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RECENT CASES

Civil Aviation Safety Authority v Alligator Airways Pty Ltd (No 3) [2012] FCA 601

Serious and imminent risk to air safety considered

In the recent case of *Civil Aviation Safety Authority v Alligator Airways Pty Ltd (No 3)*,[1] Justice Murphy of the Federal Court of Australia (**Court**) grounded Western Australia's Alligator Airways (**Alligator**) for one month following an application by the Civil Aviation Safety Authority (CASA) for a prohibition order under s 30DE(2) of the *Civil Aviation Act* 1988 (Cth) (**Act**).

Ultimately, this case is an important one, because it is a clear pronouncement of the Court's role in relation to the variation, cancellation, or suspension of a civil aviation authorisation following reforms to the Act in 2003. The Court's risk-based application of the current principles demonstrates its unwavering regard for public air navigation safety in Australia. It also provides a useful demonstration of the application of the *Civil Aviation Safety Authority v Boatman*[2] (**Boatman**) decision.

The applicant, CASA, has the statutory function as set out in the Act of conducting safety regulation of civil air operations in Australia. The respondent, Alligator, operates 16 light aircraft for sightseeing trips and charter during the tourist season, through its small general aviation business based at Kununurra in Western Australia.

Division 3A of the Act, which provides the structure relied on by CASA for its application, was inserted into the legislation by the Civil Aviation Amendment Act 2003 (Cth). Until 2003, the Court had no involvement in the suspension, cancellation or variation of an authorisation. CASA held sole responsibility for these decisions. These amendments were inserted to address the perception in aviation circles that CASA is somehow 'judge, jury and executioner'.

The case arose when the applicant sought a prohibition order to ground the Kununurra-based airline. The order was sought to prevent Alligator from doing anything that it would otherwise be authorised to do under its civil aviation authorisations and to provide CASA with enough time to investigate the circumstances giving rise to the airway's conduct.

CASA pointed to a series of key events over a period between 2009 to April 2012 to support its view that there was a systemic problem with Alligator. Of concern was the maintenance and airworthiness of the aircraft, as well as a catalogue of errors by the respondent's pilots.

Alligator claimed certain mechanical failures were 'one off' or unexpected. Others were ascribed to the realm of 'unforeseeable pilot error', for which it claimed it was not responsible. It also claimed that those pilots had since been made redundant and as such there was no imminent risk to safety.

Alligator also argued that while its safety and checking procedures were deficient in the past, they had significantly improved since July 2011.

Under the current legislative framework, the Court must issue a prohibition order if it is satisfied that, under s 30DE(2) of the Act:

There are reasonable grounds to believe that the holder of a civil aviation authorisation has engaged in, or likely to engage in conduct that constitutes, contributes to or results in a serious and imminent risk to air safety.

Justice Murphy noted that in consideration of this provision, the Court is required by s 30DE(3) to have regard to ss 3A and 9A(1). These sections provide:

> "*3A The main object of this Act is to establish a regulatory framework for*

[1] [2012] FCA 601.
[2] [2006] FCA 460.

> *maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents.*
>
> *9A(1) In exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration."*

In answering the central question in the proceeding, Justice Murphy agreed with the approach taken in Boatman. In this case, Madgwick J considered that there were three steps involved in deciding the case:

i. A consideration of the meaning of 'reasonable grounds';
ii. A consideration of the meaning of 'serious and imminent risk to air safety'; and
iii. The application of these tests to the conduct of the respondent.

In elucidating the requirement to establish 'reasonable grounds', Justice Murphy referred to the case of *Loughnan v Magistrates Court of Victoria*[3], citing the judgment at 692:

> *"...the court is not required to be satisfied, even to some prima facie stage, that the suspect has committed the offence; the court need be satisfied only that there are reasonable grounds to believe that the suspect has committed the offence."*

Accordingly, it is possible for the Court to find that there are 'reasonable grounds to believe that there is a serious and imminent risk to air safety' without finding that the risk is in fact present.

The logical corollary of His Honour's reasoning was aptly put by Madgwick J in Boatman, stating that:

> *"If the judge is moved by all evidence to conclude that there was in fact such a risk, it will follow that there were reasonable grounds for that belief. If not, the judge must consider whether, nevertheless, there are, in the judge's opinion, reasonable grounds for so believing."*

While the Court seems to support a low threshold test of the 'reasonable grounds' requirement, it is consistent with the risk-based approach envisaged by the establishment of a regulatory regime under Part 3A of the Act.

Importantly, Justice Murphy noted that the required standard of evidence is not akin to that which would generally be admissible at trial. Justice Murphy noted that:

> *"...while procedural fairness must be afforded, I may have regard to evidence that is inexact or indefinite in providing a foundation for the existence of 'reasonable grounds to believe' the factual matters upon which my satisfaction rests."*

The Court considered that hearsay evidence might be acted upon. Moreover, it noted that it would not make ultimate findings as to the credit of any witness 'as if at final trial'. In this light, His Honour did not reject any hearsay testimony or secondary reports presented by both CASA and Alligator, noting that the primary aim of the proceedings was to protect the public.

In consideration of the 'serious and imminent risk' element, His Honour cited the test put by Madgwick J in *Boatman* at 55:

> *"So far as the present case goes, the test is, in my opinion, given appropriate meaning by asking: was there a really significant prospect that such risks of serious considerable harm as actually existed, in relation to the conduct complained of, would materialise?"*

His Honour proposed a slightly different test, stating that a 'significant' risk is sufficient. However, His Honour noted that the decision to grant the prohibition order did not turn on slight semantics.

The thrust of Alligator's argument was not that the incident did not constitute a serious risk to air safety, but rather that its conduct did not constitute, contribute to or result in the risk.

Justice Murphy was critical of Alligator's claim that certain errors were 'one off' or attributed to pilot error. His Honour stated

[3] [1993] 1VR 685.

that Alligator is responsible for the performance of its own employees, and accountable for their failures and omissions. To emphasise this view, his Honour deferred to s 97A(2) of the Act, which provides that any failure by an employee is considered conduct by the body corporate, unless it can establish that it took reasonable precautions and exercised due diligence to avoid the error.

The Court concluded that, viewed in the context of other incidents, there were reasonable grounds to believe that the problems with maintenance and airworthiness of Alligator's aircraft were not able to be 'hand balled' off to three former employees. Rather, His Honour concluded that the failures of the employees were indicative of Alligator's failure to properly train and supervise its pilots and maintenance employees and to ensure that its aircrafts were properly maintained and airworthy.

Finally, Justice Murphy rejected Alligator's contention that the risk to air safety was not serious because the pilots involved were no longer employed by it. Whilst His Honour noted that this was relevant, he held that when considered against the backdrop of other key incidents, there were reasonable grounds to believe that the incidence of serious errors by Alligator's pilots (including errors that Alligator alleged were not 'everyday risks') were indicative of Alligator's organisational and systemic failures, and as such the risk remained current.

Andrew Tulloch, Partner, and Olivia Nicola, DLA Piper

Qantas Airways Limited v Australian Licensed Aircraft Engineers Association [2012] FCAFC 63

On 4 May 2012, the Full Court of the Federal Court of Australia handed down its decision[4] upholding the finding of the Federal Magistrates Court[5] that Qantas Airways Limited (**Qantas**) and one of its managers, contravened the general protections provisions in the *Fair Work Act 2009* (Cth) (**FW Act**).

Facts

Mr Luke Murray, a Brisbane engineer, had made claims for additional payments and additional time off arising from a 6-week posting overseas. The claims were not recognised by Qantas and, shortly after the claims were received, a decision was made by Qantas to suspend all overseas postings for Brisbane engineers for an indeterminate period.

Finding

Gray, North and Besanko JJ dismissed all of Qantas' grounds of appeal and upheld the federal magistrate's decision that the suspension of overseas postings was made, at least in part, due to the claims lodged by Mr Murray, and constituted adverse action in breach of s.340 of the FW Act.

On appeal, Qantas claimed that the suspension of overseas postings was not to Mr Murray's prejudice as he would not have received an overseas posting during the operative period of the suspension.

The Federal Court accepted that Mr Murray had an expectation of an overseas posting towards the end of 2010 or early 2011 and that the suspension had been lifted by that time. However, the Federal Court also accepted that, at the time the suspension commenced, there was no end date on the suspension. The Federal Court held that, when the suspension commenced, Mr Murray's expectation of an overseas posting in late 2010 or early 2011 could not be met. Therefore, Qantas had altered Mr

[4] *Qantas Airways Limited v Australian Licensed Aircraft Engineers Association* [2012] FCAFC 63.
[5] *Australian Licensed Aircraft Engineers Association v Qantas Airways Limited* [2011] FMCA 58.

be met. Therefore, Qantas had altered Mr Murray's position Murray's position to his prejudice. In addition, although the suspension was directed at a larger group of employees, the Federal Court held that it was sufficient to ground a finding of adverse action that Mr Murray was one of the employees at which the action was directed.

The Federal Court also upheld the finding of the federal magistrate that the manager, Peter Cawthorne, contravened section 343 of the FW Act because he had taken action against Mr Murray with the intent to coerce him not to exercise his workplace right. Mr Cawthorne was found to have made a statement to the effect that, *"the guys who go away and accept the conditions that they are given, are the ones who get asked to go away the next time."* The Federal Court upheld the finding that, by threatening to refuse future overseas postings if Mr Murray did not withdraw his claims, Mr Cawthorne had applied pressure that amounted to compulsion of Mr Murray's will. The actions of Mr Cawthorne were also considered to be unlawful, illegitimate and unconscionable.

Implications for employers

This decision makes it clear that altering an employee's position to their detriment is a broad concept. An action taken by an employer will not be required to have an 'immediate tangible effect' and an employee is not required to suffer loss or infringement of a legal right in order to establish a prejudicial alteration to their position.

This decision also makes it clear that the action taken does not need to be targeted directly and solely at the employee alleging adverse action. The action need only target a group to which the employee belongs.

As a result, careful consideration should be given to the reason for implementing a change where that change has the potential to disadvantage or prejudice an individual employee or a group of employees.

Nick Ogilvie, Partner and Lauren Davis, Graduate, Freehills.

