, required separation between IFR and VFR flights and special VFR flights and the provision of traffic avoidance advice on request.

Woodhouse J observed that the pilot of an aircraft operating in a control area or a control zone must (subject to specific exceptions), under rule 91.241, comply with any air traffic control clearance or instruction and notify air traffic control of certain matters. A pilot of an aircraft, under Rule 91.245, must not enter a control area or a control zone without air traffic control clearance. Further, pilots are required to maintain two-way radio communications with the air traffic control unit responsible for the airspace.

Legislative regime applicable to state owned enterprises

Section 4(1)(a) of the *State-Owned Enterprises Act* provided that the principal objective of every State enterprise shall be to operate as a successful business and, to [as] profitable and efficient as comparable businesses that are not owned by the Crown. The Court opined that this provision '*is, in as many words, express statutory authority for Airways to charge for services it provides*'. Further, it was observed that Section 4(1)(a) places a positive obligation on Airways to charge for services it provides. The court also noted that '*there* [was] *no statutory provision which provided that Airways may not charge for particular services*.'

The issue of whether or not Airways could charge for ATC services to VCR Aircraft

Nicholls alleged that Airways did not have the right to recover payment for Air Traffic Control services provided to aircraft operating by VFR unless the operator had expressly agreed to pay for the services. He also argued the relevance of the distinction between IFR and VFR as a determinant of the mandatory or optional nature of ATC services and whether in a contractual sense consideration was involved.

In response the Court considered the irrelevance of the IFR –VFR distinction as a determinant of the rules applicable and emphasised that there was an *obligation* in law to obtain clearance. This was an obligation arising from the Director's designation of airspace and was not something imposed by Airways (or the Tauranga Airport Authority).

The Court further considered that the overall position taken by Mr Nicholls appeared to have arisen, at least in part, from a misunderstanding of *Geyserland,* maintaining that *Geyserland* was not

authority for a proposition that Airways was bound to provide aerodrome control services to Nicholls notwithstanding his objection to the standard terms and charges and *Geyserland* does not support Nicholls' argument that, if aerodrome control services are provided to an aircraft operating on VFR, no consideration is provided. Thorp J expressly held in *Geyserland* that there was consideration for the air traffic control services provided in that case.

Ultimately, the Court rejected arguments 'that a distinction between regulatory and commercial functions, or between needed and required assistance, somehow limited [Airways'] ability to charge for the provision of air traffic control services.'

'Non-commercial activities' argument

Nicholls had argued, under section 7 of the *State-Owned Enterprises Act* that Airways was not entitled to charge for its services. Section 7 provides that:

> "*Where the Crown wishes a State enterprise to provide goods or services to any persons, the Crown and the State enterprise shall enter into an agreement under which the State enterprise will provide the goods or services in return for the payment by the Crown of the whole or part of the price thereof*."

The Court concluded that this provision had no application because there was no request from the Crown made in terms of this provision. Once the Director designated a control zone Airways was then engaged to provide the appropriate service from a certified air traffic controller.

The Court noted that an underlying theme of Mr Nicholls's submissions was a fundamental objection of principle to paying user charges which was seen as essentially a political issue and not something for a court to resolve. It was felt that Nicholls case was 'not founded on any legal entitlement or on any correct proposition of law.'

The issue of Airways withholding its services

Referencing the judgment of Thorp J in *Geyserland,* Woodhouse J determined that Airways complied with its general obligations under the applicable Rules, namely, 172.87 (ATC clearances) and 172.157 (Denial of ATC clearance).

Conclusion

As a consequence of the foregoing reasons Nicholls application for directions and his claims were dismissed. Airways was held to be entitled to withhold aerodrome control services from Nicholls until he agreed to pay their standard term charges. Airways was also awarded costs.

Dr Vernon Nase & Nick Humphrey, *Editors*

Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4) **[2011] FCA 1126 (30 September 2011)**

The suspension and cancellation of an airline's air operator's certificate will inevitably have serious financial consequences and often cause the demise of the airline. The exercising of this power to suspend and cancel aviation licenses and certificates by the Civil Aviation Safety Authority and its officers is taken very seriously. However, the question of whether or not CASA and its officers owe common law or statutory duties in exercising these statutory powers remains unresolved. In *Polar Aviation Pty Ltd v Civil Aviation Safety Authority (No 4)* the Federal Court of Australia attempted to clarify the situation.

Background

This interlocutory application arose from a dispute between, on the one hand, Polar Aviation Pty Ltd, a commercial flight operations business and flying school in Western Australia and Clark Butson ("the Applicants"), and on the other hand, the Civil Aviation Safety Authority and six former and current officers of CASA ("the Respondents"). The dispute centered on matters following an audit and investigation

by CASA of Polar between 2004 – 2006 in which CASA suspended Polar's AOC and Mr Butson's approval as Chief Pilot and Chief Flying Instructor.

The application was heard on 31 January 2011 and Kenny J delivered judgment almost 8 months later on 30 September 2011.

By the Further Amended Statement of Claim ("FASC"), the Applicants claimed that CASA owed them the following duties:

i. a common law duty to take reasonable care in the exercise of CASA's statutory powers;

ii. a statutory duty by operation of the *Civil Aviation Act 1988* and sections 22 to 25 of the *Commonwealth Authorities and Companies Act 1997* to exercise CASA's statutory powers lawfully, reasonably and in "good faith" for the purposes for which those powers were given;

iii. a common law duty not to exercise CASA's statutory powers "in such a way as unlawfully and intentionally to interfere with the trade or business" of the Applicants;

iv. a common law duty not to act beyond power, intending to cause harm to the Applicants, or knowing that their acts were beyond power and that harm to the Applicants was foreseeable, or recklessly indifferent (a) to whether their acts were beyond power and (b) to the likelihood of harm to the Applicants.

The Applicants further alleged that:

1. these duties were breached by a series of actions taken by CASA officers under the CAA;
2. the CASA officers were required to exercise "their powers and functions":
   a. with reasonable care and diligence;
   b. in good faith and in the best interests of CASA and for a proper purpose; and
   c. so as not improperly "*to use their position*" to cause detriment to Applicants;
3. the breaches of duty arising from the alleged "pattern of conduct" which was variously particularized in the FASC and constituting "unlawful acts" during and following an "operational audit" of Polar by CASA in May 2004.

CASA in turn applied to the Court to have the FASC struck out, or alternatively parts thereof, on the basis that it failed to disclose a reasonable cause of action and was otherwise vague, embarrassing, insufficiently particularised, or otherwise an abuse of the process.

The decision of Kenny J

In the judgment of Kenny J, Her Honour outlined the applicable tests under the Federal Court Rules to strike out pleadings emphasizing the need of the Court to exercise caution when doing so. Next, Her Honour outlined in detail the statutory context by which CASA exercises its statutory powers and performs its statutory functions through the making of administrative decisions under the Civil Aviation Act, Regulations and Orders, in particular, the issuing and setting out terms and conditions of an AOC. Her Honour then reviewed the claims as pleaded by the Applicants.

Did CASA owe the Applicants a common law duty of care?

CASA submitted that no common law duty of care is capable of being imposed on CASA or its officers in relation to persons whose conduct they must regulate in the public interest.

In response, whilst raising other submissions, the Applicants attempted to side-step the point by arguing that the issue should not be dealt with as a preliminary / interlocutory issue submitting that there would be "*evidence of exactly how airlines operate, how they are financed, how they are dependent ... for their efficient and safe operation on the certainty of being able to*

continue to operate" (at [50]) at the final hearing.

The Court repeated the position espoused by various Justices of the High Court that there are no guiding principles to be found that identifies when a statutory authority is subject to a common law duty of care with respect to the exercise of statutory powers [at 47].[3] In addition, Her Honour considered that this case is distinguishable from *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority*[4] because in this case the Applicants have pleaded at an unsatisfactory level of generality which exposes the pleaded duty to the "fatal observation that it is inconsistent with the statutory regime" and, in particular, the due exercise of CASA's powers under the CAA.[5] Whilst in *Repacholi,* the challenged pleading had made some attempt to give content to the alleged duty by reference to an obligation to collect information regarding takeoff procedure.

Accordingly, Her Honour found on this point that:

1. the existence of the duty as pleaded in the FASC is inconsistent with the statutory regime governing CASA, and the setting in which CASA issues, suspends or cancels certificates, licences and other authorities;

2. this is not a case in which the facts as proven at trial would affect the conclusion I have reached; and

3. responding to the application submission that it would raise evidence the FASC contained no pleading of any material fact, by reference to which it might be said that such evidence might be relevant and admissible.

The Court outlined a range of factors for and against the finding that CASA has a legal duty to exercise its statutory powers with reasonable care. The factors in favour of a duty included:

1. that there was the alleged duty related to a positive act, as opposed to a mere failure to act; and

2. that the fact that in view of the certificates, licences and approvals held by the Applicants, there existed a relationship between the Applicants and CASA which "*pre-dated the exercise of the power*" on which basis CASA should have known that if it exercised its power without reasonable care (cancelling of licences etc) it would likely cause harm to the Applicants.

