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RECENT CASES

Commissioner of Taxation v Qantas Airways Ltd [2012] HCA 41 (2 October 2012)

High Court rules Qantas makes a supply even if passengers don't take their flight

The High Court has issued its much anticipated judgment as to whether Qantas is liable to pay GST on forfeited fares and on fares where the customer failed to claim an available refund for an unused ticket.

By a 4-1 majority, the High Court confirmed that a GST liability did arise, because Qantas had made a supply of *'a promise to use best endeavours to carry the passenger and baggage, having regard to the circumstances of the business operation of the airline.'*

While the Commissioner will no doubt welcome the ruling, the decision may not be the last word in the GST treatment of forfeited payments, unclaimed refunds or cancellation fees.

Analysis

Qantas argued that it made no supply when a customer forfeited its fare upon failure to take a discounted flight or didn't claim an available refund for an unused ticket. Qantas argued that in substance, although its contract with the customer contained various terms and conditions, the primary supply was air transportation. As such, where no travel was taken, no supply was made so that Qantas was not liable for GST even though it retained the fare.

On the other hand, the Commissioner emphasised that the definition of supply included a supply of services, a creation of any right, an entry into an obligation or any combination of these. Accordingly, he contended that Qantas had made a supply, being the making of the contract with the customer under which Qantas supplied rights, obligations and services in addition to the flight. The Commissioner was alive to the risk that his argument could imply that a payment should be dissected between the various rights and obligations within a contract. He stressed that section 29-5 of the GST Act, which provides that GST on a taxable supply is attributable to the earlier of the period in which any consideration is received or an invoice is issued, meant that GST is only payable once, even if a contract involves more than one supply.

Ultimately the High Court concluded that Qantas had made a supply, placing significant emphasis on the particular contractual provisions that allowed Qantas the right to amend the customer's travel arrangements in certain exceptional circumstances (such as a flight cancellation). This justified the conclusion that Qantas was not supplying a right to take a particular flight, but rather was making a broader supply, being the promise to use its best endeavours to transport the customer. This broader supply was sufficient to confirm Qantas' GST liability, irrespective of whether the customer took the flight or claimed a refund of an unused ticket.

However, the decision may not be the last word in relation to the GST payable on cancellations or forfeited payments. In many cases (e.g. discounted hotel bookings) there may not be equivalent contractual provisions which necessitate the conclusion of a broader supply. For example, would a hotel need to reserve the right to cancel or amend a booking because of inclement weather or unanticipated maintenance? Of course, it remains to be seen whether any such providers are inclined to pursue such arguments.

The High Court's decision does not resolve a number of other issues of uncertainty. Top of mind is the GST treatment of out of court settlements, where common practice reflects the position set out in public ruling *GSTR 2001/4*. This ruling arguably takes an 'in substance' approach by confirming that the GST treatment of a settlement payment will normally follow the treatment of the underlying cause of action and that 'discontinuance supplies' (otherwise commonly known as 'release of claims') can generally be disregarded. However, the High Court's judgment in Qantas does not endorse a substantive approach, and

requires consideration of the particular terms of the contractual arrangements. Adopting this approach, it might be argued that in many cases, the release of claims (which is clearly a supply) is exactly what a particular settlement payment is for.

In light of these uncertainties, we look forward with interest to the Commissioner's decision impact statement in relation to the impact of the High Court's decision.

Minter Ellison's GST team is recognised as one of the leading GST practices in Australia and can help you work out how the High Court's decision impacts your business.

Rhys Guild, Partner, Minter Ellison

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***Herde v Oxford Aviation Academy (Australia) Pty Ltd* [2011] NSWCA 385**

This decision highlights the importance of insurers confirming an insured's agreement to the settlement of an insured claim. It also highlights the differences in State and Commonwealth regimes for damage caused by an aircraft.

Oxford Aviation owned an aircraft which crashed at Bankstown Airport. The pilot, who was piloting it on a test flight after repairs, died in the crash. During the crash, part of the aircraft hit and damaged another aircraft owned by Mr Herde (the plaintiff).

The plaintiff was insured by a QBE entity. QBE indemnified the plaintiff and exercised its subrogation rights to sue Oxford Aviation (the defendant), which was in turn insured by Hemisphere.