Kuehne+Nagel International AG v Commerce Commission **[2012] NZCA 221 (31 May 2012)**

Liability of a holding company?

Kuehne + Nagel International AG (the "Swiss Company"), is a company incorporated in Switzerland and is the ultimate holding company for a group of companies which provide freight forwarding services to more than 100 countries, including through Kuehne + Nagel Ltd, a New Zealand company, in which it is the sole shareholder.

In late 2007 the New Zealand Commerce Commission (the "**Commission"**) commenced an investigation into the freight forwarding industry as a result of a confidential application for leniency. Following its investigation, in 2010, the Commission filed a proceeding against the Swiss Company and four other freight forwarders[6] claiming they had breached sections 27(1) and (2) of the *Commerce Act 1986* (the **Act**) for entering into and giving effect to the following agreements which fixed prices in the freight forwarding industry:

- *The WRS 2001 agreement* – agreement to pass on security surcharges imposed on freight forwarders by airlines;
- *United Kingdom NES agreement, Italian SAF agreement, (United States) Air AMS agreement, (Canadian) ACI agreement and Swiss SFA agreement* – agreements to impose a surcharge to recover costs related to additional security measures required by the relevant national authorities;
- *Chinese CAF agreement* – An agreement to insulate freight forwarders from the impact of the revaluation of the Chinese currency by the People's Bank of China.

[6] EGL Inc, BAX Global Inc, Schenker AG and Panalpina World Transport (Holdings) Ltd.

The Commission alleged that these agreements impacted on freight forwarding customers in New Zealand because:

1. the WRS 2001 agreement applied to all freight sent to and from New Zealand;
2. the Air AMS agreement applied to all freight sent to or from New Zealand via the United States; and
3. the ACI agreement applied to all freight sent to or from New Zealand via Canada.
4. the United Kingdom NES agreement applied to all freight sent to New Zealand from the United Kingdom;
5. the Italian SAF agreement applied to all freight sent to New Zealand from Italy;
6. the Chinese CAF agreement applied to all freight sent to New Zealand from China;
7. the Swiss SFA agreement applied to all freight sent to New Zealand from Switzerland.

Protest of jurisdiction

The Swiss Company filed a protest of jurisdiction to the New Zealand High Court. On 12 October 2011, Venning J ruled that the High Court had jurisdiction to hear the causes of action alleging breach of section 27(2) in relation to five of the alleged price fixing agreements[7] dismissed but not under sections 27(1). In respect of the Chinese CAF agreement and the Swiss SFA agreement, Venning J ruled that there was an insufficient factual basis to suggest that there was a serious issue to be tried.

In the matter before the Court of Appeal, the Swiss Company appealed against the dismissal of its protest to jurisdiction. Leave to appeal was granted and the Court was called to determine whether:

(a) the Commission had a good arguable case that the acts of the New Zealand Company could be attributed to the Swiss Company under section 90(2) of the Act;[8] and,

(b) there was a serious issue to be tried in respect of each cause of action relating to the five alleged price fixing agreements.

"***Good arguable case***"

The Swiss Company submitted that it was a "*mere holding company of the shares in subsidiary companies within the KN Group*" and itself did not operate or manage any part of the KN Group's freight forwarding business, rather, the operational aspects of the freight forwarding business were conducted by Kuehne + Nagel Management AG, which was also incorporated in Switzerland. The Swiss Company also submitted that, in view of the structure of the KN Group, members of the KN Group acted as independent companies.

The Commission submitted that the New Zealand Company collected the surcharges on freight that offshore KN Group entities had directed be imposed. The conduct in New Zealand was thus on behalf of the Swiss Company because it was to further the interest of the Swiss Company and for the benefit of the KN Group as a whole. The Commission also submitted that the way the KN Group was structured and operated meant that subsidiaries in fact acted as agents of the KN Group and that such conduct was within the scope of actual or apparent authority.

[7] The five agreements are: the WRS 2001 agreement, the Air AMS agreement, the AIR ACI agreement, the United Kingdom NES agreement, and the Italian SAF agreement.

[8] Clause 90(2) provides –

"Any conduct engaged in on behalf of a body corporate—

(a) By a director, servant, or agent of the body corporate, acting within the scope of his actual or apparent authority; or

(b) By any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

The Court agreed with the Commission finding that, on the evidence available, it could be said that the conduct of the New Zealand Company was in the interests of the Swiss Company and for the benefit of the KN Group as a whole. This conduct was carried out as part of the worldwide operation of the network of companies functioning within the KN Group with the New Zealand Company acting at the direction of the Swiss Company. The Court considered that this conclusion was supported by the detailed evidential material produced by the Commission.

In addition, the Court considered that the position of the Swiss Company was undermined by information lodged in respect of a plea agreement entered into between the Swiss Company and the United States Department of Justice in which the Swiss Company entered a guilty plea to pay fines of US49,865,044 and the Swiss Company indicated that it was "*engaged in the business of providing freight forwarding services in the United States and elsewhere*", that is, not just a "*mere holding company*". The Court also highlighted information contrary to the Swiss Company's submission of being a "*mere holding company,*" namely: (i) its role in a World Intellectual Property Organization proceeding as "the proprietor" of certain trademarks; and (ii) a formal letter sent by its New Zealand solicitors to the Commission indicating the name of its chief executive officer, relevantly, the existence of an "employee".

Moreover, the Court found that the Swiss Company "*failed by a wide margin in demonstrating the Judge below was wrong either in his conclusion or on the factual matters relied upon to support the conclusion*".[9]

"Serious issue to be tried"

Under this limb, the Court considered in detail the lower Court's factual findings in respect of each of the five agreements in respect of which the protest to jurisdiction was dismissed, noting that: "*Venning J gave conscientious and meticulous consideration to all facets of the Commission's* [pleadings]".[10]

Under each of the five agreements the Court considered that the inferences drawn and factual findings were correct, and that the there was a serious issue as to the merits to be tried.

Editors.

***Competition Commission v Singapore Airlines Ltd* (45/CR/Apr12) [2012] ZACT 38 (15 May 2012)**

Singapore Airlines has settled its complaint with the Competition Commission of South Africa for its involvement in a cartel to fix air fare increases on both economy class flights between South Africa and the Far East.

At the conclusion of its investigations, the Commission found that:

1. Singapore Airlines had engaged in discussions regarding air fare rates or prices in South Africa with Cathay Pacific, Malaysian Airlines and South African Airways on occasions during 2004, 2005 and ending February 2006.
2. The discussions related to market fare levels and increases on certain market fares for flights out of South Africa to South East Asia, Hong Kong and China.
3. Local representatives of Singapore Airlines in South Africa relied on the content of these discussions among other considerations to determine fares and gain knowledge on competitor activities and price movements in the above stated routes.
4. This conduct was in contravention of section 4(1)(b)(i) of the Competition Act No. 89 of 1998 ("the Act").

The key terms of the settlement, Singapore Airlines agreed to:

[9] At [58].

[10] At [62].

1. cooperate with the commission in its investigation;
2. Cease to engage in any such future conduct;
3. Undertake to ensure that its competition compliance programme incorporated corporate governance designed to ensure that all employees, managers and directors of Singapore Airlines did not engage in any contraction of the Act, which was to be delivered to the Commission within 60 days;
4. Pay an administrative penalty of R25,106,692 (approximately AUD3m) which was the equivalent of 7.56% of its passenger turnover in South African for the 2009/2010 financial year.

Editors.

Commerce Commission v Japan Airlines Co Limited **[2012] NZHC 1683 (29 June 2012)**

On 29 June 2009, the High Court of New Zealand approved a penalty of $2.275 million recommended by the New Zealand Commerce Commission against Japan Airlines Co Limited ("JAL") following JAL's admission to its participation with other airlines in the Fuel Surcharge Understandings (FSU) and the Security Surcharge Understanding (SSU) (broadly described as the "**air cargo cartel**").

During the relevant period the subject of this proceeding, JAL did not fly its own aircraft to or from New Zealand on scheduled flights, but it offered air cargo services to and from New Zealand using Air New Zealand aircraft, pursuant to a joint services agreement with Air NZ signed on 31 March 1993.

In determining whether the penalty proposed by the Commission was sufficient, the Court reviewed other comparable cases and considered that $3.1-3.9 million was within the properly available range in all the circumstances of the case. The Commission proposed and JAL accepted a total discount of 35% for mitigating factors, which was less than that offered in the Qantas Airways Limited (50%),[11] and British Airways plc (40%)[12] settlements where cooperation with the Commission was more extensive and on-going, and was provided at an early stage of the Commission's investigations. The Court considered that, though a discount of 35% was higher than is standard, "*it properly reflects the extent to which JAL is going out of its way to assist the Commission in bringing the wider proceedings to an appropriate resolution*"[13] including the payment of penalties in other jurisdictions by JAL.

JAL was also order to pay costs to the Commission of $259,079.18.

JAL is the fourth airline to settle with the Commission, following settlements with British Airways PLC, Cargolux International Airlines S.A.[14] and Qantas Airways Limited. Proceedings continue against Air New Zealand Limited, Cathay Pacific Airways Limited, Emirates, Korean Air Lines Co Limited, Malaysian Airlines System Berhad Limited, Singapore Airlines Cargo Pte Limited and Singapore Airlines Limited, and Thai Airways International Public Company Limited.

Editors.

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[11] See *Commerce Commission v Qantas Airways Limited* HC Auckland CIV 2008-404-8366 [2011] NZHC 468 (11 May 2011).
[12] See *Commerce Commission v British Airways PLC* HC Auckland CIV-2008-404-8347 [2011] NZHC 289 (5 April 2011).
[13] At [67].
[14] See *Commerce Commission v Cargolux Airlines International S.A.* HC Auckland CIV-2008-404-8355 [2011] NZHC 290 (5 April 2011).

COMPETITION UPDATE

Jetstar Pan-Pacific Strategy

On 28 June 2012, Qantas Airways Limited, and its low-cost subsidiary, Jetstar Airways Limited, applied to the ACCC for authorisation of its Jetstar Pan-Asia Strategy ("the **Strategy**").