The factors against a legal duty of care included:

1. that the legal relationship between the Applicants and CASA was not straightforward or analogous to any existing relationship in which a similar duty of care had been found to exist;

2. that the FASC did not plead a relationship or position of vulnerability of the kind referred to in the authorities where a duty of care to avoid economic loss has been said to have been owed and, in any event, the Applicants were able to protect themselves against by making immediate application to the AAT; and

3. that CASA does not have unfettered "control" over their issue, cancellation and suspension, but that power is regulated and subject to the statutory regime established under the CAA with aviation safety sitting paramount to all other duties.

The Court considered that CASA cannot exercise this power paramount to all others if it does so with the apprehension that it might breach a legal duty to persons in the position of the Applicants. That is, the public interest is greater than the individual interest otherwise CASA's officers may "*act*

[3] Citing *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; and *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.
[4] [2009] FCA 1487. McKerracher J in that case held that it was not possible to conclude that a claim in negligence was not open to be made against CASA based on a duty of care in the exercise of its statutory powers.
[5] At [53].

defensively"[6] which would derogate aviation safety as the paramount concern.

Based on these matters, Kenny J concluded that CASA and its officers did not owe the Applicants a common law duty of care as alleged.

Did CASA owe the Applicants a statutory duty of care?

Similarly, Her Honour found that there was no statutory duty of care owed by CASA to the Applicants as pleaded. The Court noted that importantly the Applicants had the availability of other protections and remedies against a wrongful exercise of power and the existence of such options is considered a factor militating against the existence of a statutory duty of the kind for which the applicants contend here.

Good faith?

On the issue of good faith, the Court found that based upon the authorities there is no tenable basis on which the Applicants could bring an action in tort against CASA for breach of a general duty to act in good faith.

Interference with trade or business by CASA?

The Court noted (at [92]), that there is no authority for the proposition that interference with trade or business interests by acting beyond statutory power gives rise to a cause of action and based on the principles espoused in the High Court decision of *Sanders v Snell*[7], where a public authority and its officers are alleged to have wrongfully interfered with private business interests by alleged misuse of statutory power, any liability for damages is governed by the tort of misfeasance in public office, not by a tort of wrongful interference with trade or business interests.

Under the common law, the elements of the tort of wrongful interference with a trade or business interest were stated in *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd*[8], which adopted the approach of Lord Hoffman in *OBG Ltd v Allan*[9]; namely, the Applicants would be required to plead: (1) a wrongful interference with the actions of a third party in which the applicants have an economic interest; (2) an intention on the Respondents' part thereby to cause loss to the applicants; (3) the acts of interference being actionable by the third party as an interference with its freedom to deal with the Applicants; and (4) loss or damage suffered by the Applicants.

CASA submitted, and the Court agreed, that the Applicants failed to plead in accordance with *OBG Ltd v Data* to invoke a claim of wrongful interference. This respect of the Applicants' pleadings was also struck out.

Misfeasance in Public Office?

In the joint judgment of the High Court in *Northern Territory v Mengel*[10], the Court stated that misfeasance in public office is "*a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power*". This is a very high threshold.

On this matter, whilst CASA conceded that the Applicants had pleaded the elements of the tort of misfeasance, the Applicants had failed to allege any material facts on which liability under the tort could be established. The Court referred and relied upon the judgment of Flick J, in *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 3)*[11] in which His Honour stated that "*[t]he allegation that a public officer has so abused his office that his conduct constitutes the tort of misfeasance is, self-evidently, a serious allegation. It is an allegation which should be pleaded with sufficient detail that the public officer knows the case being mounted against him"*.

Kenny J considered that the Applicants had sufficient opportunities to particularise the pleading of this "*serious allegation*", as the

[6] Per Lord Woolf MR at 310 in *W v Home Office* [2007] Imm AR 302
[7] (1998) 196 CLR 329
[8] (2010) 173 ACTR 33 at 52 [139]-[141]
[9] [2008] 1 AC 1
[10] (1995) 185 CLR 307 at 345
[11] [2010] FCA 361 at [66].

Applicants had applied for pre-trial discovery but they did not pursue this applicant after CASA provided some documents, some of which were exhibited in the affidavit evidence. However, "[t]*he particulars nonetheless remain at a high level of generality*" (at [115]) and "[t]*here is nothing that supports the hypothesis that the respondents had the intention or acted with reckless indifference" at [118]).*

Accordingly, Kenny J found that, "*the applicants' pleading of misfeasance in public office is embarrassing within the meaning of the Federal Court Rules and should also be struck out*" (at [121]).

Conclusion

Kenny J not only struck out the entire pleadings, Her Honour also fatally found that "*[h]aving regard to the history of the pleading, the evidence, and the parties' submissions*" the Applicants have no reasonable prospect of successfully prosecuting the proceeding and thus there was no basis to grant leave to re-plead.

It remains to be seen whether the Applicants will appeal this decision.

Nick Humphrey & Dr Vernon Nase, Editors

Qantas Airways Limited v Danniel Amadio **[2011] ATMO 84 (25 August 2011)**

Qantas clips 'flying kangaroo' trade mark application's wings

This matter before the Australian Trade Mark Office relates to an opposition by Qantas to the registration of a Trade Mark with the use of the phrase 'flying kangaroo'.

Mr Amadio had filed the Trade Mark for the words 'flying kangaroo' under Class 33 covering 'wines, white wines, red wines, sparkling wines, beverages containing wines'. Qantas opposed the registration of the trade mark under *s60* (trade mark similar to trade mark that has acquired a reputation in Australia) and *s42(b)* (contrary to law) of the *Trade Marks Act 1995* (the 'Act').

Qantas produced evidence to support its submission that the Kangaroo symbol which features on the tail of Qantas aircraft is universally recognized as the 'flying kangaroo'. Qantas argued that the words 'flying kangaroo' which may originally have been used to describe the tail logo have now achieved recognition as a trade mark in its own right.

Interestingly Qantas's submissions included a history of the iconic 'flying kangaroo' logo, which until 1984 included a set of wings on the 'flying' Kangaroo as follows:

From 1947 to 1968:

From 1968 to 1984:

In 1984 the wings were clipped and the logo was as follows:

The logo changed in 2008 for the arrival of the A380:

The Kangaroo was originally used on Qantas aircraft in 1944, painted beneath the cockpit, following the decision to name its Indian Ocean passage the Kangaroo Service. Qantas produced advertisements, publications, books and a 1980s television commercial which all referred to Qantas and the Qantas logo as the 'flying kangaroo'.

Qantas also submitted that it had strong links with the Australian wine industry referring to its in-flight wine service, promotion and support of the Australian wine industry, 'Sommelier in the Sky' cabin crew training program, offers of wine tours on its website, and its recognition within the wine industry for excellence.

In response, counsel for Mr Amadio submitted that: (i) the use of the expression 'flying kangaroo' in Qantas's evidence does not disclose use of the expression 'flying kangaroo' as a trademark, (ii) the trade marked Qantas logo is not a use of the *expression* 'flying kangaroo' as a trademark, and (iii) the use of the word 'kangaroo' and the Kangaroo device is widespread and depicts 'Australian-ness' and Qantas's use is only one such example.

Decision of the Delegate of the Registrar

Delegate Thompson of the Registrar found that the advertisement and publications in which the expression 'flying kangaroo' appeared, were not in the character of brands in which Qantas used the term in relation to airline services. Rather, the expression was being used by the writers of articles about the airlines.

In regards to its use in books Delegate Thompson found that the expression *"disappears in a mass of text"* and furthermore, *"is not used in the course of trade in relation to any particular goods or services"* (i.e. wine).

Delegate Thompson found the television commercial to be the most persuasive evidence, but nonetheless found it too much of a *"stretch"* that the use of the term in a jingle within a television commercial from the 1980s meant *"that the words 'flying kangaroo' have a reputation in Australia as a trade mark"*. Furthermore, the Delegate considered *s7* of the Act which states that *"the Register…may decide that a person has used a trade mark if it is established that the person has used the trade mark with additions or alteration that do not substantially affect the identity of the trade mark"*. On these facts the Delegate asked whether the expression 'flying kangaroo' and the Qantas logo equates to a *lack* of substantial alteration of identity and are thus interchangeable. However, Delegate Thompson considered that although the Qantas logo may have become known as the 'flying kangaroo' *"there are more obvious methods of depicting such an animal"*. Thus the change of the Qantas logo to the words 'flying kangaroo' is "*an alteration which substantially affects the identity of the trade mark"*.

He also reiterated the hesitation to view the Qantas logo and the words '*flying kangaroo*' as interchangeable because based on the evidence before him the expression '*flying kangaroo*' has been used just as frequently to refer to the Qantas logo as Qantas itself. Qantas failed under *s60* to satisfy Delegate Thompson on the evidence before him that the expression '*flying kangaroo*' had been used by it as a trade mark.

The second ground was pleaded under *s42* of the Act which holds *"the registration of a trade mark must be rejected if: (b) its use would be contrary to law*". Interestingly, the Register considered the law applicable at the 'priority date'. The priority date was *"the day that would be the date of registration of the trade mark in respect of those goods or services if the trade mark were registered"* or in this instance 29 January 2009. Thus Qantas opposed the registration under *s52* of the *Trade Practices Act 1974,* namely for 'misleading and deceptive conduct'.