Settlement negotiations between the parties were conducted by their respective insurers. A settlement was reached and the insurers respectively executed a release and discharge upon the payment by Hemisphere of $73,408. However, for whatever reason, the insurer Hemisphere was not in a position to pay that sum (it seems that it became insolvent). Mr Herde (through QBE) sought to enforce the agreement against Oxford Aviation. Oxford denied liability but the defence filed was "uninformative", and the trial judge awarded summary judgment against the defendant.

Oxford appealed to the New South Wales Court of Appeal. The Court of Appeal overturned the summary judgment and remitted the matter to the trial judge for hearing. In doing so, the Court of Appeal noted that there were a number of matters which gave Oxford an arguable case.

The insurance policy issued to Oxford contained a clause which stated that Hemisphere "shall be entitled (if they so elect) at any time and for so long as they desire to take absolute control of all negotiations and proceedings and in the name of the Insured to settle, defend or pursue any claim."

Mr Herde relied on this clause to say that Oxford's insurer Hemisphere had all necessary authority to enter into the release on Oxford's behalf. However, Oxford argued that there was an issue as to whether its insurer had admitted liability in negligence on behalf of Oxford, although knowing that it had not been negligent. Oxford relied on the principles expressed in Groom v Crocker (1939) 1 KB 194 – a contract of liability insurance normally permits, but does not compel, the insurer to take over the defence of a claim against the insured; and the insurer normally exercises that right. If it does so, the insurer obviously cannot act with total disregard for the interests of the insured or in breach of its contractual authority.

In making this point, Oxford pointed to the application of the Damage by Aircraft Act 1999 (Cth) compared with the application of the Damage by Aircraft Act 1952 (NSW) to the incident at Bankstown Airport. If Bankstown Airport was Commonwealth territory, then the Commonwealth regime would apply and Oxford and the (deceased) pilot may have incurred equal liability. On the other hand, if Bankstown Airport was not Commonwealth territory, so that the NSW regime applied, then it was by no means clear that equal liability would have applied under that regime.

On the basis of these issues, the Court of Appeal held that Oxford had an arguable case, and ordered the matter to return to the District Court for hearing.

The matter highlights the importance of insurers obtaining the insured's express agreement to the terms of settlement even if clear rights to negotiate and settle are contained in the policy. It also highlights the importance of ensuring that an opponent's insurer has proper authorisation to settle – and to perhaps have the respective insured's agreement in writing to settle a matter (even if the Deed of settlement is executed by insurers or solicitors).

Matthew Brooks, Partner, HWL Ebsworths

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King v Jetstar Airways Pty Limited [2012] FCAFC 115

Refusal by LCC to Carry Wheelchair Not Discrimination

The Full Court of the Federal Court of Australia in *King v Jetstar Airways Pty Limited* [2012] FCAFC 115, upheld a decision in favour of Jetstar in a disability discrimination case. Mrs King booked a seat over the internet on Jetstar flight JQ 769 from Adelaide to Brisbane on 23 September 2008. She was subsequently informed by Jetstar that she could not take her wheelchair on that flight because the flight had already reached its limit under Jetstar's two wheelchairs per flight policy. Jetstar offered to move Mrs King to another flight for free but she declined, and booked a flight with another airline for an additional $40.

Mrs King complained to the Australian Human Rights Commission who terminated her complaint. She then applied to the Federal Court seeking declarations for contraventions of the *Disability Discrimination Act 1992* (Cth) (Act) and "an order directing Jetstar to cease enforcing its policy of limiting the number of passengers who require wheelchair assistance to two passengers per flight". The Federal Court found at first instance, and subsequently upheld on appeal by the Full Court, that Jetstar had discriminated against Mrs King on the basis of her disability, however found that the discrimination was not unlawful as Jetstar had proved the defence of unjustifiable hardship.