The Qantas and Jetstar application sets out that the proposed Strategy will involve the following:[15]

- the establishment of joint ventures in a number of Asian jurisdictions by the Applicants (generally the minority owner) and local partners (including local full service airlines ("**FSA**"))) to operate low cost carriers ("LLC") under the Jetstar brand and a business model that provides air travel services focussed on the price sensitive market segment primarily in the Asia-Pacific region;
- coordination between each Jetstar LCC and its FSA shareholder (where relevant);[16]

  and,
- the coordination of each of the Jetstar LCCs with each other and with each of Qantas and Jetstar Airways pursuant to the Jetstar Joint Venture Coordination Agreement

  (**JVCA**).

Qantas also indicates that it is considering incorporating further Jetstar LCC joint ventures in Asia which, as a result of the regulatory restrictions described above, are unlikely to be wholly or majority owned by Qantas (**Future Jetstar Joint Ventures**).[17]

Qantas and Jetstar sought authorisations on the conducting of all network, scheduling, pricing, marketing, purchasing, customer service and resourcing decisions between: (a) Qantas; Jetstar Airways; Jetstar Asia; Jetstar Pacific; Jetstar Japan; and Jetstar Hong Kong, (b) each Jetstar joint venture airline and its local partner airline shareholder; and (c) a Jetstar joint venture, its local partner airline shareholder and any other airline in the Jetstar Group to the extent they overlap or potentially overlap.[18]

Under the JVCA, the parties propose to operate as a single, fully integrated organisation by coordinating their operations and activities in the Asian region including:[19]

(a) network and scheduling decisions including routing, frequencies, aircraft types, product specifications, aircraft configurations, connection requirements and range of times for any services;

(b) sales and marketing initiatives including the offering of customer rebates, incentives and discounts;

(c) holiday products and joint promotions;

(d) pricing and inventory decisions including agreeing fares and new fare products;

(e) product distribution channels;

(f) frequent flyer and other loyalty programs;

(g) in-flight products or services;

(h) information technology;

(i) joint purchasing and procurement including but not limited to back office functions, fleet acquisitions and engineering services;

[15] At paragraph 1.3 of the Application.

[16] The Jetstar LLC's and their respect shareholders are as follows:

i. Jetstar Asia Airways Private Limited (**Jetstar Asia**) incorporated in Singapore and effectively owned by Qantas (49%) and a Singapore citizen (51%);

ii. Jetstar Pacific Airlines Aviation Joint Stock Company ("**Jetstar Pacific**") incorporated in Vietnam and effectively owned by Qantas (30%) and Vietnam Airlines (67%);

iii. Jetstar Japan Co Ltd ("**Jetstar Japan**") incorporated in Japan and effectively owned by Qantas (33.3%), Japan Airlines Co. Ltd (33.3%), Mitsubishi Corporation (16.65%); and Century Tokyo Leasing Corporation (16.65%); and,

iv. Jetstar Hong Kong Limited ("**Jetstar Hong Kong**") incorporated in Hong Kong and effectively owned Qantas (50%) and by China Eastern Airlines (50%).

[17] At paragraph 4.34 of the Application.

[18] At paragraph 5.1 of the Application.

[19] At paragraph 5.6 of the Application.

(j) customer service activities and initiatives; and,

(k) sharing of experience and learning including the secondment of personnel.

Qantas and Jetstar submitted that they have implemented strict ring-fencing protocols to ensure that there is no actual or potential coordination between any of the following entities:

(a) Qantas and Japan Airlines ("JAL");

(b) Qantas and Vietnam Airlines;

(c) Qantas and China Eastern Airlines;

(d) Qantas and any other local partner airline which becomes a shareholder of a future Jetstar joint Venture;

(e) the Jetstar Group and JAL, except as between Jetstar Japan and JAL on overlapping or potentially overlapping routes and as contemplated in paragraph 5.2 above;

(f) the Jetstar Group and Vietnam Airlines except as between Jetstar Pacific and Vietnam Airlines on overlapping or potentially overlapping routes;

(g) the Jetstar Group and China Eastern Airlines except as between Jetstar Hong Kong and China Eastern Airlines on overlapping or potentially overlapping routes;

(h) the Jetstar Group and any other local partner airline which becomes a shareholder of a Future Jetstar Joint Venture except as between the relevant Future Jetstar Joint Venture and its local airline shareholder on overlapping or potentially overlapping routes and as contemplated in paragraph 5.2 of the Application; and,

(i) any of JAL, Vietnam Airlines, China Eastern Airlines and any local partner airline which becomes a shareholder of a Future Jetstar Joint Venture.

Public submissions are expected to be invited shortly.

Editors.

Emirates & Flydubai Affiliation Agreement

On 27 June 2012, the ACCC has issued a draft determination authorising an Affiliation Agreement ("the **Affiliation**") between Emirates and the low cost Dubai-based carried Flydubai, both of which are effectively owned by the Government of Dubai for a period of ten years. Etihad current operates services into Brisbane, Sydney, Melbourne and Perth, with a planned service to Adelaide to commence in 2013. The ACCC's determination follows the provision of an interim authorisation on 16 May 2012.

Under the Affiliation the airlines will coordinate on international air passenger transport and international air cargo transportation services between Australia and the Middle East and Australia and regions adjacent the Middle East (North West Africa, Indian sub-continent, Eastern Europe). The Affiliation is an enhancement of the collaboration that currently exists between the carriers under a Special Pro-rate Agreement which provides for two-way interlining of air passenger and air cargo transport services and each airline pays the other revenue on a pro-rata basis depending on the section of the route operated by the respective carrier.

The cooperation contemplated under the Affiliation includes:

- marketing and advertising arrangements;
- interline, SPA and codeshare arrangements;
- pricing strategies;
- revenue sharing;
- frequent flyer rewards programmes;
- flight schedules and airport handling services;
- joint purchase of goods and services from third party suppliers and vendors;
- sharing of information and facilities;
- staff secondments;

- making joint submissions to IATA; and,
- other joint and coordinated activities, including holiday/vacation packages; customer rebates; corporate dealings and incentives and discounts.

The ACCC was satisfied that the public benefit that is likely to result under the Affiliation Agreement would outweigh the public detriment, including from any lessening of competition that may result.

Editors.

Etihad and Air Berlin Commercial Alliance

On 27 June 2012, issued a draft determination authorisation a Commercial Alliance ("the **Alliance**") between Etihad, the Abu Dhabi based carrier, and Air Berlin, for ten years. Etihad is the single largest shareholder of Air Berlin current holding 29.21% of issued capital. Etihad current operates services between Abu Dhabi and Sydney, Brisbane and Melbourne. It has a codeshare arrangement with Air New Zealand and an alliance with Virgin Australia which was approved by the ACCC in 2011 which includes a commercial cooperation agreement, a frequent flyer agreement and a reciprocal lounge access agreement.

Under the Alliance between Etihad and Air Berlin, the airlines plan to coordinate international air passenger transport and air cargo transportation services between Australia and the Middle East/South East Asia and between Australia and Germany. The Commercial Alliance contemplates cooperation on:[20]

- Joint pricing;
- Joint route and schedule coordination;
- Joint marketing distribution and sales representation;
- Other cooperative activities including: freesale code sharing; reciprocal preferred fare pro-ration; reciprocal frequent flyer programs; reciprocal lounge access; staff travel and staff exchange; codeshare product development; seamless full service transfers; consolidation of sales offices; global sales agreement to support sales in the United Arab Emirates; joint travel agent and corporate account dealing; joint airport representation and handling; and belly hold capacity services; and,
- Other future initiatives including: cargo; transfers; product innovation; sharing of airport facilities; support services; technical and maintenance services; procurement of goods and services; alignment of service levels; and information technology and training.

The ACCC was satisfied that the Alliance fulfilled the public benefit test under the *Competition and Consumer Act 2010* (the Act).

Editors.

Star Alliance Corporate Customer Programs

On 23 April 2012 Air New Zealand, on behalf of the other member airlines of the Star Alliance[21] lodged an authorisation application with the ACCC seeking approval of its Corporate Plus, Conventions Plus and Meetings Plus Programs ("**Programs**").

Currently eight Star Alliance members fly in or out of Australia including Air Canada, Air China, Air New Zealand, Asiana Airlines, Singapore Airlines, South African Airways,

[20] At paragraph 1.6 of the Draft Determination.

[21] Adria Airways, The Airline of Slovenia d.d., Aegean Airlines S.A., Air Canada, Air China Limited, All Nippon Airway Co. Ltd, Asiana Airlines Inc., Austrian Airlines Osterreichische Luftverkehrs AG, Blue1 part of the SAS Group (SAS AB (publ)), British Midland International Limited, Brussels Airlines SA/NV, Croatia Airlines Ltd, Deutsche Lufthansa AG, Egyptair Airlines part of Egyptair Holdings, Ethiopian Airlines Enterprise, LOT Polish Airlines S.A., SAS AB (publ), Singapore Airlines Limited, South African Airways Group, Swiss International Air Lines Ltd, TAM Linhas Aereas S.A., TAP Portugal (of Transportes Aereos Portugueses SGPS S.A), Thai Airways International Public Company Limited, Turkish Airlines Inc, US Airways Group Inc, and United Air Lines Inc.

Thai Airways and United Airlines. Collectively these airlines offer 353 weekly international flights from Australian mainland capital city airports to hub destinations.

The features of the Programs are as follows:

- ***Corporate Plus Program*** provides a structure in which members of Star Alliance may approach potential corporate customers to ask if the customer would like to receive a joint offer from Star Alliance members. Members wishing to participate collect and exchange information required to develop the relevant bid, offering the customer access to discounted fares and volume incentives across the participating carriers' combined networks.
- ***Conventions Plus Program*** provides a framework within which Star Alliance can seek appointment as the official airline network for convention events and provide discounts off published fares under a single arrangement with convention organisers. In order to qualify for the Program a convention must have at least 500 delegates from a minimum of three different countries and two different continents. If a convention organiser elects to receive a joint bid, Star Alliance members submit bids for discounts they are prepared to offer. The bidding phase and all administrative tasks are automated using Star Alliance tools and systems.
- ***Meetings Plus Program*** is identical in concept and design to the Conventions Plus Program, except it provides discounts for travel to corporate meetings that are organised through professional travel managers.