Delegate Thompson found that on the evidence before him, Qantas had clearly established that it is widely identified by the Qantas logo and the expression 'flying kangaroo'. Although 'Kangaroo' and the graphical device of a kangaroo are widely understood to refer to Australia or 'australian-ness' it is the collocation of the words 'flying' and 'kangaroo' *"which is unusual and is almost universally identified within Australia with [Qantas] and its leaping kangaroo logo"*. The Delegate was also satisfied that Qantas had demonstrated its strong association with the wine industry.

Inevitably, Delegate Thompson found that a *"significant number of people"* upon seeing a bottle of the Applicant's wine with the trademark 'flying kangaroo' would be mislead into believing that the wine was endorsed by Qantas or is a wine selected from its in-flight service. On that basis, Mr Amadio's application for the trade mark was refused.

Conclusion

Ultimately the strong brand recognition of Qantas and its 'flying kangaroo' logo meant that Qantas was successful in opposing the application. The fact that Qantas was successful under the *Trade Practices Act* and not the *Trade Marks Act* demonstrates that even a brand as strong as Qantas should not assume to have a protected trade mark if it is not specifically registered.

Jess McGuirk, Assistant Legal Counsel, Supreme Group

Rosengarten v American Airlines Inc (ARBN 000 775 753) **(Civil Claims) [2011] VCAT 1535 (11 August 2011)**

Ms Rosengarten ("the **Applicant**") purchased an electronic ticket for an around-world journey ("the **Ticket**") which commenced on a Qantas flight from Melbourne to Los Angles on 26 May 2010. On the Ticket, the Applicant took several flights on various carriers in the United States, including American Airlines flight AA3820 from Chicago to Washington on 12 June 2010, Europe and Asia, and returned on Qantas flights from Bangkok to Sydney and then Sydney to Melbourne on 27 July 2010. On the American Airlines flight from Chicago to Washington, the Applicant's baggage (valued at $3,642) was lost by the airline. The Applicant sought $3,642 as compensation from American Airlines, but American Airlines agreed only to pay her $1,770.54 on its view that the subject flight was part of "*international carriage*" as defined under Article 2 paragraph 1 of the Montreal Convention 1999 and its liability was limited to that amount.

The Applicant commenced this claim in the Victorian Civil and Administrative Tribunal ("the **Tribunal**") seeking the balance of the amount claimed from American Airlines of $1,871.46 submitting that the flight from Chicago to Washington was not "*international carriage*" as defined under the Montreal Convention 1999.

Article 1 paragraph 2 of the Montreal Convention relevantly provides:

> "*For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State*

is not international carriage for the purposes of this Convention." [Emphasis added].

The Tribunal was presided over by Senior Member Vassie whom will be remember for his earlier decision in *Ali v Malaysian Airlines System Berhad*[12], in which he found that the Tribunal did not have jurisdiction to hear a case under the Warsaw Convention because the Tribunal is not a "*Court*" in the relevant sense. In line with that reasoning, Senior Member Vassie indicated that should it be found that flight from Chicago to Washington was "*international carriage*" under the relevant convention then the Tribunal did not have jurisdiction to rule on the claim. We note that, whilst this methodology eventually resulted in the correct conclusion, we doubt that the Tribunal, in the state of Victoria, would have jurisdiction if the subject carriage was a US domestic flight.

The Applicant relied on matters set out in the second sentence of Article 1 paragraph 2 submitting that the flight was a domestic flight and not "International carriage". On the other hand, American Airlines submitted an historical construction of "*international carriage*"[13] to aver that the flight falls into the first sentence of Article 1 paragraph 2 (at [23]) relying on the following matters:

1. the "*agreement between the parties*" was created upon the booking of the electronic ticket for around-the-world air travel, part of the booking being flights AA3820;
2. the place of departure, Melbourne, for the around-the-world journey was within the territory of a single State Party, Australia;
3. the place of destination, "*according to the agreement between the parties*" was also Melbourne (within the territory of a single State Party, Australia) because in the case of a ticket for around-the-world air travel the place of departure and the place of destination are the same; and
4. there was an agreed stopping place within the territory of a single State Party, the United States of America.

The Tribunal agreed with American Airlines submission that in these circumstance the flight from Chicago to Washington was "international carriage" referring to that part of Lord Bridge's judgment in *Holmes v Bangladesh Biman Corporation*[14] citing that example referenced in *Goldman v. Thai Airways Ltd*.[15]

Accordingly, the Applicant's claim was dismissed.

Nick Humphrey & Dr Vernon Nase, Editors

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[12] [2007] VCAT 1967

[14] [1989] A.C. 1112 at 1131
[15] [1983] 1 WL.R. 1186

FOCUS ON THE UNITED STATES

Certain Underwriters at Lloyd's London v. Great Socialist People's Libyan Arab Jamahiriya (No. 06-cv-731, No. 08-cv-504; Sept. 2, 2011)

Reinsurers Awarded Judgment Against Syria for 1985 Hijacking of EgyptAir Flight 648

On November 23, 1985, EgyptAir Flight 648 was hijacked shortly after takeoff from Athens, Greece, bound for Cairo, Egypt by terrorist operatives of the Abu Nidal Organization (ANO), a brutal terrorist organization sponsored and funded by the Syrian government. More than 60 passengers were killed in the hijacking, including three American citizens. In an attempt by Egyptian security forces to end the hijacking, the airplane was totally destroyed. The plane was insured under a hull war risk policy issued by MISR Insurance Company, which in turn had secured numerous reinsurance agreements with Certain Underwriters at Lloyd's London (Lloyd's) and other reinsurers.

Lloyd's sued the government of Syria under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602 *et seq*. Syria failed to appear and the court considered the evidence presented by Lloyd's to establish a prima facie case in order to obtain default judgment under FSIA. The court granted judgment in favor of Lloyd's for its reinsured share of the loss. The loss included approximately $10.5 million for the value of the plane minus the offsetting salvage recovery, nearly $500,000 in claims-related expenses, prejudgment interest at the rate of 7 percent per year, and post-judgment interest.

In determining whether Lloyd's could recover under FSIA against Syria, the court considered various jurisdictional issues. The court explained that FSIA allows a foreign state that is a sponsor of terrorism to be held liable to a United States citizen for personal injury or death and for reasonably foreseeable property loss. The killing of three U.S. citizens in the hijacking provided jurisdiction under FSIA for the U.S. court to entertain Lloyd's collateral claim for property damage to the plane incurred as a result of the hijacking. The court ruled that FSIA creates a federal cause of action against a foreign state that provides material support or resources for an act of terrorism, including for reasonably foreseeable property damage resulting from such a terrorist act. Considering the uncontested evidence presented by Lloyd's in a five-day hearing, the court found that Syria indisputably supported the ANO, was fully aware that ANO was a brutal terrorist organization, and that the damages sought by Lloyd's for destruction of the airplane were reasonably foreseeable from such support as required to recover under FSIA.

IMPACT – REINSURANCE: Terrorist attacks remain a seemingly ever-present risk worldwide. The FSIA creates a cause of action against state sponsors of terrorism, providing a useful tool for insurers and reinsurers to recover assets of state sponsors of terrorism for reasonably foreseeable injuries, death and property damage.

Daniel Gerber, Partner, Goldberg Segalla LLP

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Getz v Boeing Company et al (US Court of Appeals, 9th Circuit, August 2011)

This class action arose from the crash of an Army Special Operations Aviation Regiment helicopter in Afghanistan in February 2007 in which 8 servicemen were killed and 14 were injured. The Plaintiffs included those injured and the heirs of the deceased.

The Army-operated MH-47E Chinook helicopter, which was carrying military personnel to Bagram Air Base, crashed in the Kabul Province of Afghanistan when it encountered snow, rain and ice causing its engines to suddenly shut down.

Initial investigations into the cause of the crash concluded:

i. the accident occurred after one of the aircraft's two engines suddenly flamed out;

ii. the aircraft's engine control system—the Full Authority Digital Electronic Control (FADEC) — unexpectedly shut down, causing the engine to fail; and

iii. the engine's Digital Electronic Control Unit (DECU)—the onboard computer that controls fuel flow to the engine—malfunctioned due to some kind of electrical anomaly.

A further investigation conducted by the aircraft's manufacturers concluded:

i. the crash occurred because the engine ingested an inordinate amount of water and ice during the inclement weather causing it to flame out; and

ii. the flameout might have been avoided if the aircraft's ignition system had been equipped with a continuous or automatic relight feature, which would have allowed the engine to restart automatically in the event of a water- or ice-induced flameout.

This action was filed by the Plaintiffs against those parties that designed and manufactured the aircraft including Boeing, Honeywell, who designed and built the engines (including the ignition system), Goodrich who designed the FADEC and were responsible for the DECU and ATEC, a British company that designed the hardware and software for the DECU.