Section 5 of the Act, as it was in force at the relevant time, provided that a person discriminates against another person (the "aggrieved person") on the ground of a disability if, because of the disability they treat the aggrieved person less favourably than they would treat a person without the disability in circumstances which are the same or not materially different.[1] Section 24(1) provided that it is unlawful for a person who provides services or makes facilities available to discriminate against a person on the ground of their disability by refusing to provide those services or make those facilities available. However section 24(2) provided that it is not unlawful discrimination if the provision of the services or the making available of the facilities would impose "unjustifiable hardship" on the person.[2]

Mrs King's appeal to the Full Court of the Federal Court was largely on the ground that the proper construction of her case should consider the issue of unjustifiable hardship only by reference to the impact of one extra passenger requiring wheelchair assistance on flight JQ 769 as opposed to the unjustifiable hardship of altering Jetstar's two wheelchair policy across all its flights. The full bench dismissed this ground, citing correctly that this was not the case alleged by Mrs King, and upheld the analysis of unjustifiable hardship of the primary judge.

The Primary Judge, and as upheld by the Full Court, took into consideration the Low Cost Carrier business model which is dependant on high aircraft utilisation and tight aircraft turnaround times. The Court found that if there was an increase to the

[1] The version of the Act under which this case was decided was superseded on 4 August 2009, however there are no material differences to the sections relevant to this case under the current version of the Act.

[2] "*Unjustifiable hardship*" can now be found at section 29A of the Act.

two wheelchair limit then it would force Jetstar to increase its 30 minute turnaround time, resulting in delays to other passengers, a loss to Jetstar of 14 sectors per day and a significant loss of revenue. The Court also noted that the two wheelchair policy applied only on Jetstar's A320 and A321 narrow body aircraft and not on Jetstar's A330 wide body aircraft, and placed significance on the fact that Mrs King was not denied travel generally but had been denied access to one flight only.

This decision by the Full Court of the Federal Court is a significant precedent in support of Low Cost Carrier's placing reasonable limits on wheelchair availability on flights in line with their business model.

Jess McGuirk, Solicitor, HWL Ebsworth

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PT Garuda Indonesia Ltd v ACCC [2012] HCA 33 (7 September 2012)

Garuda Airlines Unable to Obtain Foreign States Immunity

Summary

The recent High Court decision involving Garuda Airlines is the latest decision relating to the alleged cartel conduct (price fixing) involving surcharges that the ACCC has been pursuing against numerous airlines over the last 5 years. A number of these proceedings have already settled with the ACCC having obtained $58 million in penalties. All these proceedings predate the criminalisation of cartel conduct.

In the Garuda Airlines decision, Garuda was held not to be able to claim immunity from alleged cartel related allegations by reason of being an instrumentality of the Republic of Indonesia. The judgment is important as it provides some clarity regarding the operation of the *Foreign States Immunities Act* 1985 (Cth) ("**FSI Act**") and in particular the breadth of the commercial transaction exception.

Unfortunately for Garuda this means it is likely that the ACCC will bring separate proceedings against it for the alleged cartel conduct. However, Garuda will miss out on being involved in the trial scheduled for October 2012 in which the ACCC is bringing essentially the same claims against 5 other airlines.

What entities are protected?

The FSI Act provides that a foreign State is immune from the jurisdiction of the Courts of Australia. For the purposes of the FSI Act a "foreign State" means the State itself and certain other organs of the State including the head of the State and the executive government or part thereof. In most circumstances the immunity extends to a "separate entity" of the foreign State essentially being an agency or instrumentality of the foreign State.

The High Court proceeded on the basis that Garuda (which is basically owned and controlled by the Republic of Indonesia) was a separate entity of a foreign State, as this was the factual finding of the Full Court and was a finding which was not appealed by the ACCC. The Full Court discussed in detail the relevant criteria for determining whether an entity was a separate entity of a foreign State.

Exceptions

There are numerous exceptions to the immunity in the FSI Act. For example, there is no immunity from criminal proceedings or if the foreign State has submitted to the jurisdiction.

The critical issue for the High Court was whether the proceeding brought by the ACCC concerned a "commercial transaction" as this is another exception to immunity. Garuda argued that the sale of cargo services was merely the background to the allegations by the ACCC which related to alleged arrangements or understandings between airlines to fix prices for cargo services and that these were not commercial transactions in any real sense. The High Court unanimously rejected Garuda's arguments and found the proceedings brought by the ACCC did concern a commercial transaction.

Implications

As noted above, the FSI Act has numerous exceptions to immunity. The recent High

Court decision means that it will be hard for foreign States or their instrumentalities to claim immunity from proceedings brought by the ACCC for cartel conduct as by their very nature there are likely to be underlying commercial transactions. Arguably the High Court decision means that it will be very difficult for a foreign State to claim immunity in any dispute that arises in a commercial context.