On 27 June 2012, the ACCC issued draft determination authorisation the Programs opining that[22] the Programs are likely to result in limited, if any, public detriment, primarily because:

(i) the networks of the Star Alliance members are largely complementary;

(ii) there are a number of competing carriers operating in the relevant international air passenger transport services markets, including Qantas (and its oneworld alliance partners) and Virgin Australia (and its alliance partners). These competitors are well placed to discipline the price and service offerings of Star Alliance members post authorisation;

(iii) Star Alliance members are only authorised to coordinate on fares/discounts to be offered to corporate and convention customers that invite a joint offer. The applicants are not authorised to coordinate more widely on fares and discounts; and,

(iv) customers are not compelled to purchase fares under any of the Programs and are free to negotiate with individual Star Alliance members if that is their preference.

Editors.

Approval of Airservice Australia Price Increases

On 27 June 2012, the ACCC indicated that, following consultation with key stakeholders, it would not object to a proposal by Airservices Australia to increase prices for some of its monopoly services which are paid for by airlines and other aircraft operators, such as air traffic control, from 1 July 2012. The fees changes are as follows:

- Terminal navigation charges will increase at 24 airports by between 0.2 per cent and 3.5 per cent, and will decrease at six airports by between 1.0 and 5.1 per cent.
- Charges for aviation rescue and fire-fighting services will increase at 21 airports by between 2.4 per cent and 10.4 per cent, depending on location and aircraft category.

[22] At pagraph 3.36 of the Draft Determination.

- Charges for en route services will decrease by between 0.7 per cent and 1.1 per cent.

Critical to the ACCC's acceptance of the price rises was its view that Airservices has made sufficient progress on its commitments to improve consultation with industry on capital expenditure and to develop internal drivers of efficiency. These commitments were a critical component of the ACCC's consideration and acceptance of Airservices' five-year pricing agreement in 2011 as they help to ensure that Airservices invests prudently and efficiently manages its costs.

Editors.

Update – Australian Air Cargo Cartel Cases

On 14 June 2012, the Federal Court of Australia sanctioned a penalty by the ACCC against Malaysia Airlines Cargo Sdn Bhd ("MAS") of $6 million for its part in the air cargo price fixing cartel. MAS was also order to pay $500,000 for the ACCC's costs.

The ACCC's proceedings against Singapore Airlines, Cathay Pacific, Emirates, Air New Zealand and Thai Airways International continue whilst the proceeding against PT Garuda Indonesia has been stayed pending the outcome of its appeal to the High Court of Australia in which it is claiming immunity under the Foreign States Immunities Act 1985. The Appeal was heard before the High Court on 4 May 2012[23] and a decision is expected later this year.

Editors.

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[23] *P.T. Garuda Indonesia Ltd v Australian Competition & Consumer Commission* [2012] HCA Trans 101 (8 May 2012).

FOCUS ON CHINA

Outcry over new passenger and airline levy

Earlier in 2012 the Ministry of Finance promulgated a controversial regulation which requires every passenger on a flight originating in China to pay a levy of Rmb50 (for domestic routes) or Rmb90 (for international routes). The levy is a contribution to the Civil Aviation Development Fund. Chinese airlines are also required to contribute to the fund - their levy is calculated on a per-kilometer basis and according to the maximum take-off weight of the aircraft.

Previously, passengers in China were charged a so-called 'airport administration and construction fee' on each ticket purchased, while Chinese airlines contributed to a civil aviation infrastructure construction fund for each revenue-earning flight that they operated. The airport administration and construction fee was in place for over 20 years, whereas the airline fee was first introduced in 2004. Although the two charges have been consolidated and given a new name, their function remains largely unchanged.

The regulation provides that the fund must be used to finance or subsidise:

- the construction of civil aviation infrastructure (eg, airports and air traffic control systems);
- cargo airlines, regional airlines, international routes and small and medium-sized airports;
- energy-saving measures and emissions reduction plans;
- general aviation; and,
- research and development in civil aviation education and information technology.

The regulation also provides that the fund levy will be charged from April 1 2012 to December 31 2015.

The ministry's regulation has provoked a public outcry in China. Many commentators have questioned the need for, and the legitimacy of, such a charge. It has been argued that with vast tax revenues of Rmb1 trillion in 2011, the government does not lack capital for large-scale public infrastructure, and that passengers should not be charged to finance or subsidise such construction projects. Moreover, the fund is similar to a tax. As such, its introduction and implementation require the approval of the National People's Congress; the government cannot introduce a quasi-fiscal measure on its own initiative and without following the requisite legislative process. However, neither the ministry nor the Civil Aviation Administration of China has offered a satisfactory response to these issues.

Why has the government chosen to impose a new and unpopular levy on passengers and Chinese airlines? Some see the move as being motivated by fear of a declining tax take. Following tax reform measures in 2011, including changes to personal income tax that seek to reduce the burden on low-income individuals, the government may be looking elsewhere to maintain capital construction spending and support the economy through uncertain times.

***Yi Liu, Executive Partner,* Run Ming Law Office, Beijing**

Editor's note: In an interesting comparison to the new laws proposed to be introduced in China, on 8 May 2012, the Australian Federal Government delivered its Budget for the 2012-2013 fiscal year.

Under the Budget, the Australian Government increased the passenger movement charge by $8 to $55 per passenger with effect from 1 July 2012, with the charge to be indexed annually by movements in the Consumer Price Index thereafter. The measure is estimated to increase revenue by $610.0 million by 2015-2016.

This increase has been the subject of criticism from all corners of industry including IATA and the tourism sector.

FOCUS ON SPAIN

Validity of the clause concerning the imposed obligation by some airlines to print the boarding pass

The judgment of the Regional Court of Barcelona dated October 5th 2011 dealing with the appeal of a lawsuit filed by a passenger against "Ryanair Limited", which is based on the imposition of a fine of 40 euros due to the fact that the user did not carry the printed boarding pass and did not hand it in at the counter.

The claimant seeks the reimbursement of the fine and request that the clause included as general condition of the agreement is declared null pursuant to the legislation governing the protection of consumers and users. The claimant considers the clause is unfair and contrary to Article 3 of the Convention of Montreal on the airlines liabilities, stating that the airline is obliged to issue the boarding pass to its clients.

The Court of First Instance dealt with the claim and considered that this causes an imbalance between the benefits, it limits consumer's rights and determines a lack of reciprocity. Consequently the airline alters its basic contractual obligations, causing a negative impact on the passenger and charging a penalty for an obligation that the company should be responsible for.

Ryanair appealed to the Court, and the considerations from Court were the following: Firstly, the Court stated its disagreement in regard to compliance with Article 3 of the Montreal Convention, given that in this case, the company does provide the traveler with their boarding pass, the only difference rises in the "modus operandi", since it is not delivered at the counter as it is in the traditional way. The boarding pass is available to the passenger two weeks before the flight takes place and it is stored on the Ryanair website with specific instructions for the user who can easily print it out and bring it to the airport displaying it at the gate. According to the Court, this system is not contrary to the legal dispositions established in the Montreal Convention, furthermore, it speeds up the shipping process, it involves cost savings for the company and also time for the passenger and therefore, it shall not be considered as detrimental for the user in any way.

Secondly, in regards to the annulment of the clause for being considered unfair and contrary to the legislation that protects consumers and users, the Court does not consider that the obligation to print the card, which is sufficiently warned in advance, would be contrary to Section 82 of *Royal Decree* (RDL as per its Spanish acronyms) 1/2007, which specifies the figure of unfair and abusive terms. The Court states that the fact of printing out the boarding pass does not causes a disproportionate burden, does not involve a significant imbalance in benefits neither causes an unreasonable limit to their rights pursuant to Section 82 of the Royal Decree 1/2007.

Furthermore, the Court considers that the penalty clause of 40 Euros assumed by the passenger in the event of default is not excessive or disproportionate. It could be considered excessive or disproportionate if, for instance, the passenger were denied to board.

Thus, according to the Court it shall be considered as a disposition pursuant to the Freedom to Contract included in Section 1255 of the Spanish Civil Code, and the passenger is sufficiently informed about the conditions whose implementation can be avoided by easy steps on the website of Ryanair.

Therefore, the Court upheld the appeal brought by Ryanair and revokes part of the judgment issued in first instance, which claims the declaration of the contract clause as null and void.

However, one of the judges, Mr. Juan F. Garnica Martín, issued a dissenting opinion as he considers that the appeal should not be upheld, alleging that the clause shall be considered abusive and unfair. He states that there is an alteration of the system of obligations established under the positive law which usually weighs on the company, forcing the passengers to use certain

devices to print out the boarding pass. Furthermore, the unfairness of the disposition still remains even if the passenger knows in advance the conditions upon the agreement and even if these conditions are accepted. It would not be considered unfair and abusive if it had been individually negotiated (Section. 82-1 of the Revised Text of the General Law for the Protection of Consumers and Users), which does not occur in this case.

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FOCUS ON GERMANY

Nelson v Deutsche Lufthansa AG (C-581/10) and *TUI Travel plc v Civil Aviation Authority* (C-629/10)

ECJ Advocate general affirms controversial Sturgeon decision

Introduction

On May 15 2012 Advocate General Yves Bot of the European Court of Justice (ECJ) delivered his opinion on the joined cases of *Nelson v Deutsche Lufthansa AG* (C-581/10) and *TUI Travel plc v Civil Aviation Authority* (C-629/10). Unfortunately for carriers, the advocate general confirmed the much-debated ECJ decision in the joined cases of *Sturgeon v Condor Flugdienst-GmbH* (C-402/07) and Böck v Air France SA (C-432/07). In Sturgeon the ECJ ruled that passengers whose flights are delayed, and who reach their final destination three hours or more after the arrival time originally scheduled by the air carrier, may rely on the right to compensation pursuant to EU Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and repealing EU Regulation 295/91.

Background

Regulation 261/2004 provides that in the event of flight cancellation, passengers have a right to compensation at a fixed level. In Sturgeon the ECJ ruled that if passengers reach their final destination three hours or more after the arrival time originally scheduled by the air carrier, they have the same right to compensation under Regulation 261/2004 as passengers whose flight has been cancelled.

In the two cases before the ECJ, the Cologne Local Court and the High Court of Justice of England and Wales asked the ECJ whether it would confirm the interpretation of Regulation 261/2004 which it adopted in *Sturgeon*.