Boeing successfully removed the action from a Californian State Court to the Federal Court. The District Court rejected each of Plaintiffs' claims. First, it ruled that it lacked personal jurisdiction over ATEC. Then, in 2010, it granted summary judgment to Boeing, Honeywell, and Goodrich (the Contractors) in *Getz v. Boeing Co*[16]. The district court ruled that the Plaintiffs' state-law claims against the Contractors were pre-empted by the government contractor defense.

The appeal was heard by Circuit Judges Wallace, Noonan and Clifford with an opinion by Senior Circuit Judge Wallace.

The case against ATEC

The issue against ATEC was whether or not the Plaintiffs' claims for product liability, negligence, wrongful death, and loss of consortium arose under federal law. The Court noted that under the procedural rules, aggrieved Plaintiffs are afforded a mechanism for vindicating their federal rights in cases involving defendants that lack single-state contacts, but who possess minimum contacts with the United States as a whole.

In concurrence with the commentary on "*Federal Claim Outside State-Court Jurisdiction*" and judicial authority, the Court held that Plaintiffs' claims against ATEC did not arise under federal law for that purpose.

The Court also rejected the Plaintiffs' contention that ATEC had a minimum contact with California which would enliven a right under the procedural rules. The Court maintained that the Plaintiffs failed to identify any specific facts, transactions, or conduct that would give rise to personal jurisdiction over ATEC in California.

The government contractor defence

The Supreme Court established the framework of the government contractor defense in *Boyle v. United Technologies Corp.*[17], In that case, the Court explained that procurement of military equipment involves "*uniquely federal interests*" that sometimes pre-empt a plaintiff's product liability claims against government contractors. This defense protects government contractors from tort liability that arises as a result of the contractor's compliance with the specifications of a federal government contract.

To afford the benefit of this defence, a contractor must establish:

i. that the United States approved reasonably precise specifications;

[16] ., 690 F.Supp.2d 982 (N.D. Cal. 2010)

[1717] 487 U.S. 500 (1988).

ii. the equipment conformed to those specifications; and

iii. the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[18]

The Plaintiffs raised several challenges to each of these elements. Under *Boyle*'s first element, approval must result from a "continuous exchange" and "back and forth dialogue" between the contractor and the government.[19] Plaintiffs argue that the necessary specifications are lacking with respect to the following design features of the MH-47E Chinook: (i) the engine's ignition system, (ii) the FADEC-DECU, and (iii) the aircraft itself.

Engine ignition system

The Plaintiffs claimed the ignition system was defective because it was manufactured without a continuous relight function, which would have allowed the engine to restart automatically in the event of a water-induced flameout. However the Court found:

i. the United States Army approved reasonably precise specifications for this aspect of the ignition system, which was manufactured by Honeywell;

ii. Honeywell was compliant with its contract with the Army; and

iii. the Army's approval of this specification resulted from careful deliberation, not a "rubber stamp."

The Court emphasised that these elements went to design specifications and were more than mere performance criteria.

The FADEC-DECU system

The Court concluded that the Army had carefully reviewed these specifications, scrutinized their content, and evaluated the reported test results before approving Goodrich's specifications. His Honour also noted that '[at] one point Army engineers even rejected the "FADEC control system specification," insisting that Goodrich address certain technical concerns.

Conversely, it was noted that the Plaintiffs presented no contrary evidence. It was felt that 'the government [had] exercised judgment in approving this product's design'. The Court was 'persuaded' by the Eleventh Circuit's decision in *Brinson v. Raytheon Co.*[20] where 'the court imposed the government contractor defense even though the product design had been patented before it was approved by the United States Air Force.' This was done because the Air Force had carefully considered and reviewed the design prior to approval and implementation and that was sufficient.

The 'helicopter [as a whole] was defective' argument

This argument was also rejected by the Court for the same reasons as the two prior arguments, that the Government had approved reasonably precise design specifications.

Second element of the 'government contractor' defense

Relying on *Miller v. Diamond Shamrock Co.,*[21] the Court held that the operative test for conformity with reasonably precise specifications turns on whether "the alleged defect . . . exist[ed] independently of the design itself." Noting that the Government had spent years reviewing, developing, and testing both the MH-47E and its engine, and conducted tests and checks upon delivery, the Court concluded that MH-47E conformed with the approved specifications for both the ignition system and the FADEC-DECU.

The Court also considered a post-accident email advanced by the Plaintiffs in which an Army officer had expressed disappointment that the contractors had not provided an input/output table that would have measured the electrical perameters used by the DECU to control the engines on the helicopter. The Court felt that this did not impact upon the issue of the DECU's

[18] Id at 512.
[19] *Butler v. Ingalls Shipbuilding, Inc.,* 89 F.3d 582, 585 (9th Cir. 1996).
[20] , 571 F.3d 1348 (11th Cir. 2009)
[21] 275 F.3d 414, 421 (5th Cir. 2001)

conformance with design specifications. In the words of the Court, '*the notion that the measurements would have identified a deviation from the approved design specifications is speculative and thus insufficient to defeat summary judgment*.'

Citing *Kerstetter*, 210 F.3d at 435, and *Oliver*, 96 F.3d at 1000, the Court maintained that a mere allegation of non-performance is insufficient. Although the aircraft's engine did not perform like it was supposed to does not preclude the Defendants from establishing the contractor defense.

Oligation to warn about known dangers

Under the final limb of the government contractor defense, government contractors must warn of the dangers in the use of the equipment that were known to the [contractor] but not to the United States.[22] On this point, the Court concluded that the Defendants satisfied this requirement. Curiously, the Chief of the Aviation Engineering Directorate, which approved the design specifications for the MH-47E, stated in his undisputed affidavit that "*automatic re-light . .. technology has always been known to the Army, but the Army elected not to include it*" on the Chinook line of helicopters.

In response to Plaintiffs' assertion that the Army had never heard of an engine actually flaming out due to water or ice ingestion the Court noted that under *Boyle* a contractor is not required to warn about dangers of which it merely should have known.

Did the Contractors violate a state-law duty to warn of dangers of which they should have known?

In order for a contractor to defend itself against a claim of failure to warn, it must show that:

i. the government exercised its discretion and approved certain warnings;
ii. the contractor provided the warnings required by the government; [and]
iii. the contractor warned the government about dangers in the equipment's use that were known to the contractor but not to the government.[23]

The Plaintiffs argued that the Defendants violated their duty to warn because they knew or should have known of an electrical problem with the FADEC-DECU, but failed to provide timely warnings to the operators of the MH-47E Chinook.'

The Court focused on warnings included in the helicopter's Operator's Manual, maintaining that it was '*beyond dispute*' that the government exercised discretion when it selected warnings for the aircraft. Alluding to its earlier analysis, the Court also concluded that the Contractors could easily satisfy the second and third elements of the criteria. On the second criterion they had delivered the Operator's Manual and for the third criterion they had warned the government about dangers in the equipment's use that were known to the Defendants but not to the government.

The Court affirmed the District Court decision.

Dr Vernon Nase & Nick Humphrey, Editors

***Illinois National Insurance Company v. Wyndham Worldwide Operations, Inc*., 653 F.3d 225**

U.S. Court of Appeals, Third Circuit

In *Illinois National Insurance Company v. Wyndham Worldwide Operations, Inc*., 653 F.3d 225 (3rd Cir. Aug. 3, 2011), the U.S. Court of Appeals for the Third Circuit, in a precedential decision, held that New Jersey law allows reformation on the basis of mutual mistake against a party that did not participate in the negotiation of a contract.

Illinois National commenced an action in the U.S. District Court for the District of New Jersey seeking a determination that Wyndham is not covered under an aircraft fleet insurance policy issued to Jet Aviation. Various claimants had sued Wyndham after two Wyndham employees rented an aircraft that later crashed, resulting in multiple fatalities. Jet Aviation, which managed Wyndham's own aircraft,

[22] Per *Boyle*, 487 U.S. at 512.

[23] *Oliver,* 96 F.3d at 1003-04.

had no involvement with the rented aircraft. Nevertheless, Wyndham claimed that, pursuant to a change in the policy's managed aircraft endorsement made in 2008, it was entitled to coverage under Jet Aviation's policy regardless whether the accident involved an aircraft arranged by Jet Aviation. The change had been proposed by Jet Aviation's broker and agreed to by Illinois National, without any involvement of Wyndham. Illinois National sought a declaration that Wyndham is not entitled to coverage under the policy because it excludes coverage for "non-owned" aircraft, unless operated by or used at the direction of Jet Aviation or, alternatively, reformation of the policy to conform to the parties' undisputed intent that coverage was so limited.

The provision of the Managed Aircraft Endorsement at issue – excluding non-owned aircraft coverage unless such aircraft is "operated by or used at the direction of Jet Aviation Business Jets, Inc." – remained unchanged throughout 2004, 2005, 2006 and 2007. In 2008, however, the term "Named Insured" was substituted for "Jet Aviation Business Jets, Inc." Jet Aviation's broker proposed this change to encompass all Jet Aviation entities that might be involved in arranging non-owned aircraft for insured owners. Wyndham did not dispute that neither Jet Aviation, Marsh nor Illinois National intended the change to give any of Jet Aviation's clients such as Wyndham, referred to in the endorsement as "Insured Owners," coverage for non-owned aircraft with which Jet Aviation had no involvement. Indeed, Wyndham procured its own coverage for non-owned aircraft liability under policies from StarNet Insurance Company, outside of Jet Aviation's policy. Nevertheless, the District Court found that mutual mistake was impossible since Wyndham was not directly involved in negotiating and drafting the policy with Illinois National.