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White et al v Emirates Airlines, Inc., 2012 U.S. App. LEXIS 20460 (October 1, 2012)

Air Carrier's Response to a Passenger's Heart Attack

The action against Emirates was taken by the children of a passenger, Carol Wilson, who suffered what turned out to be a fatal heart attack shortly before her flight from Dubai landed in Houston in the United States.

Facts

As the plane began its descent into Houston, Wilson left her seat to use the lavatory. Five minutes later, a flight attendant found that Wilson had collapsed inside the lavatory. The flight attendant summoned Shawn Carriker, Wilson's son, who was accompanying her. Wilson's breathing was shallow and her eyes were unfocused. Carriker tried unsuccessfully to communicate with her. Raed Abdallah ("Abdallah"), the lead flight attendant, was called and Wilson was taken from the lavatory and placed on the ground, face-up, in the aisle.

About ten minutes prior to landing, Abdallah began to administer emergency aid to Wilson, guided by the Emirates "*In-Flight Services Cabin Crew Emergency Manual*" (the "Manual"). The steps to be followed are reflected by the acronym "DRS ABCD" and were (1) Assess Dangers, (2) Check Responses, (3) Shout for Help, (4) Open Airway, (5) Check Breathing, (6) Start CPR (if no breathing), and (7) Use Defibrillator. These steps comprise the "primary survey." A "secondary survey," is performed when there is no longer a threat of immediate danger. The crew then monitors the passenger's vital signs. If necessary, the crew also (i) contacts MedLink (a medical advice service), (ii) inquires into whether a medical professional is onboard, and (iii) requests medical assistance on arrival.

Here, the crew (1) removed Wilson from the lavatory and placed her on the floor, (2) administered oxygen through a mask, and (3) alerted the captain, who notified medical personnel at the airport. The crew instructed Carriker to return to his seat due to the imminent landing.

The parties disputed whether members of the flight crew stayed with Wilson and monitored her vital signs after Carriker returned to his seat. Carriker acknowledged that a flight attendant was no more than two feet away from Wilson during landing.

After landing, EMS personnel boarded the plane and took over Wilson's care. The captain ordered all passengers to remain seated until EMS was onboard. Although Wilson was conscious and responsive when EMS arrived, she lost consciousness when she was placed in a wheelchair. The paramedics performed CPR on Wilson after they removed her from the plane, but did not use a defibrillator. Wilson was taken to a nearby hospital, and died two days later.

The Appeal

On appeal, Carriker argued that his case was analogous to *Husain v Olympic Airways*, 540 U.S. 644 (2004) and that the flight crew's response to Wilson's emergency constituted an unexpected or unusual event or happening that was external to the passenger. Specifically, Carriker argued that the flight crew (1) refused his request for medical assistance and (2) failed to follow Emirates' policies in attending to Wilson. Emirates contended that its reaction to Wilson's medical emergency was not an "accident" unless that reaction was so thoroughly deficient as to be considered unexpected or unusual under the circumstances.

Refusal of request argument

The plaintiff contended that he had requested the flight crew to perform CPR or to use a defribrillator on his mother. In addition to *Husain,* the plaintiff argued from *Yahya v Yemenia-Yemen Airways*, a 2009 case, in which a flight crew declined to divert the plane, in spite of the passenger's life-threatening condition. This was found by the court to be an article 17 "accident". The plaintiff also cited the case of *Prescod v AMR*, a 2004 case, in which an airline confiscated a bag containing the passenger's medication and, at the same time, promised to allow it to travel with her. However, the airline lost the bag and the passenger travelled without access to her medication. The passenger subsequently died because she lacked access to the medication.

Findings

The Court found that the facts of each of *Husain, Yahya,* and *Prescod* were distinguishable from the facts of this case.