Advocate general's opinion

The advocate general's opinion can be summarised as follows:

- Articles 5, 6 and 7 of Regulation 261/2004 should be interpreted in such a way that passengers may rely on Article 7 for compensation if they are delayed by three hours or more on their scheduled arrival time.

- The advocate general did not see why he should reconsider the qualifying delay period set by the ECJ in Sturgeon, as the carriers had not put forward anything new which might call into question the interpretation that the ECJ gave of those provisions in Sturgeon.

- The ECJ's interpretation of Regulation 261/2004 in Sturgeon is compatible with the Montreal Convention 1999 as the type of damage covered by Regulation 261/2004 is not covered by the convention. In particular, Article 7 of Regulation 261/2004 is said not to infringe any exclusivity stemming from Article 29 of the convention.

- The obligation on carriers to pay compensation is not disproportionate and therefore compatible with the principle of proportionality.

- The ECJ's interpretation of Articles 5, 6 and 7 of Regulation 261/2004 is not incompatible with the principle of legal certainty because there was no inconsistency in the ECJ's interpretation in *Sturgeon* and *IATA v Department for Transport* (C-344/04).

- Regulation 261/2004 should be applied to claims which have arisen in relation to carriage by air ever since the regulation came into force, regardless of whether such claims have already been filed.

Comment

The advocate general did not take the opportunity to present an opinion that

aimed at rectifying the flawed decision in Sturgeon. In addition, he did not satisfy the industry's desire for a substantiated legal opinion covering the crucial points. In particular, his comments on the first question posed by the Cologne Local Court regarding the relationship between Article 29 of the Montreal Convention and Article 7 of Regulation 261/2004 are unsatisfactory, as he dealt with this question only superficially. Even though the advocate general's opinion is not binding on the ECJ, it is legal practice that it is usually followed in the final judgment. The ECJ's final judgment in the cases at hand is expected to be handed down later in 2012.

If the ECJ were to follow the advocate general's opinion, carriers would have to compensate passengers for delay pursuant to Regulation 261/2004 dating back to the date when the regulation came into force (ie, February 17 2005). Whether the two-year limitation period provided for in the Montreal Convention 1999 should apply to claims brought by passengers pursuant to Regulation 261/2004 is still under debate on a European level. Otherwise, the only defence which air carriers can rely on is the extraordinary circumstances exemption contained in Article 5(3) of Regulation 261/2004. However, in the event of a technical default, it is generally difficult for carriers to rely on this defence as a result of the ECJ's decision in *Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA* (C-549/07).

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This article first appeared in the International Law office newsletter on 20 June 2012 and has been reproduced with the kind permission of the authors.

Federal Administrative Court upholds flight ban at Frankfurt Airport

On April 4 2012 the Federal Administrative Court in Leipzig announced its long-awaited decision on the night curfew at Frankfurt International Airport. The ruling came as no surprise given the clear words of the presiding Judge Rüdiger Rubelcourt in the oral hearing held on March 14 and 15, 2012.

The court mainly affirmed the first instance ruling, issued by the Administrative Court of the State of Hessen, by prohibiting exceptions to the night curfew during the core night hours of 11:00pm to 5:00am. The initial planning approval, which allowed for 17 flights during core night hours, will now be amended accordingly by the State of Hessen through a supplementary planning procedure. Shortly after publication of the court's decision, Dieter Posch, the minister of economic affairs of the State of Hessen, reiterated the government's willingness to implement a strict night curfew as demanded by the court.

For shoulder hours (10:00pm to 11:00pm and 5:00am to 6:00am), the court went beyond the findings of the first instance court and reduced the average number of flights from 150 to 133. Although the State of Hessen could increase this number again through a supplementary planning procedure, it is bound by the so-called 'principle of proportionality'. According to this principle, shoulder hours can be used only to handle reduced traffic volumes and cannot serve as an extension of regular daytime operations (ie, capacity peaks must be avoided).

On the other hand, the expansion of Frankfurt International Airport was not called into question and the court confirmed the overall planning approval for a fourth runway.

Aircraft noise has become a politically charged issue in Germany and was the decisive factor in the recent Frankfurt mayoral elections. Boris Rhein, minister of interior affairs of the State of Hessen and member of the Christian Democratic Union, was considered the top candidate. However, in a surprise result in the run-off elections held on March 25 2012, Peter Feldmann – the relatively unknown Social Democratic Party candidate – defeated his rival by a 15-point margin. Feldmann won many votes from people angered by aircraft noise – he not only supported a strict night curfew, but also lobbied for the extension of the flight ban from 10:00pm to 6:00am.

In 2000 the State of Hessen had initially agreed to a night curfew from 11:00pm to 5:00am in return for a fourth runway at Frankfurt airport. However, during the planning approval process, the requested ban on night flights was lifted as Frankfurt International Airport – the second busiest in Europe by cargo traffic – is dependent on night operations, especially for time-sensitive goods. Although Volker Bouffier, the prime minister of the State of Hessen, and Rhein subsequently changed their position and expressed support for the night curfew, this political turnaround was condemned by sceptical voters.

While the court's ruling ends the long-running conflict – at least for the time being – the economic consequences for Frankfurt and the Rhine-Main region could be severe. It is also troubling that competitive distortions among European airports have not been considered, as these could weaken Germany's economic position in the future. It appears that politicians, in order to safeguard their own interests, are willing to abandon objectivity for power in the face of forthcoming elections.

The ruling points the way for further planned airport expansions in Germany – only time will tell how, for example, Munich responds to the recent findings.

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Airline compensation claim valid only if delay occurred on both departure and arrival

In a March 8, 2012 judgment the Nürtingen local court confirmed that, in relation to claims for compensation brought pursuant to EU Regulation 261/2004, a delay can have the same legal consequences as a cancellation only in cases where delays occurred both on departure and on arrival.

Facts

The claimants had booked two flights with the defendant airline from Stuttgart to Tampa with a stopover in another US city. The plane left Stuttgart airport on time. However, it subsequently landed some three hours later than scheduled at the stopover destination. This was due to an unscheduled stopover in Amsterdam as a result of an unforeseeable technical defect on the plane. The claimants therefore missed their connecting flight to Tampa once they had reached the stopover destination and had to take a later flight, which meant that they arrived in Tampa some four and a half hours later than originally planned.

The claimants claimed compensation from the defendant airline pursuant to Article 7 of EU Regulation 261/2004 with reference to the European Court of Justice's (ECJ) *Sturgeon* decision.[24] In this decision, the ECJ ruled that Articles 2(l), 5 and 6 of EU Regulation 261/2004 are to be interpreted to mean that a delayed flight – regardless of the duration of the delay – cannot be regarded as a cancellation if the flight is operated by the airline in line with the original airline schedule.

In addition, the ECJ ruled that Articles 5, 6 and 7 of EU Regulation 261/2004 are to be interpreted to mean that passengers of a delayed flight should be treated like passengers whose flight has been cancelled and should therefore have a claim for compensation pursuant to Article 7 if they suffer a delay of three hours or more (ie, if they do not reach their destination

[24] November 19 2009, Cases C-402/07 and C-432/07.

earlier than three hours after the arrival time originally scheduled by the airline).

Decision

The Nürtingen local court considered itself competent to hear these proceedings, but considered the claim to be without merit. The court took the view that the claimants had no claim for compensation pursuant to Articles 5 (applied analogously), 6 and 7 of the regulation for the following reasons:

- There had been no delay on departure in Stuttgart.
- The delay was caused only by the unscheduled stopover in Amsterdam, which led to a delay of three hours on arrival at the stopover destination and four and a half hours in Tampa.
- According to the clear wording of EU Regulation 261/2004, flights are delayed within the meaning of Article 6(1) of EU Regulation 261/2004 only if they are delayed on departure. At the same time, the ECJ's *Sturgeon* decision and the corresponding decisions of the German Federal Court of Justice, in which it was decided that a delay can have the same legal consequences as a cancellation pursuant to EU Regulation 261/2004, do not state that the required criterion of a delay on departure contained in Article 6 should be dispensed with when assessing a delay in light of EU Regulation 261/2004. The court therefore took the view that it can, in fact, be assumed that a delay should have the same legal consequences as a cancellation only in cases where a delay has occurred cumulatively on departure as well as on arrival. The court also referred to a decision of the Rüsselsheim local court of August 10 2011 in this regard.[25]

Comment

This decision is to be welcomed, as the judge considered the clear wording of EU Regulation 261/2004 when interpreting the meaning of 'delay' in relation to compensation claims under the regulation, rather than simply looking to the ECJ's *Sturgeon* decision or corresponding decisions by the German Federal Court of Justice.

Whether the ECJ was, in fact, correct to rule in the *Sturgeon* case that a delay can have the same legal consequences as a cancellation under EU Regulation 261/2004 is currently being examined by the Grand Chamber of the ECJ. On November 30 2011 the ECJ joined the trials regarding the preliminary rulings requested by the UK High Court[26] and the Cologne local court[27] and the hearing in this regard took place on March 20 2012.

The ECJ is expected to rule on this important issue, which will affect all airlines, before the end of 2012.

The ECJ's advocate general's opinion is was delivered on 15 May 2012.

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[25] Case 3 C 72/11.

[26] C-629/10.

[27] C-581/10.

LEGAL UPDATE FROM XXIV OLD BUILDINGS, LONDON

Jet2.com Ltd v Blackpool Airport [2012] EWCA Civ 417

The English Court of Appeal ruled in favour of Jet2.com, a low cost British carrier, in a case concerning its right to use Blackpool Airport.

Blackpool Airport Limited ("the **Airport**"), 95% owned by Balfour Beatty plc, had argued unsuccessfully before HHJ Mackie QC at trial that it was not obliged to keep the Airport open beyond its promulgated opening hours in order to accommodate the schedules of the British low cost carrier Jet2.com.

The Airport had contended that the provisions of the agreement that obliged it (i) to cooperate and use best endeavours to promote Jet2.com's low cost services from the Airport and (ii) to use all reasonable endeavours to provide a cost base that would facilitate Jet2.com's low cost pricing did not require it to sacrifice its own commercial interests. The Airport renewed its argument on appeal, namely that the best and all reasonable endeavours provisions entitled it to consider its own commercial interests before those of Jet2.com.