The District Court granted summary judgment to Wyndham, dismissing Illinois National's action. The court ruled that the policy provided coverage to Wyndham and reasoned – without reference to the undisputed intent of the contracting parties, Jet Aviation and Illinois National – that reformation based on mutual mistake could not be obtained against Wyndham because Wyndham was not involved in negotiating and drafting the policy. The district court also dismissed Illinois National's complaint on the ground that the reformation claim had not been adequately pled in accordance with the requirements of Federal Rule of Civil Procedure Rule 9(b). Illinois National appealed the decision.

The central issue of the appeal was whether the district court erred by disregarding the undisputed intentions of the contracting parties to the policy. Ruling that reformation based upon mutual mistake is not available as to a party not directly involved in negotiating and drafting the policy, the District Court apparently decided that any evidence of the parties' intent was irrelevant. Illinois National argued that in so doing, the District Court disregarded the fundamentals of reformation.

The Third Circuit agreed with Illinois National that the District Court erroneously interpreted New Jersey law in concluding that mutual mistake can only serve as a basis for reformation against a bargaining party. Reformation based on mutual mistake can be obtained against third parties, but is based upon the intent of the *contracting* parties. The Third Circuit found that "the understanding of persons who were not contracting parties at the time of consummation of a contract is irrelevant." Accordingly, the Third Circuit found that the District Court erred in not considering the intent of the contracting parties. With respect to whether the claim met the requirements of Rule 9(b), the Third Circuit again disagreed with the District Court and found that Illinois National sufficiently pled mutual mistake. The fact that Wyndham had enough information with which to answer and counterclaim, engage in discovery, and move for summary judgment indicated the complaint was adequately pled.

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Oxford Aviation, Inc. v. Global Aerospace, Inc **-- F. Supp. 2d --, 2011 WL 4102582 (D. Me. Sept. 14, 2011)**

U.S. District Court, District of Maine

In *Oxford Aviation, Inc. v. Global Aerospace, Inc*., the U.S. District Court for the District of Maine rejected a claim by an insured aircraft refurbishment and repair facility, Oxford Aviation, Inc., that its aviation insurer, Global Aerospace, must defend a suit against Oxford alleging defective repairs to a customer's aircraft.

Global had denied coverage for the underlying suit, in which Oxford's customer alleged that the insured incorrectly installed equipment, scratched and damaged the exterior of the aircraft, damaged avionics and engine components, and that in a subsequent flight a window cracked because of faulty repairs by the insured. The customer asserted causes of action for breach of contract and warranties, violation of the Maine Unfair Trade Practices Act and deceptive trade practices law, unjust enrichment, promissory estoppel, fraud and negligent misrepresentation. As the court noted, there was no claim for bodily injury and no claim for damages to any property other than the aircraft itself.

The insured argued that there was a potential for coverage for at least some of the damage, and therefore a duty to defend, under Coverage A of its aviation general liability insurance policy, which provided that the insurer would pay "those sums that the insured becomes legally obligated to pay as damages because of property damage to which this insurance applies," and under Coverage D, which provided hangerkeepers liability coverage.

Without directly addressing Global's argument that the damages did not result from an accident, the court concluded that, because all of the counts of the complaint relate to deficiencies in the insured's work and product, coverage was barred by the exclusions to Coverage A, including Exclusion (j), which excluded claims for damage to "*personal property in the care, custody or control of the insured, Exclusion (k), which precluded coverage for property damage to "your product*," and Exclusion (l), which barred coverage for property damage included in the "*products-completed operations hazard*." The court also concluded that coverage for the crack in the window that subsequently occurred in flight because of the insured's faulty repair was barred by Exclusion (m), which excluded claims for damage to impaired property or property that has not been physically injured resulting from the deficient product or work of the insured. The court appears to have viewed the window as "*impaired property*" defined in the policy as "*tangible property other than your product or your work, that cannot be used or is less useful*."

The court also rejected the insured's argument there was a potential for coverage under Coverage D (hangerkeepers liability coverage). Coverage D provided coverage for sums the insured becomes liable for because of damage to aircraft in the insured's "care, custody and control." However, Coverage D explicitly excluded coverage for defects in the actual work of the insured while they have custody of the aircraft. The court held that while it is undoubted that Coverage D covered accidental damage, there was no possibility of coverage because the complaint only sought compensation for damage caused by the insured's work rather than purely "accidental" damage. Because the complaint specifically did not state a claim for the type of accidental damage to which Coverage D would apply, the court held that there was no duty to defend.

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FOCUS ON CANADA

Quantum Helicopters Ltd. v. Honeywell International Inc. 2011 BCSC 1352

Particulars in Aviation Product Liability Cases

On June 26, 2008, one of Quantum Helicopters Ltd's ("Quantum") Bell helicopters suffered a hard landing in British Columbia following an engine failure — causing damage to the rotorcraft.

Quantum commenced legal proceedings alleging that the engine failure was caused by a defective power turbine blade due to a fatigue crack which caused an overstress fracture of the remainder of the blade. Quantum also alleges that the fatigue crack originated at a metallurgical anomaly in the power turbine blade which had been introduced when it was cast.

Quantum named a number of parties as defendants in the action, including Honeywell International Inc. (the engine manufacturer), Howmet Castings & Services, Inc. and Howmet Corporation (the companies alleged to have cast the subject blade) as well as Airborne Aero Engines Ltd. (an aircraft engine maintenance facility which performed work on the helicopter prior to the accident).

There were several bundles of allegations made as to Airborne's negligence in the claim, two of which were that Airborne:

(i) failed to comply with Honeywell's overhaul manuals, instructions, bulletins and recommended practices for the overhaul of the engine; and

(ii) failed to properly service, repair, test, inspect and maintain the helicopter, including the engine in accordance with the applicable manufacturer's manuals, recommendations, bulletins, advisories, instructions for continuing air-worthiness, the Canadian Aviation Regulations (the "CARs"), the CARs standards and the standards of good airmanship.

Airborne brought a motion to the Superior Court of British Columbia seeking particulars as to these allegations. In short, Airborne's position was that these allegations, as pled, were overly broad. Airborne maintained that it was not possible for it to understand the case against it unless it was provided with greater specificity by the plaintiff.

The Master deciding the motion heard arguments from Quantum to the effect that the action was still at the pleadings stage, and that documentary discovery was ongoing. As a result, argued Quantum, it was too soon for it to provide the requested level of specificity sought by Airborne.

I am satisfied that, to a large ex-tent and with the exception noted, the request for particulars is premature. The exception is with respect to the applicable CARs sections and standards.

Quantum also argued that some of the information that it will need to make out its case (and provide greater particularization as to the negligent actions allegedly committed by the defendants) was still in the hands of other defendants, such as Honeywell which was expected to produce its applicable overhaul manuals, instructions, bulletins, recommended practices for the overhaul of the engine in question and instructions for continuing air-worthiness. Only when those documents were produced, and the Honeywell representative had been questioned on discovery, would Quantum be in a position to set out informed particulars of negligence.

Master MacNaughton accepted Quantum's arguments with one exception, which is discussed further on in this article. She held that she was satisfied that Airborne had been provided with sufficient particulars to "take the matter through to examinations for discovery". She noted that there was no evidence from a representative of Airborne suggesting that it does not have sufficient particulars to respond to the action or to

know the case it has to meet at this early stage of the proceedings.

On the issue of the CARs, however, Master MacNaughton considered the voluminous index to the CARs, which was attached to an affidavit filed by Airborne and noted that there are "many parts of the CARs which are irrelevant to this action and will not be in issue between the parties." She therefore ordered that Quantum provide particulars as to which sections it intended to rely upon.

It is likely that Master MacNaughton's rather bald order that Quantum provide particulars as to which sections of the CARs it is relying upon will be problematic for the parties — as there are thousands of sections and subsections in the CARs (organized under nine Parts, each with its own set of Subparts) — and Master MacNaughton did not specify the level of precision to which the sections had to be cited.

Because there was divided success on the motion, costs were ordered "in the cause" (i.e. the party that ultimately succeeds in the action will be entitled to costs of the motion).

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FOCUS ON FRANCE

Emirates v. X. n° 09-71307, 1st Civil Chamber of the Cour de Cassation

French Cour de Cassation rules that claim for deep vein thrombosis does not amount to an accident under Warsaw Convention

By Judgment of 23 June 2011 (Emirates v. X. n° 09-71307), the 1st Civil Chamber of the Cour de Cassation reiterated the conditions for establishing an international air carrier's liability under art. 17 of the 1929 Warsaw Convention (and *mutatis mutandis* art. 17 of the Montreal Convention of 1999).

This is also the first French decision that expressly rules that deep vein thrombosis (DVT) is not an accident under art. 17 of the Warsaw Convention.