> *Here, the undisputed facts demonstrate that the Emirates flight crew responded to Carriker's request for medical assistance. Indeed, it is uncontested that the crew took action to assist Wilson during the final minutes of the flight. Abdallah and other crew members moved Wilson to the floor, gave her oxygen, and alerted the captain, who arranged for medical assistance for Wilson once the plane arrived.*

Noting that the plaintiff's argument was essentially that the air carrier failed to do more, the Court failed to find that there was anything unusual or unexpected about the response of the crew. The decision not to commence CPR was based on the observation that Wilson was breathing at the time and the EMS subsequent decision not to use the defibrillator was seen by the court as supporting the crew's decision in this regard. Noting also that their decision was consistent with the reasonings of other circuits in cases such as *Hipolito v Nw. Airlines* (2001), *Krys v Lufthansa Ger. Airlines* (1997) and *Rajcooar v Air India Ltd.* (2000), the Court found that the crew's response to Wilson's emergency was not an unexpected or unusual event that constituted an "accident" for the purposes of article 17 of the Montreal Convention of 1999.

The Failure to Follow Policies and Procedures

Carriker, citing *Fulop v Malev Hungarian Airlines*, 175 F. Supp. 2d 651 (S.D.N.Y. 2001) also argued that the crew's failure to follow the policies in the Emirates Manual constituted an unexpected or unusual event. Carriker asserted that the crew failed to monitor Wilson's breathing and pulse rates or to seek assistance from a medical professional onboard. Emirates responded by contending that an airline's failure to follow its own procedures or industry standards does not necessarily constitute an "accident" under the Montreal Convention. In *Fulop* the crew decided not to divert the aircraft when a passenger

suffered a heart attack after consulting a doctor onboard. The court in *Fulop* concluded that an airline's "*alleged deviation from its own rules and standards that were in place to deal with passengers stricken by medical emergencies may be sufficient to support a determination that such an event . . . was unusual or unexpected, and thus an accident . . . .*"

The *White* court was unconvinced by the above argument suggesting that this approach has been rejected by the court in *Blansett v Continental Airlines*, 379 F. 3d 177 (5th Cir. 2004). The court observed that in *Blansett* the court rejected the plaintiff's argument that a departure from an industry standard of care necessarily constituted an "accident."

> *"As Blansett clearly demonstrates, [HN12] the inquiry for purposes of Article 17 is not whether Emirates failed precisely to adhere to its procedures, but rather whether any such failure constituted an "unexpected or unusual event or happening that is external to the passenger."*

The court noted that the flight crew's ability to respond in this case was limited by the short time period in which it had to act and by the need to ensure the safety of other passengers and crew due to the imminent landing. In these circumstances Carriker had not shown that any such departures were unusual or unexpected under the circumstances.

Noting the need to apply the definition of "*accident*" "*flexibly . . . after assessment of all the circumstances surrounding a passenger's injuries*" (per *Saks*) the court concluded that the flight crew's failure to follow all Emirates procedures in handling Wilson's emergency was not an Article 17 "*accident*."

Editors.

LEGISLATIVE UPDATE

Aviation Legislation Amendment (Liability and Insurance) Act 2012

Amendments positive but take a narrow view of 'bodily injury' concept

As a result of a review of Australian carrier's liability and insurance arrangement pursuant to the 2009 National Aviation Policy White Paper (the "**White Paper"**) various amendments to both the *Civil Aviation (Carriers' Liability) Act 1959* (the 'CACLA') and the *Damage by Aircraft Act 1999* (the "**DBA Act**") are currently before parliament. They are found in the Aviation Legislation Amendment (Liability and Insurance) Bill 2012 (the "**Bill**").

Contributory Negligence

The Bill provides for amendment of the "DBA Act" to provide for compensation payments to be reduced according to the contributory negligence of the claimant. This represents a legislative response to the case of *Cook v Aircair Moree*[3] where it was ruled that the partial defence of contributory negligence was not available under DBA Act.

The Explanatory Memoranda of the Bill suggests that in the light of the above judgment it is appropriate "to allow defendants an opportunity to argue that their liability should be appropriately reduced if they can show that the victim was partly negligent in causing the damage."

Contribution

A further amendment enables defendants to seek contribution from other parties who may have contributed to the damage suffered by the person bringing the claim. This provision also represents a response to *Cook v Aircair Moree*.

Increases in both liability and insurance

The Bill will increase a carrier's liability limit for domestic carriage from $500,000 to $725,000. In the absence of an in-built 'escalator' or 'accelerator' clause this increase seeks to adjust the limit upwards in line with changes in the consumer price index.