The Airport further argued that the terms of the agreement to use such best endeavours and all reasonable endeavours to promote low cost services and low cost pricing were too uncertain to create legally enforceable obligations. It argued that the contract was silent on hours of operations so it was not obliged to keep the Airport open to accommodate any flights outside its standard promulgated opening hours even though it had done so for 4½ years from the outset of the agreement.

Jet2.com argued that the nature of best / all reasonable endeavours obligations depended on the context in which they arose and that this was a matter of construing those terms against the factual matrix in which they arose.

Jet2.com also argued that there was nothing uncertain about the obligations and that any attempt to restrict the Airport opening hours was, as the Judge had held at trial, a breach of contract.

After an exhaustive review of the best and reasonable endeavours case law, including *Sheffield District Railway Co. v Great Central Railway Co.* (1911) 27 T.L.R. 451, *Terrell v Mabie Todd and Co. Ltd* [1952] 2 T.L.R. 574, *A.P. Stephens v Scottish Boatowners Mutual Insurance Association (The 'Talisman')* [1989] 1 Lloyd's Rep. 535, *Phillips Petroleum Co. UK Ltd v Enron Europe Ltd* [1997] C.L.C. 329, *Yewbelle Ltd v London Green Developments Ltd* [2006] EWHC 3166 (Ch), *EDI Central Ltd v National Car Parks Ltd* [2010] CSOH 141 and *R. & D. Construction Ltd v Hallam Land Management Ltd* [2010] CSIH 96, the English Court of Appeal (Longmore LJ and Moore-Bick LJ, Lewison LJ (dissenting)) held by a majority that the nature of best and reasonable endeavours obligations depended very much on the context in which they appeared. In particular, it did not follow that on each occasion these words were used in a commercial contract that this permitted the obligated party to place its own commercial interests first or that the duty was limited in the way the Airport had suggested.

The Court of Appeal by a majority also rejected the Airport's argument that the contract was too uncertain to create binding obligations to promote Jet2.com low cost services.

Philip Shepherd QC, Adam Cloherty,
Barristers at XXIV Old Buildings, London

Jet2.com Ltd v TAROM [2012] EWHC 622 (QB)

The London Commercial Court found in favour of a low cost British carrier in its claim against a Romanian state-owned MRO on a claim for damages for wrongfully terminating a long-term maintenance contract.

An English airline, Jet2.com, and a Romanian maintenance provider TAROM (which is also the state airline) had a 3 year maintenance contract under which TAROM agreed to carry out as many of Jet2.com's Boeing 737 fleet C-Checks as Jet2.com might choose. The contract did not provide for any inflation of the fixed hourly rate and permitted Jet2.com unilaterally to extend it for a further 3 years in 2007, which Jet2.com did. The contract was by then uneconomic for TAROM which sought to renegotiate its terms.

After the negotiations failed, TAROM purported to terminate the contract relying upon alleged non-payments of sums which it said had been due and demanded in an email sent in May 2007. That email had made demand for payment of various sums but contained inaccuracies.

At the trial, the Court decided (after considering *Italmare Shipping v Ocean Tanker* [1982] 1 WLR 158) that TAROM could not rely upon the May email demanding payment for outstanding sums due as a contractual notice to terminate the maintenance contract because the email did not make clear that it was such a notice. Furthermore, the email contained inaccuracies and TAROM, upon request, failed to clarify and substantiate the figures in it. For this reason too, the email could not be held to be a valid contractual notice.

As TAROM's attempt to rely upon the May 2007 email as a basis upon which to terminate the contract in September 2007 failed, its letter purporting to terminate the contract in reliance upon it amounted to a repudiation of the contract, which Jet2.com duly accepted. Following the English Court of Appeal decision in *Stocznia v Latco* [2002] 2 Lloyd's Rep 436, the Court held that Jet2.com had accepted TAROM's repudiation even though it had at the time given a wrong reason for doing so.

The Court rejected Jet2.com's alternative claim that TAROM had repeatedly represented that it was not willing and able to provide sufficient resources to carry out the likely B737 C-Check requirements of the airline for the 2007/08 maintenance season, without promises of better payment terms. The Court held that those representations were not repudiatory as they were made in the context of the abortive contractual renegotiations. Furthermore, the Court said, Jet2.com had affirmed the contract thereafter.

TAROM was accordingly liable to pay Jet2.com damages which it had suffered as a result of its not having the benefit of the agreement from its termination until what would otherwise have been its expiry in July 2010. Following *Durham Tees Valley Airport v bmibaby* [2011] 1 Lloyds LR 68, that exercise involved taking a view, assuming that TAROM was willing to comply with its obligations under the agreement, about which if any aircraft C-Checks Jet2.com would have asked TAROM to carry out in that period and how much extra, if anything, Jet2.com would have had to pay others to do the work instead.

The Court made directions for the enquiry into damages.

Steven Thompson, Barrister at XXIV Old Buildings, London

ACG Acquisition XX LLC V Olympic Airlines (in special liquidation) [2012] EWHC 1070 (Comm)

The English High Court considers the meaning of 'airworthiness'. A signed certificate of acceptance did not conclusively or contractually determine whether the aircraft was in fact airworthy at the time of delivery. But on the facts, the airline was estopped from recovering damages for delivery of an unairworthy aircraft because an affiliate of the lessor had relied upon it in waiving its right to refuse redelivery from the preceding lessee.

As noted in Volume 59, Q1(2012) at page 18, the English Court had refused to grant the lessor summary judgment in this case. The trial was conducted in the London Commercial Court and, in a significant judgment for the aviation industry, Teare J handed down his judgment on 30 April 2012 finding that:

1. In the context of a lease of an aircraft intended for the safe carriage of passengers, whether an aircraft was airworthy depended upon whether it was fit or safe for the carriage of passengers by air as a matter of fact. Whether a particular defect renders an aircraft unfit or unsafe for flight will depend upon the function of the part in question and the severity of the defect and not upon whether the operator of the aircraft knows of the defect or not.

2. Contrary to the terms of the lease, the Claimant ("**ACG**") had delivered a Boeing 737-300 aircraft to the Defendant airline ("**Olympic**") which was neither airworthy nor safe to fly and which "*had not been properly maintained*".

3. Olympic's signature of a 'Certificate of Acceptance' immediately prior to delivery did not give rise to a 'contractual estoppel' which prevented it from arguing that the aircraft was not airworthy or was otherwise not in the required condition at delivery. On a proper construction of the lease the parties had agreed that the 'Certificate of Acceptance' would be conclusive proof of certain matters, but had not agreed that it would be conclusive proof of the condition of the aircraft at delivery. By signing the 'Certificate of Acceptance' Olympic had not waived any right to damages for any breach by ACG of its obligation to deliver the aircraft in the required condition.

4. A related company of ACG had nevertheless relied on Olympic's statement in the 'Certificate of Acceptance' that the aircraft "*complied in all respects with the condition required at delivery*" so as to be "*absolutely certain that Olympic considered that the aircraft complied with the required condition*". Olympic was therefore estopped from resiling from that statement. As such ACG was entitled to rent and Olympic was estopped from counterclaiming damages for breach of contract.

Background facts

ACG delivered the aircraft to Olympic in August 2008 pursuant to a 5-year dry lease. Immediately prior to delivery to Olympic a related company of ACG had leased the aircraft to AirAsia.

Clause 4.2 of the lease obliged ACG to deliver the aircraft to Olympic "*as is, where is and in the condition required in Schedule 2*". Schedule 2 required the aircraft to be "*airworthy … and be in a condition for safe operation*" and "*have undergone, immediately prior to delivery, the next scheduled, full zonal block C-Check*".

The next scheduled C-Check was carried out by AirAsia's maintenance, repair and overhaul organization ("**MRO**") in Singapore, ST Aerospace, between May and August 2009. AirAsia was required to carry out this C-Check as part of the redelivery conditions set out in its lease of the aircraft.

During the C-Check, representatives of ACG and Olympic inspected the aircraft for defects. ACG's representatives drew up a list of 308 discrepancies (including corrosion on the spoiler and aileron cables

and corrosion on the left horizontal stabilizer which Olympic's representatives had identified and notified to ACG). ACG gave the list to AirAsia to allow it to inspect and, if necessary, rectify the discrepancies.

On 19 August 2008 Olympic and ACG each signed a 'Certificate of Acceptance' which the lease required Olympic to sign in a specified form. The 'Certificate of Acceptance' stated that Olympic confirmed to ACG that the aircraft "*complied in all respects with the condition required at delivery under section 4.2 and Schedule 2 of the Agreement*". The lease provided that the 'Certificate of Acceptance' would be "*conclusive proof*" of certain specified matters (none of which was that the aircraft was airworthy and otherwise in the required condition at delivery). Shortly thereafter the related company of ACG accepted redelivery of the aircraft from AirAsia and ACG delivered it on to Olympic.

On 6 September 2008, only 2 weeks after the aircraft had entered commercial service with Olympic, engineers discovered that one of the flight spoiler cables on the aircraft was broken. Olympic's MRO identified a series of additional defects to the flight controls and the Hellenic Civil Aviation Authority (the "**HCAA**") suspended the aircraft's airworthiness review certificate (the "**ARC**"), grounding the aircraft.

During September and October 2008, the aircraft underwent further inspections in Athens, including by Boeing. In January 2009 it was sent to a third party MRO in Chateauroux, France, to undergo work to enable its ARC to be restored. Repairs were carried out to address the defects identified and others which subsequently came to light. A sample check of 12 Airworthiness Directives ("**ADs**") and Corrosion Prevention Control Program ("**CPCP**") tasks was also carried out. The aircraft was found to be non-compliant with 4 ADs.

By 26 June 2009 the repair works were eventually completed at a cost of more than €1.25 million. The aircraft was returned to Athens on 23 July 2009 and Olympic sought the re-issue of the ARC.