Background

Following a Colombo-Paris flight on 1st March 2004 operated by Emirates, with stopovers in Muscat and Dubai, a passenger suffered from DVT (the formation of a blood clot in a deep vein); this was diagnosed after his return to France.

Proceedings

The passenger commenced interlocutory proceedings against Emirates before the Paris courts, claiming damages on a summary basis for personal injury resulting from DVT, on the grounds that the airline was presumed liable. The court ordered a medical survey. The Court appointed medical expert concluded that there was no logical explanation for the DVT suffered by the claimant, other than the "economy class syndrome" of remaining seated too long. The court at first instance dismissed the claim, on the grounds that there appeared to be an arguable defence, and that the summary relief sought was inappropriate.

The claimant lodged an appeal to the Paris Court of Appeal.

The Court of Appeal (21 Sept. 2009) overturned the interlocutory order, finding the carrier liable under art. 17 of the Warsaw Convention, which provides that the carrier is liable for damage sustained in the event of wounding of a passenger or any other bodily injury suffered by a passenger, "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The Appeal court held inter alia that the Court appointed medical expert had concluded that the passenger's medical history did not reveal any particular sensitivity to thrombosis; the Court thus concluded that the presumption of liability under article 17 operated in favour of the passenger.

Emirates lodged an appeal against this decision before the Cour de cassation.

Arguments

The air carrier challenged the Court of Appeal ruling on the following grounds:

1. The presumption of liability under art. 17 of the Warsaw Convention only applies where injury results from an accident. The appeal judgment was thus inconsistent with the Warsaw Convention;

2. The Court of Appeal merely found that the precise cause of the injury was unknown and that there was no evidence of any previous pathology which could explain the DVT suffered by the passenger; it did not find that there had been any accident. In the absence of an accident, the Court of Appeal had erred in finding Emirates liable under the Convention.

Decision

The Cour de Cassation annulled the Court of Appeal judgment in an unequivocal ruling. The Supreme Court found that the Appeal court's findings of fact did not justify that the injury should be attributed to an accident; as a result there was no legal

basis for the appeal court judgment, which should thus be annulled in all respects.

For the Cour de Cassation, the DVT suffered by the passenger was not an accident within the meaning of art. 17 of the Warsaw Convention.

Comment

This ruling is consistent with the interpretation by the French courts of the notion of accident under art. 17 of the Warsaw Convention (and art. 17 of the Montreal Convention).

The French courts have repeatedly stressed and highlighted that an accident must be a sudden and exterior event. Such test therefore excludes all loss or injury resulting from an internal pathology of the passenger, and more generally any damage caused by or contributed to by the negligence of the injured person. The Cour de Cassation had previously held, in similar circumstances, that pulmonary embolism (also resulting from the formation of blood clots) suffered by a passenger is not as such an accident (Gillet v. Air Canada - 14 June 2007). Other decisions have also established that heart attacks, cardio-vascular accidents or deafness suffered by a passenger, even on flight, could not be construed as accidents either. All these decisions and the reasoning contained therein should logically also apply to the equivalent provisions of art. 17 of the Montreal Convention.

Scope

The decision rendered by Cour de Cassation is consistent with other court decisions from other parties to the Warsaw Convention (and the Montreal Convention) in respect of DVT claims.

Over the last decade, passengers have brought claims before the courts of various States for compensation for damage resulting from DVT. Authors have referred as a result to the *"economy class syndrome"*, to which the French court appointed medical expert had also alluded. Amongst previous decisions which have ruled that DVT is not an accident under art. 17 of the Warsaw Convention one can cite *Povey v. Quantas Airways Limited [2005] HCA 170 (*Australia) ; *Deep Vein Thrombosis and Air Travel Group Litigation [2005] UKHL 72* (House of Lords, England and Wales) ; *Blansett v. Continental Airlines, 379 F. 3d 177 (5th cir. 2001)* or *Caman v. Continental Airlines, Inc., 455 F.3d 1087 (9th Cir. 2006)* (USA); *McDonald v. Korean Air [2003] 171 OAC 368* (Canada); *Distr. Court of Tel Aviv (Dec. 2007), Zelaksonov v. El Al* (Israel) ; *Landgericht München I, 7 March 2001, n° 2902354/00, 2001* (Germany); *Trib. Busto Arsizio, Lombardia, 7 Jan. 2009, Meilan v. Air China*) (Italy). Several of these decisions refer directly to the case law of other State Parties.

The French Cour de Cassation's recent ruling is therefore consistent with the international interpretation of the Convention; the lack of any ambiguity in its judgment clearly sets an important precedent within France.

Furthermore, the common approach adopted in a number of jurisdictions, here confirmed by the French courts, is a perfect illustration of the will of the respective signatory states to try to adopt a uniform interpretation of the Convention. In this respect a French decision was awaited with interest as the Warsaw Convention was initially drawn up in French (art. 36), which was the version intended to prevail if clarification was required.

It also confirms that inspiration can and should be sought from decisions of the courts of other Convention countries (as observed by Lord Scott of Foscote in his opinion under abovementioned House of Lords judgment, at § 11.4).

Jean-Baptiste Charles and Olivier Purcell, Holman Fenwick Willan, France

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AVIATION AND THE ENVIRONMENT

Australia's new carbon price legislation and what it means for the aviation sector

New carbon price legislation passed by Senate

On 8 November 2011, the Australian Senate passed the Federal Government's 'Clean Energy' package of 18 related carbon pricing bills. In passing the legislation, Australia joins the ranks of a select few jurisdictions around the world that will have carbon pricing schemes in place, including the EU, New Zealand and California.

The new legislation, which commences on 1 July 2012, imposes a carbon price on the carbon emissions of Australia's top emitters, and also on the emissions generated from transport fuel, including fuel used for domestic aviation.

In this article the key issues for the aviation sector are analysed and the key components of the carbon liability scheme are considered.

Legislative framework

The new *Clean Energy Act 2011* introduces the 'carbon pricing mechanism' or CPM. Under the CPM, 'liable entitles' will be required to purchase permits to cover their gaseous emissions and will need to surrender the permits at the end of each compliance year.

It is critical to note that carbon liability for emissions from transport fuel use (including domestic aviation fuel use) will not be subject to the CPM. There is no requirement for aviation and other transport fuel users to obtain and surrender permits in respect of their transport fuel emissions. However there may be an opportunity for large fuel users to voluntarily 'opt in' to the CPM instead of complying with the fuel tax credit and fuel excise legislation. This is discussed in more detail below.

Whilst the Government has imposed a carbon price on some transport fuel emissions (including aviation fuel emissions), the architecture of the transport fuel scheme is entirely different to that of the CPM. Government has imposed a carbon price on transport fuel emissions through amendments to existing fuel tax credit and fuel excise legislation.

Key features of the carbon liability framework for the aviation sector

Emissions from aviation fuel used for domestic aviation will be subject to a carbon price from 1 July 2012. Fuel used for international aviation will not be subject to carbon liability under the Australian scheme. It is the Government's intention that the carbon price on transport fuel (including aviation fuel) will be equivalent to the carbon price paid by liable entities under the CPM.

It is important to appreciate that there will be no threshold for liability in respect of transport fuel emissions. Under the CPM, only liable entities that emit more than 25,000 tonnes of carbon dioxide equivalent per year will be liable to pay a carbon price on their emissions. However, under the transport scheme, all emissions from the covered transport fuels used by the covered transport modes will be subject to carbon liability. This means that all domestic aviation fuel users, including regional and general aviation businesses as well as the larger domestic and international carriers, will need to pay a carbon price for their aviation fuel use.

Carbon liability for aviation fuel use for domestic aviation will be imposed via the *Customs Tariff Amendment (Clean Energy) Act 2011* and the *Excise Tariff Legislation Amendment (Clean Energy) Act 2011*.

Mechanics of liability for aviation fuel users

A proxy carbon price will be imposed on domestic aviation fuel use by adding a 'carbon component rate' to the excise duty for each litre of aviation fuel used.

Adjustments to the fuel excise will be made annually from 2012 to 2014 (when the CPM is in its fixed price phase) and then every six months from 1 July 2015.

The aviation fuel 'carbon component rate' will be determined by multiplying the relevant 'carbon price' by the emissions rate for the aviation fuel. The carbon price from 2012 to 2014 will be the pre-set carbon permit price under the CPM. From 2015 onwards, the carbon price will be the average permit auction price for permits auctioned on the domestic market over the previous six months.

Key features of the CPM

The gaseous emissions which are covered under the CPM include carbon dioxide, methane, nitrous oxide and perfluorocarbons (from aluminum smelting).

The CPM applies to stationary energy sources, industrial processes, fugitive emissions and emissions from non-legacy waste. The CPM does not apply to agriculture and land sector emissions and does not apply to emissions from transport fuel use.

Under the CPM, 'liable entitles' which have 'operational control' over 'facilities' that emit more than 25,000 tonnes of covered emissions will be subject to the CPM. Liable entities that do not meet this threshold will have no carbon liability.

The Australian Government estimates that about 500 businesses will be subject to the CPM. The liable entities will comprise about 130 waste disposal businesses, 100 mining businesses, 60 electricity generation businesses, 60 industrial process businesses (such as cement, chemicals and metal processing), 50 businesses from fossil fuel intensive sectors and 40 natural gas retailers[24].