Pure mental injury exclusion

All of the above amendments represent fair, reasonable and responsible amendments to the liability systems pertaining to domestic carriage and damage to third parties on the ground. However, the amendment of both acts to exclude recovery for what is characterised as 'pure mental injury' is much more contentious than it seems at first glance.

The Australian legal regime for carriers' liability has historically sought to import the international regime into its domestic laws and, in so doing, to harmonise the two. In this sense, the amendment can superficially be argued to perform this positive role. However, the choice of the words "personal injury" may also be argued to represent a choice to allow recovery more broadly than in the international regime, tied as it was for so long to the authentic French language version of *lesion corporelle* which had been variously interpreted, including as "harm to the person" or "bodily injury".

While the choice of the words "bodily injury" by the Montreal Diplomatic Conference (May, 1999) was very deliberate, nonetheless, the issue of the interpretation of the word "bodily" has lingered with just cause. Thomas Whalen has argued that in choosing the formulation 'bodily injury' that "the delegates clearly excluded the recovery of mental injuries as a Montreal Convention remedy."[4] And yet an interpretative statement, included into the *travaux préparatoires* of the Montreal Convention, was both read out to the Conference in plenary session on the second last day of the conference and included without objection. It reads:

> "*THE CONFERENCE STATES AS FOLLOWS:*
>
> *with reference to Article 16, paragraph 1, of the Convention, the expression 'bodily injury' is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with*

[3] *ACQ Pty Ltd v Cook* [2008] NSWCA 161.

[4] "The 1999 Montreal Convention", Condon & Forsyth Newsletter, August 1999.

> *this development, having regard to jurisprudence in areas other than international carriage by air*."[5]

The explicit acknowledgement of a developing jurisprudence by the conference in its *travaux préparatoires* provides a platform upon which a modern interpretation of what constitutes bodily injury might be made. Lord Steyn in respect of the *In re M* appeal in *King v. Bristow Helicopters Ltd*.,[6] observed that:

> *"If and when the 1999 Montreal Convention comes into force there may be scope for argument, on the basis of the travaux préparatoires evidencing the consideration that was given to mental injury, that those who drafted the Convention intended the meaning of the phrase 'bodily injury' to turn on the jurisprudence of the individual state applying that Convention."*

Has balance of interests between the passenger and carrier been altered?

Arguably, the conscious decision on the part of the government to substitute the expression 'personal injury' with the words 'bodily injury', if a narrow interpretation of bodily is taken, weakens the opportunities of passengers to recover for stand-alone recognised psychiatric injury (RPI). This arguably tilts the internal balance within the domestic liability regime in favour of the carriers and their insurers. Passenger advocates lose out on the possibility of recovery for their clients caught up in aviation accidents who, as a consequence, are suffering from an RPI.

Is there a conceptual division between the mind and body artificial?

A second issue is how the law interacts with other areas of knowledge, particularly medicine. Is there a danger that the law is adopting a meaning for 'bodily injury' that is different from its normal meaning, including its normative medical meaning? To borrow an oft used phrase, words ought not to become a prison and an exclusively legally meaning for 'bodily' carries with it some dangers.

In *King v Bristow Helicopters*, the 2002 House of Lords case that is more recent than the leading U.S. case, *Eastern Airlines v Floyd*[7], Lord Hobhouse observed that "a psychiatric illness may often be evidence of a bodily injury or the description of a condition which included bodily injury; but the passenger must be prepared to prove this, not just prove a psychiatric illness without evidence of its significance for the existence of a bodily injury."

Lord Nicholls at 748 in the same case observed that "*it may be that, in the less advanced state of medical and scientific knowledge 70 years ago, psychiatric disorders would not have been related to physical impairment of the brain or nervous system. But even if that is so, this cannot be a good reason for now excluding this type of bodily injury, if proved by satisfactory evidence, from the scope of art. 17*." Counseling that "*this does not mean that shock, anxiety, fear, distress, grief or other emotional disturbances will as such now fall within art. 17*" his Lordship suggested that "*it is all a question of medical evidence*". Alluding to the U.S. case of *Weaver v Delta Airlines*[8], his Lordship noted that "*the uncontradicted medical evidence was that extreme stress could cause actual physical brain damage*". The Judge in that case observed, at p. 1192, that "*fright alone is not compensable, but brain injury from fright is*". Lord Nicholls also suggested that this position was not inconsistent with the position of the US Supreme Court in *Floyd*.