In early August 2009 the HCAA, having considered the findings made in Chateauroux, required a further sample check of 8 other ADs. Of the first 5 ADs which were checked, 2 were recorded as "*with findings*". For the HCAA this "*put in doubt the reliability of the aircraft documents as a whole*" and, on 17 August 2009, the HCAA refused to renew the aircraft's ARC and required "*detailed and full scale inspections*" to be undertaken, including the recertification of all ADs and the checking of all CPCP tasks and all tasks undertaken on the previous C-Check.

Olympic informed ACG that this put the aircraft "*beyond economic repair*" and shortly afterwards it was placed in long-term storage.

In September 2009, ACG commenced legal proceedings against Olympic for unpaid rent and maintenance reserves for the period of the 5-year lease. Olympic counterclaimed for damages for ACG's alleged breach of the lease in failing to deliver the aircraft in the required delivery condition, and also advanced a case based on total failure of consideration and frustration.

On 2 October 2009, Olympic went into liquidation. The aircraft nevertheless remained in Athens for well over a year. ACG subsequently transported the aircraft to Florida where, between July and September 2011, it underwent a C-Check as well as further work which allowed the Federal Aviation Authority to certify it as airworthy. ACG thereafter leased the aircraft to Aerosur in Bolivia.

The Decision

After a trial in the London Commercial Court, Teare J held:

1. "*The meaning of the word 'airworthy' depends upon its true construction in the context of the lease in which it is found, having regard to the factual background of which both parties are aware. The lease in this case is of an aircraft intended for the safe carriage of passengers. In that context the ordinary and natural*

meaning of airworthy is, in my judgment, fit or safe for the carriage of passengers by air. Whether a particular defect renders an aircraft unfit or unsafe for flight will depend upon the function of the part in question and the severity of the defect. It will not depend upon whether the operator of the aircraft knows of the defect or not".

2. An appropriate test for airworthiness is: "*Would a prudent operator of an aircraft have required that the defect should be made good before permitting the aircraft to fly, had he known of it. If he would the aircraft was not airworthy.*"

3. The aircraft "*had not been properly maintained*" and a series of defects were present at delivery, including corrosion to the spoiler and aileron cables, to the horizontal stabilizers and to the cargo door cut-outs as well as an unacceptable amount of debris in the fuel tanks.

4. Contrary to clause 4.2 of the lease the aircraft was not airworthy at delivery and otherwise did not comply with the required delivery conditions set out in schedule 2 to the lease.

5. On a proper construction of the lease the parties had not agreed that the 'Certificate of Acceptance' would be conclusive proof that the aircraft was airworthy and otherwise in the required condition at delivery.

6. There was, therefore, no 'contractual estoppel' and Olympic had not agreed to waive any right to damages for ACG's breach of its obligation to deliver the aircraft in that condition.

7. Olympic was nevertheless estopped from alleging that the aircraft did not comply with the condition required the lease as a result of its statement in the 'Certificate of Acceptance' that the aircraft "*complied in all respects with the condition required at delivery under section 4.2 and Schedule 2 of the Agreement*". An affiliated ACG entity had relied on that statement so as to be "*absolutely certain that Olympic considered that the aircraft complied with the required condition*" and had thereby suffered detriment by giving up its right to refuse to accept redelivery of the aircraft from AirAsia, the previous lessee. It would accordingly be unconscionable to permit Olympic to resile from the statement.

8. The HCAA's withdrawal of the ARC in September 2008 and its refusal to renew it in August 2009 had not frustrated the lease.

9. ACG was accordingly entitled to rent and maintenance reserves which fell due under the lease prior to its termination and to damages for lost rent after its termination. Olympic was not entitled to the damages for breach of contract which it sought by its counterclaim.

Olympic is understood to be considering an appeal to the Court of Appeal.

Philip Shepherd QC, Edward Cumming, Barristers at XXIV Old Buildings, London

SPECIAL FEATURE

Use of ATSB documents in liability proceedings

The Australian Transport Safety Bureau (ATSB) has a function of improving safety and public confidence in aviation, marine and rail modes of transport through, among other things, the conduct of independent investigations of transport accidents.

In practice the ATSB will take control of any significant aviation or maritime accident site and will conduct (some times in tandem with others) the first comprehensive investigation as to cause.

Those investigations are not directed to attributing fault to any party. The conduct of those investigations is fully financed by the Commonwealth Government.

It is frequently the case that that information and/or analysis would be relevant to and of assistance in the conduct of subsequent proceedings concerning liability arising out of the accident.

However provisions of the *Transport Safety Investigation Act 2003* (Cth) (*TSI Act*) together with the practices of the ATSB and the application of those provisions, result in that material rarely being available to any party in the conduct of those subsequent proceedings.

This article considers the legal framework which has resulted in this outcome. It concludes that the outcome may not be authorised by the *TSI Act* and identifies the steps which litigants in subsequent liability proceedings ought consider in addressing ATSB's approach to disclosure.

The *Transport Safety Investigation Act 2003*

The ATSB is established as an independent agency by the *TSI Act*.

It provides for the ATSB to conduct investigations, at least in respect of accidents which attract a relevant Commonwealth head of power.[28] It requires the ATSB to produce draft and final reports and is clear that those reports are not admissible in subsequent proceedings.[29]

In the conduct of such investigations the ATSB acquires two categories of underlying information which is potentially available in later proceedings, the use of which is regulated by the *TSI Act*:

(a) on board recordings, or OBRs; and

(b) restricted information.

Whether information is an OBR depends upon the definition in s.48 of the Act.

A cockpit voice recording from an aircraft engaged in a flight to which a Commonwealth head of power applies is likely to be an OBR within the meaning of that definition.

An OBR can only be required to be produced for the purposes of civil proceedings[30], or admitted in civil proceedings in two circumstances:

(a) if the ATSB has by notice declared that the recording is no longer to be treated as an OBR on or after a date specified in the notice[31]; or

(b) the ATSB issues a certificate under s.50 of the *TSI Act* in relation to the OBR information and a Court makes a public interest order under subsection 53(4) of that Act in relation to that information.[32]

Restricted information is defined for the purposes of the Act as:

[28] The references to "powers in this Act" in s.11(1)(2) and (3) should be read as including the function of conducting an investigation, so as to give the *Transport Safety Investigation Act* an operation which does not exceed the Commonwealth's constitutional limits. See *FCT v Munro* (1926) 38 CLR 153 at 180; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11].
[29] *TSI Act* s. 27.
[30] Coroners proceedings are dealt with differently – see s.59.
[31] *TSI Act* s.49(1).
[32] Section 53(3)(d) and (6).

"restricted information" means any of the following (but does not include OBR information):

"(a) all statements (whether oral or in writing) obtained from persons by a Commissioner, staff member or consultant in the course of an investigation (including any record of such a statement);

(b) all information recorded by a Commissioner, staff member or consultant in the course of an investigation;

(c) all communications with a person involved in the operation of a transport vehicle that is or was the subject of an investigation;

(d) medical or private information regarding persons (including deceased persons) involved in a transport safety matter that is being or has been investigated;

(e) in relation to a transport vehicle that is or was the subject of an investigation-- information recorded for the purposes of monitoring or directing the progress of the vehicle from one place to another or information recorded in relation to the operation of the vehicle;

(f) records of the analysis of information or evidential material acquired in the course of an investigation (including opinions expressed by a person in that analysis);

(g) information that is contained in a document that is produced to the ATSB under paragraph 32(1)(b);

(h) information that is contained in a document that is produced to the Chief Commissioner under paragraph 36(3)(a) or (4)(a);

(i) information contained in a report made under a voluntary reporting scheme;

(j) information obtained or generated by the ATSB in the course of considering a report made under a voluntary reporting scheme;

(k) records of the analysis of information contained in a report made under a voluntary reporting scheme (including opinions expressed by a person in that analysis)."

By reason of s.60(8) of the *TSI Act* restricted information is not admissible in civil or criminal proceedings unless:

"(a) the ATSB has issued a certificate in relation to that information, stating that disclosure of the information is not likely to interfere with any investigation; and

(b) the Court is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice."[33]

The ATSB Policy on use of information

The ATSB publishes a policy on the exercise of its power to issue a certificate in relation to use of restricted information in subsequent proceedings. It states:

"The ATSB should consider whether the disclosure:

(a) is consistent with the objects of the TSI Act;

(b) would interfere with the free flow of information to any investigation under the TSI Act; or

(c) would otherwise prejudice any investigation.

Relevant to each of these considerations will be:

(a) the nature of the restricted information;

(b) the manner in which the restricted information was obtained;

(c) the purpose for which it may be used in the civil proceedings; and

(d) whether persons connected with the aviation, marine and rail transport industries that the ATSB investigates may be less cooperative in investigations if the disclosure was made for the purpose it was sought in the civil proceedings.

In civil proceedings, other than coronial inquiries, the focus is predominantly on apportioning blame and liability. As the ATSB conducts no blame investigations in the majority of circumstances, the ATSB will need to carefully consider whether there will be any adverse effect on ATSB investigations by becoming involved in civil proceedings through the disclosure of restricted information. In this context, the TSI Act's explanatory memorandum makes it clear, with respect to s.60, that the intention of the protections is to separate judicial proceedings from the ATSB's investigation to ensure the continued free flow of information."

In promulgating that policy the ATSB may have impermissibly conflated the questions to be considered by the ATSB when it is requested to issue a certificate under s.50 or s.60(5) and the separate and distinct questions to be considered by the Court under s.53(4) or s.60(6).

The Explanatory Memorandum

Contrary to the suggestion in the policy, the explanatory memorandum to the *Transport*

[33] *TSI Act* ss. 60(5) and (6).

Safety Investigation Bill 2002[34] does not support the conflation of those tests.