Mechanics of liability under the CPM

Under the CPM, liable entities must surrender permits at the end of each compliance year equivalent to the amount of their emissions. One permit represents one tonne of carbon dioxide equivalent gas.

When the CPM starts on 1 July 2012, there will be an initial 3 year fixed price period where the price of the permits is pre-set by government. The permit price in the first year of the CPM will be $23.00, moving to $24.15 in 2013 and $25.40 in 2014.

This will be followed by a 3 year flexible price phase commencing on 1 July 2015. During this phase, Australian permits will be auctioned on the domestic market but will be subject to a price floor of $15 (increasing 4% each year) and a price ceiling of $20 above the international price (increasing 5% each year). In 2017, the price ceiling and price floor will be removed and the permit price will be purely determined by the domestic market.

It is likely that the Australia permit price will be significantly influenced by the price of international permits, for example those available on the EU market. Whilst during the first three years of the CPM (during the fixed price phase) international permits cannot be used to meet the CPM liability, from 2015 onwards, up to 50% of permits can be purchased on the overseas market.

From 2015 onwards, liable entitles will be able to manage and reduce their carbon liability through the purchase of international permits and also through the purchase of domestic carbon offsets.

Carbon liability for other transport modes

Other transport modes that will be subject to a carbon price include fuel used in domestic shipping and domestic rail, but not on-road transport. The Government has confirmed that it intends to impose a carbon liability for heavy on-road vehicles (over 4.5 tonnes) from 2014 onwards, however this will be subject to political agreement being

[24] Australian Government (Nov 2011) Clean Energy Future Fact Sheet '*Carbon Pricing Mechanism: Who is liable?*'

reached at the time[25]. Government's failure to treat all transport modes equally has raised a number of concerns from transport stakeholders that the scheme lacks competitive neutrality and will give commercial advantage to the emissions intensive on-road transport sector.

Biofuel

The new carbon legislation provides that ethanol, biodiesel and renewable diesel will not be subject to a carbon price, however the legislation is silent on whether sustainable aviation fuels will be zero carbon rated.

Both the EU ETS and the NZ scheme specifically provide that sustainable aviation fuel is not subject to a carbon price. Sustainable aviation fuel should also be expressly included as a zero carbon rated fuel in the Australian carbon legislation. This will ensure that there is certainty for the R&D sector and in the funding market to encourage the development of sustainable aviation fuel in the Australian market.

Managing carbon liabilities in the aviation sector

As the fuel excise scheme makes use of existing business systems for taxation, the scheme is unlikely to be administratively burdensome for small aviation fuel users. However, for the large aviation fuel users, the fuel excise scheme will be restrictive as it does not allow for any business autonomy in managing carbon liability.

In particular, aviation businesses who pay their carbon liability via the fuel excise scheme will not benefit from the following market advantages available to those sectors which have a liability under the CPM:

- The ability to purchase carbon permits on the open market, or carbon offsets from domestic or international markets (which may be cheaper than domestic permits);
- The ability to purchase and 'bank' the carbon permits not used, for future use or sale;
- The ability to use the free allocation of allowances to fund investments in lower emissions plants or technologies; and
- The ability to claim the costs of carbon permits as a tax deduction.

Opt In Scheme

Pursuant to section 92A of the Clean Energy Act 2011, large fuel users (a term not defined in the legislation) will be entitled to 'opt in' to the CPM as an alternative to paying for their carbon liability via fuel tax adjustments.

The details of which large fuel users will be able to opt in to the CPM scheme will be provided in regulations, which are due to be released by December 2012. It is likely that the large domestic carriers will be eligible to opt in to the CPM. All remaining aviation fuel users which choose not to opt in to the CPM, or which are not eligible to opt in, will be required to pay for their carbon liability through the fuel excise adjustment legislation.

The opt in provisions enable large fuel users to opt in from 1 July 2013 onwards. For the first year of the scheme in 2012, large aviation fuel users will be required to pay for their carbon liability via the fuel excise scheme.

The aviation fuel users which are eligible and which choose to opt in to the CPM may be able to achieve a lower net carbon cost for their fuel use, as compared to aviation fuel users who pay for their carbon liability via fuel excise adjustments. This is because the aviation fuel users who opt in to the CMP will, in the long term, be able to purchase international permits (which may be cheaper than the domestic permits) and will also be able to participate in carbon emission offset schemes, to decrease their overall carbon liability.

[25] Australian Government (July 2011) 'Securing a clean energy future', page 133.

On the horizon

Future developments which will be relevant to the domestic aviation sector include:

- the release of the draft opt in regulations, which will clarify which aviation fuel users will be entitled to opt in to the CPM, due to be released by December 2012;
- possible future government clarification that sustainable aviation fuels will indeed be subject to a zero carbon price;
- the Government's decision on whether the heavy on-road transport sector should be subject to a carbon price from 2014; and
- the Productivity Commission's future review of carbon fuel tax credit and fuel excise arrangements which will include an examination of the merits of a regime, based explicitly and precisely on the carbon and energy content of transport fuel. No date has been yet been given for this review.

Nikolina Babic, Senior Associate, Norton Rose Australia

Pressure mounts on the EU over its Emissions Trading Scheme

The Air Transport Association of America & Ors **[2011] EUECJ C-366/10 (6 October 2011)**

On 6 October 2011 Advocate General Kokott of the European Court of Justice (ECJ) delivered her highly anticipated opinion on the legality of the extension of the European Union Emissions Trading Scheme (EU ETS) to aviation. Disappointingly for the airlines and industry associations involved in the case, but unsurprisingly, the Advocate General concluded that *"the inclusion of international aviation in the EU Emissions Trading Scheme is compatible with the provisions of international law invoked."* Although the opinion is not binding on the ECJ, it is followed in the majority of cases. The judgment from the Grand Chamber is now awaited and expected by early 2012. As noted by the Advocate General herself (implicitly acknowledging the political nature of the legal dispute), the judgment *"will be of fundamental importance not only to the future shaping of European Climate Change Policy but also generally to the relationship between European Union and international law."*

This article examines the Advocate General's opinion and the global response to it before considering what options remain available to opponents of the scheme.

Background

In 2008, the EU's ETS legislation was amended by Directive 2008/101 to include aviation within the scheme of greenhouse gas emissions allowance trading. In December 2009, the Air Transport Association of America (ATA) and three of its airline members filed an application for a judicial review of the UK regulations that implement the Directive. The National Airlines Council of Canada, the International Air Transport Association and a transatlantic coalition of environmental organisations were subsequently granted permission to intervene in the judicial

review application, which the English High Court referred to the ECJ for a preliminary ruling.

The EU ETS is a source of increasing concern for airlines. From 1 January 2012, all civil aviation flights arriving into or departing from European Community airports will be included within the EU ETS and airlines will have to acquire and surrender allowances for the carbon emissions produced by these flights. Failure to surrender sufficient allowances will result in potentially heavy sanctions. Whilst assessments vary considerably, the financial burden associated with acquiring allowances and complying with the scheme will undoubtedly be substantial.

Advocate General's Opinion

In the case before the ECJ, the Claimants and supporting parties argued that the extension of the EU ETS to aviation is unlawful for a number of reasons, most notably the following:

1. It violates the fundamental principle of international law that each state has complete and exclusive sovereignty over the airspace above its territory;

2. It violates a number of provisions contained in the Chicago Convention, including those that prohibit charges on airlines for flying into the airports of signatory countries and which prohibit duty on fuel because it applies to carbon emissions over the entire length of flights into or out of the EU, including those parts of a flight which take place over the high seas or entirely within the airspace of third countries;

3. It violates the terms of a large number of bilateral air services agreements, including the Open Skies Agreement (1997) between the EU and the US; and

4. It violates the terms of the Kyoto Protocol, which requires the parties (including the EU) to pursue the reduction of greenhouse gas emissions from international aviation through ICAO.

Fundamentally, the Advocate General held that the Claimants and supporting parties cannot rely on the international agreements and customary international law invoked because they relate principally to legal relations between states rather than individuals; so essentially a finding that the individual carriers are the wrong parties to bring the legal case and that any challenge ought to be brought instead by states. The Advocate General also agreed with the majority of the Member States and the EU institutions which submitted written observations to the ECJ that, as the EU is not itself a party to the Chicago Convention, it is not appropriate to assess the validity of EU legislation by reference to provisions of that Convention. The obvious retort that all individual EU Member States are themselves party to Chicago and that the EU itself has legislated extensively in areas covered by the Chicago Convention, so ought not to be able to choose to ignore its provisions when doing so, was rejected by the Advocate General.

Although for the most part the Advocate General's Opinion on the lack of standing of the airlines to invoke international conventions and customary international law made it unnecessary to go further, she did nevertheless also give her opinion on the substantive questions raised.

The extra-territoriality and sovereignty arguments were rejected on the basis that the Directive is concerned solely with aircraft arrivals at and departures from airports in the EU, and it is only with regard to such arrivals and departures that airlines have to surrender allowances. Thus, the airport of arrival or departure within the EU provides an adequate territorial link for the whole flight to be included in the scheme; consequently, the Advocate General says there is no extraterritorial regulation or infringement of sovereign rights of third countries. The reasoning is unconvincing, requiring as it does a distinction between a measure which "regulates" activity in another state's airspace – which might be unlawful – and a measure such as ETS which, she said, merely takes such activity into account for the purposes of operation of the scheme.

With regard to the Chicago Convention arguments, the Advocate General considers that the Directive is consistent with the Convention and does not breach any of the provisions relied on by the Claimants (namely Articles 1, 11, 12, 15 and 24).

The third argument relating to the EU-US Open Skies Agreement was also rejected. Whilst the Advocate General did accept that parts of the Open Skies Agreement could be relied on as benchmarks against which the validity of an EU measure could be reviewed, it was held that none of the provisions in Open Skies actually affected the validity of the Directive. Indeed, the Advocate General considered that the inclusion of aviation in the EU ETS supported the principle of fair and equal opportunity laid down in Open Skies as third country airlines would obtain an unjustified advantage over their European competitors if they had been excluded from the scheme.

The final argument in relation to the Kyoto Protocol was rejected on the basis that the Protocol does not prevent the EU from pursuing the limitation or reduction of greenhouse gases from aviation outside the framework of ICAO. It was held that the Protocol did not confer exclusive competence on ICAO with respect to these matters.

Recent developments

The Advocate General's opinion has provoked worldwide reaction from airlines, industry bodies and governments, increasing pressure on the EU to amend its legislation or suspend the commencement of the scheme in order to avoid further legal challenges and retaliation from affected parties.

On 2 November 2011, the Council of ICAO adopted a resolution, proposed in Delhi in September and supported by 26 nations, that declares the inclusion of third country carriers in the scheme *"inconsistent with applicable international law."* Although non-binding, the resolution sends a clear message to the EU and signifies the strength of opposition at state level.

Elsewhere, the US House of Representatives has approved a draft legislative Bill that prohibits US carriers from complying with the scheme. If adopted by the Senate (which is unlikely) the legislation would expose US carriers to the ultimate sanction of a ban on operating flights within the EU.

China and India are also vehemently opposed to the scheme. It was reported in June that the Chinese government blocked an order for ten Airbus A380 aircraft as a retaliatory measure. India has clearly signalled that it will retaliate if the scheme goes ahead and has been active in canvassing support for the ICAO resolution.

Further challenges

The judgment from the Grand Chamber is likely to follow the Advocate General's opinion. If it does, opposition to the scheme will only increase and the focus will continue to shift to alternative avenues of challenge. Many of these avenues, some of which are summarised below, are already being actively explored.

1. ICAO challenge – under the Chicago Convention if any "disagreement" between two or more Chicago contracting states relating to the interpretation of the Convention cannot be settled by negotiation, it can be referred to the ICAO Council for determination. As the EU is not a party to the Chicago Convention, any such application will have to be filed by third countries against individual EU Member States.

The ICAO dispute resolution process tends to have the objective of achieving a consensual political solution between contracting states rather than achieving a "legally certain" outcome.

An ICAO challenge is highly likely given the recent resolution and would enable the ongoing dispute to be elevated to government level which might assist in a political resolution and would cut through the technical legal reasoning so far relied on in the ECJ to prevent individual airlines from relying on the provisions of Chicago.

2. Challenges by airlines – depending on their particular circumstances and the identity of their Administering Member State, some airlines may well still have grounds to challenge the legality of the scheme. Further challenges to domestic legislation implementing aspects of the scheme can be expected in the short term. These may in turn be referred to the ECJ.

3. Arbitration under the Open Skies Agreement – the US could conceivably initiate the dispute resolution procedure within its Open Skies Agreement with the EU. Ultimately, this may lead to an international arbitration between the EU and the US which would obviously place considerable strain on transatlantic relations.

Given that the Emissions Trading Scheme is the EU's flagship environmental policy and regarded as key to achieving the greenhouse gas emissions reduction targets imposed by the Kyoto Protocol, the EU will be reluctant to back down from its entrenched position. Unless any of the above challenges fundamentally alter the nature of the scheme as applied to aviation, it is likely that third countries that oppose the scheme will negotiate an exemption for certain flights. The Directive provides that where a third country adopts 'equivalent measures' for reducing the climate change impact of flights departing from that country which land in the Community, these flights may be excluded from the scheme.

At present, there is no further information or guidance from the Commission to explain what constitutes 'equivalent measures' but this has been deliberately left open to interpretation for negotiation purposes. The EU will be aware of the need to be seen to act fairly and with transparency as part of this process.

Conclusion

Emissions trading in the context of aviation remains a highly controversial issue and the Advocate General's opinion is undoubtedly a set back for airlines and affected third countries. The strength of opposition to the scheme and resultant pressure on the EU will continue to mount until some form of concession is made. Further legal challenges are likely and an ICAO challenge seems almost inevitable. Whether these actions will resolve the dispute is far less certain.

Sue Barham, Partner & Charles Cockrell, Associate Solicitor, Holman Fenwick Willan LLP[26]

The European Union Emissions Trading Scheme Prohibition Act passed by the US House of Representatives

Less than a month after the decision of the Advocate General of the Court of the European Union, on 24 October 2011, the United States House of Representatives by a bi-partisan voice vote passed the European *Union Emissions Trading Scheme Prohibition Act* of 2011(H.R. 2594) ("the Act"). If the Act is passed by the Senate and signed by the President, though some commentators are skeptical this will occur, the Act would force the Department of Transportation to bar U.S. airline operators from complying with the European Union's Emissions Trading Scheme (ETS).

The Act is very short in detail and briefly described as follows. Section 2 of the Act outlines the US Congressional findings which motivated the drafting and passing of the Act. Section 2 relevantly provides:

> "*Congress finds the following:*
>
> *(1) The European Union has unilaterally imposed an emissions trading scheme (in this section referred to as the "ETS") on non-European Union aircraft flying to and from, as well as within, Europe*
>
> *(2) United States airlines and other United States aircraft operators will be required under the ETS to pay for European Union emissions allowances for aircraft operations within the United States, over other non-European Union*

[26] The HFW Aerospace team are acting for IATA and the National Airlines Council of Canada in the ongoing legal challenge to the extension of EU ETS to aviation.

countries, and in international airspace for flights serving the European Union.

(3) The European Union's extra-territorial action is inconsistent with long-established international law and practice, including the Chicago Convention of 1944 and the Air Transport Agreement between the United States and the European Union and its member states, and directly infringes on the sovereignty of the United States.

(4) The European Union's action undermines ongoing efforts at the International Civil Aviation Organization to develop a unified, worldwide approach to reducing aircraft greenhouse gas emissions and has generated unnecessary friction within the international civil aviation community as it endeavors to reduce such emissions.

(5) The European Union and its member states should instead work with other contracting states of the International Civil Aviation Organization to develop such an approach.

(6) There is no assurance that ETS revenues will be used for aviation environmental purposes by the European Union member states that will collect them.

(7) The United States Government expressed these and other serious objections relating to the ETS to representatives of the European Union and its member states during June 2011, but has not received satisfactory answers to those objections."

The Act directs the US Secretary of Transportation to prohibit operators of civil aircraft of the United States from participating in any emissions trading scheme (ETS) unilaterally established by the European Union. The Act also directs the Secretary of Transportation, the Administrator of the Federal Aviation Administration, and other appropriate officials of the United States Government shall use their authority to conduct international negotiations and take other actions necessary to ensure that operators of civil aircraft of the United States are held harmless from any emissions trading scheme unilaterally established by the European Union.

According to the House Transportation and Infrastructure Committee, in addition to the United States, other nations have voiced opposition the EU's scheme, including Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Japan, the Republic of Korea, Malaysia, Mexico, Nigeria, Paraguay, Qatar, the Russian Federation, Saudi Arabia, Singapore, South Africa, and the United Arab Emirates.

We shall now wait and see how the Senate and US President deal with this provocative legislation.

Nick Humphrey & Dr Vernon Nase, Editors

UPCOMING EVENTS

NSW Branch Christmas Party

Date: Wednesday, 30 November 2011

Time 6pm to 9pm

Place Bar 333
333 George Street, Sydney

Cost Members: Free
Non-members: Donation

Victorian Branch Seminar

Date: Thursday 15 December 2011

Time: 5pm for 5.30 pm - 6.30 pm

Place: The offices of DLA Piper
Level 21, 140 William Street
Melbourne 3000

Speaker: Mike Falls, Managing Director & Chief Pilot, Shortstop Jet Charter)

Topic: '*Operating a DC3 in Today's Environment*'

Cost: No charge for attendance at this function (Drinks and finger food will be served from 5.00 pm)

RSVP: by Tuesday 13 December 2011 to Andrew Tulloch, DLA Piper Australia, 140

William Street, Melbourne Ph 9274 5825
andrew.tulloch@dlapiper.com

ALAANZ 2012 Annual Conference

Date: 1 – 3 April 2012

Place: The Heritage Hotel
Queenstown
New Zealand

More details to follow.