The explanatory memorandum contains a broad description of the provisions in the following terms:

> *"Part 6 – protection of OBR information and restricted information: sensitive information collected during the course of an investigation is separated into two Divisions under this part. Division 1 deals with on board recording (OBR) information, which cannot be used in criminal proceedings against a crew member. The use of OBR information in civil proceedings and coronial inquiries will be subject to different restrictions. Other sensitive information collected during an investigation is afforded another level of protection and is referred to as "restricted information" in Division 2. Division 3 confirms that the information gathering powers of the Commonwealth Parliament and Royal Commissions are not affected."*

The detailed notes in the explanatory memorandum are to the following effect:

> *"Clause 50 – Executive Director's certificate about disclosure of OBR information*
>
> *This clause enables the Executive Director to certify that the disclosure of specified OBR information is not likely to prejudice or interfere with any investigation. Such certification is one of the requirements to be met for OBR information to be disclosed under paragraph 53(3)(d) and to be admitted in evidence in civil proceedings under clause 56.*
>
> *Paragraph 53(3)(d) permits disclosure to a Court in civil proceedings (including Coronial proceedings) where the Executive Director has issued a certificate under clause 50 stating that disclosure is not likely to interfere with ANY* [uppercase in the original] *investigation, and the Court or Coroner has made a determination under subclause 53(4).*
>
> *Subclause 53(4) sets out the conditions under which a Court may order that the OBR information is permitted to be disclosed under paragraph 53(3)(d)(ii) in essence, the Court needs to conduct a public interest test to weigh up the relevance of the information in the administration of justice against any adverse impact of such disclosure on any current or future investigation.*
>
> *Subclause 56(1) allows OBR information to be admitted in civil proceedings provided that the Executive Director issues a certificate under clause 50 certifying that disclosure of the information is not likely to prejudice or interfere with any investigation, and that the Court makes an order under subclause 56(3). Note that these requirements are in addition to the restrictions on the disclosure of OBR information for the purposes of civil proceedings under paragraph 53(3)(d). A public interest order will mean that the Court will have to perform a "balancing act" by weighing up the potential domestic and international safety impact on current or future investigations against the proper administration of justice. In conducting that balancing act, the Court will also need to take into account whether the evidence can be obtained by other means. If the Court considered it is likely that the free flow of safety information would be affected in future because of the disclosure and use of the OBR information, and that this impact outweighs the administration of justice, then the Court may rule against the disclosure (and conversely). This is consistent with international practice."* [emphasis added]

The explanatory memorandum to s.60 was to the same effect. In particular the notes to subclause 60(6) expressly referred back to the explanatory memorandum comments at subclause 56(1).

As the highlighting in the extracts above indicates, the explanatory memorandum suggests the issues to be considered by the ATSB differ from those to be considered by the Court.

There is nothing in any of the explanatory memorandum which supports the proposition that the matters to be taken into account by the ATSB in deciding whether to issue a certificate under s.50 or under s.60(5) is co-extensive with, or overlaps, the matters to be taken into account by a Court in applying the "public interest" tests prescribed by ss.53(4) and 60(6).

The Question for the ATSB differs from that for a court

In this writer's opinion the ATSB policy is legally defective.

That is because the policy assumes that the questions reserved for consideration by the Court under ss.53(4) and 60(6) are analogous with those to be considered by the ATSB.

However they are not.

The question for the ATSB is whether "*disclosure of the information is not likely to*

[34] Circulated to the House of Representatives by the Minister for Transport and Regional Services, the Hon. John Anderson MP.

interfere with any investigation". Content to that question is to be found in the words "to interfere" meaning "*to collide or clash, so as to hamper or hinder each other*";[35] "*to come into opposition, as one thing with another, especially with the effect of hampering action or procedure*".[36]

An analogy can be drawn with the phrase "interference with the administration of justice" which:

> "*denotes the doing of something which, if successful, would bring about consequences in the working of the system of justice ….. by improper means. It is wrongful behaviour whether or not it is successful. Obvious examples are actual or attempted bribery of someone who has a material part to play in the decision of litigation. …. Less obvious examples are where persons material to the decision of litigation are subjected to influences upon their judgment or, if witnesses, their evidence, quite external to the particular litigation, as for instance prejudicial media comment. Other examples away from the courtroom are where persons who may have information or potential evidence relevant to projected proceedings whether they be by way of litigation or in these days some form of Royal Commission, are subjected to pressures of various kinds not to make their information or evidence available to relevant authorities. On the other hand, interruptions and delays to litigation are not of themselves necessarily interference with the proper administration of justice.*"[37]

The question of interference with an investigation similarly focusses on issues such as whether release of the documents by the ATSB would be likely to place pressure on witnesses not yet interviewed, or result in the loss or destruction of materials not yet secured by the ATSB.

That is, the question for the ATSB is a question posed only in the present tense; "is not likely to". It is a question whether disclosure would somehow cut across an existing investigation so as to hamper or hinder some action or procedure that has been taken or is to be taken in that investigation.

Unless the disclosure would have that effect, it would not "interfere" with any investigation in the present tense. Where an investigation has been completed, by publication of the Final Report, there will be no prospect that disclosure of information would be likely to interfere with that investigation.

The question for the Court is a different, and much broader question: whether there would be any adverse impact, domestic or international, that the disclosure "might have" on any "current or future investigations". If it be found that such adverse impacts exist or might exist the Court is then required to engage in a balancing exercise.

When the ATSB policy states that the ATSB will need to carefully consider whether there will be an adverse effect on ATSB investigations with reference to the continued free flow of information it articulates a test which the Act provides for the Court, and not the ATSB, to apply. The question for the ATSB is a narrow question of the likely interference with current investigations.

The construction of the relevant provisions identified above is supported by the following:

(a) the usual and plain meaning of the words used in each provision, in particular "to interfere with any investigation" in the case of the ATSB and "any adverse domestic and international impact" applied by the Court; and "is not likely to" in the case of the ATSB and "might have" as applied by the Court;

(b) the form and structure of the legislation which allocates distinct and separate functions and questions to the ATSB on the one hand and the Court on the other – which supports a construction which gives to the question reserved to the ATSB a different meaning to that reserved to the Court;

(c) the fact that for a legal consequence to flow by way of admission or compulsory production it is necessary that there be both a certificate issued by the ATSB and a determination by the Court;

[35] Oxford English Dictionary.
[36] Macquarie Dictionary.
[37] *Prothonatory v Costello* (1984) 3 NSWLR 201 per Priestley JA at 209; see also *Tasmania v Green* (2007) 16 Tas R 318 at [54]

(d) that the Court's determination is not by way of review of the ATSB determination – thus indicating that the Parliament intended that the Court would address a separate and different set of questions from that to be addressed by the ATSB;

(e) that the construction reserves to the ATSB for determination a matter peculiarly within its knowledge and capacity to assess, while leaving to the Court the broader evaluative judgment of a kind ordinarily made by the Courts;[38]

(f) the construction which reserves to the Courts the assessment of any impact on future investigations and the balancing of that impact with the public interest in the administration of justice is consistent with the requirements of relevant international instruments;[39] and

(g) the "principle of legality" operates to inform a strict construction of the provisions which permit the legally extraordinary outcome[40] that a branch of the executive, the ATSB, may prevent material being adduced in evidence in a Court.[41]

Options for review of ATSB decisions to refuse to permit use of its documents

The circumstances in which the ATSB's refusal to have documents used in liability proceedings arise are typically:

(a) on an application to set aside a Subpoena or Notice to Produce; and

(b) on an objection to admission of evidence.

In either case a party which seeks to rely upon ATSB sourced material has options available to have a Court effectively review the ATSB's refusal of its certificate.

First, provided that party can establish that its interests are affected by the refusal, it would have a right to be provided with a statement of reasons for any such refusal from the ATSB[42] and would be entitled to seek judicial review of the refusal of a certificate by the ATSB pursuant to the *Administrative Decisions (Judicial Review) Act 1977* and/or s.39B of the *Judiciary Act 1903*.

There is also the possibility of collateral challenge to the ATSB's decision within the proceeding in which it is sought to compel the production of the documents or to adduce the evidence.[43]

Whether in an application for judicial review or by way of collateral challenge a question of construction will arise as to whether ss.50 and 60(5) of the *TSI Act* require that:

(a) the relevant officer of the ATSB form the opinion that disclosure of the information is not likely to interfere with any investigation; or

(b) as an objective fact, the existence of which could be determined by the Court, disclosure of the information was not likely to interfere with any investigation.

Each of those constructions is open.[44]

If the relevant fact for the ATSB in considering whether to issue a certificate is the formation of an opinion as to likely

[38] See *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 for an example in which the High Court conducted a balancing exercise of the kind envisaged and held that cockpit voice recorder data was required to be disclosed to the cross-defendant precisely because it bore directly upon the question of allocation of liability as between the two aircraft operators and air traffic control involved in a collision on the runway at Mascot airport.

[39] Chicago Convention annex 13 clause 5.12 provides that various records of accident or incident investigation will not be made available for purposes other than accident or incident investigation unless the appropriate authority for the administration of justice in the relevant State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations. In Australia the authority for the administration of justice is the courts, not the ATSB.

[40] see *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police* (2009) 234 CLR 532 at 575 footnote 181

[41] *K-Generation v. Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47] – [49].

[42] *Administrative Decisions (Judicial Review) Act 1977* (Cth) s.13.

[43] See *Attorney General (Cth) v Breckler* (1999) 197 CLR 83 at 108 [36] and *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at [23] – [27].

[44] See by way of analogy the differences in approach to construction of s.198A(3) of the *Migration Act 1958* in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 85 ALJR 891; [2011] HCA 32 by French CJ on the one hand at [58] and [59] and Gummow, Hayne, Crennan and Bell JJ on the other at [109].

interference with investigations, judicial review of a refusal to issue a certificate, or a collateral challenge to such a decision, is most unlikely to succeed unless a statement of reasons has first been obtained. Without such a statement, the party seeking review of the refusal is unlikely to satisfy its onus of showing that the opinion was improperly formed.

The time limits in the *Administrative Decisions (Judicial Review) Act* should be borne in mind. Generally, once a party has been notified of the ATSB's refusal to issue a certificate, it has only 28 days to request a statement of reasons; and once it receives that statement of reasons it has a further 28 days in which to commence judicial review proceedings.

A party seeking production of, or to adduce, documents in circumstances where a certificate from the ATSB is necessary and has been refused, should:

(a) request a statement of reasons from the ATSB pursuant to the *Administrative Decisions (Judicial Review) Act* within 28 days of being notified of the ATSB's refusal;

(b) consider whether to seek to challenge the ATSB's refusal in collateral attack in the principal proceedings; and/or to commence proceedings under the *Administrative Decisions (Judicial Review) Act* for review of that decision within the statutory time limits; and

(c) if necessary seek an adjournment of the principal proceedings until the resolution of the judicial review proceedings.

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