The White or Discussion Paper "Review of Carriers' Liability and Insurance" on one hand suggests that courts "*have interpreted 'bodily injury' as excluding claims for purely mental injuries*" while at the same time conceding that "*there is some legal uncertainty as to the precise definition of 'bodily injury' and how this relates to mental injury*". It asserts that "*limiting carriers' liability under the domestic system to 'bodily injury' will ensure that the issue is treated consistently across the domestic and international frameworks, and remove unnecessary complexity from the overall liability structure*."

[5] International Civil Aviation Organization, International Conference on Air Law, Montreal, 10-28 May 1999: Minutes, Vol. 1 at 243.
[6] [2002] 1 Lloyd's Rep. 745, at 31.
[7] (1991) 499 US 530.
[8] (1999) 56 F. supp. 2d 1190.

In this context, the words of the responsible Minister, in his second reading speech, seems to have grossly overstated the intention and effect of the bill. He suggested that:

> *"This will mean that domestic carriers will no longer be liable for mental injuries irrespective of whether other 'physical injuries' have also been incurred."*[9]

However, obiter dicta at House of Lords level in *King v Bristow Helicopters* and *In re M* has brought the supposition that mental injury is excluded from the international regime in the Montreal Convention into considerable doubt. In particular, Lord Steyn in his judgment cited the Master of the Rolls in the *Morris* appeal, who observed that:

> *"If and when the 1999 Montreal Convention comes into force there may be scope for argument, on the basis of the travaux préparatoires evidencing the consideration that was given to mental injury, that those who drafted the Convention intended the meaning of the phrase 'bodily injury' to turn on the jurisprudence of the individual state applying that Convention."*[10]

It would seem that the controversy around the legal meaning of the words 'bodily injury' has by no means been settled. This observation now applies to Australia's domestic aviation liability law as well as the international legal regime.

Dr. Vernon Nase, Co-editor.

[9] Mr Albanese 22 August, 2012 page 9509 – second reading speech

[10] *See King v. Bristow Helicopters Ltd.,* [2002] 1 Lloyd's Rep. 745, ¶ 31 (Lord Steyn).

Australia to Sign up to Cape Town Convention

On 12 October 2012, the Australian Minister for Infrastructure and Transport, Anthony Albanese announced that Australia will sign the Cape Town Convention and will table the Convention in Parliament later this month.

The Cape Town Convention

The Cape Town Convention creates the International Registry of Mobile Assets, which allows financiers and lessors to notify third parties of their security interests in certain aircraft and engines. The Convention also imposes standard rules governing priority of competing security interests, debtor default, jurisdiction for disputes and remedies for default. The Protocol to the Convention contains additional remedies, including the Irrevocable De-Registration and Export Request Authorisation which allows a financier to deregister an aircraft from the relevant national civil aircraft register and to export it.

Potential Benefits to Industry

Implementation of the Convention in Australia should reduce barriers for international aircraft acquisitions, disposals and financing. The greater certainty for international transactions provided by the Cape Town Convention should have a positive effect on competition as the perceived risks of doing business in Australia may be reduced and a greater number of international financiers may seek to enter the Australian market.

Making the Cape Town Convention Law in Australia

In Australia, a treaty signed by the Government only has legal effect through enabling legislation. This means that whilst the signing of the Cape Town Convention is a positive step, there may be further delays before the Convention has the force of law in Australia. Currently, the Government estimates that the Convention will be brought into force in 2014.

It must be remembered that Australia was one of the first countries to sign the Montreal Convention in 1999 but that the

Convention did not come into effect in Australia until amendment of the Civil Aviation *(Carriers' Liability)* Act in 2009.

Ben Martin, Partner & David Fox, Partner, Norton White

Editors' Note: The Editors support the position taken by the Australian Government. More than 6 years ago we published an article calling the Australian Government to accede to the Cape Town Convention and Aircraft Protocol.[11] Whilst we are encouraged by this announcement, our position is otherwise reserved on the basis that over the past 10 – 15 years aviation legislation, save for matters relating to security, has been given a very low legislative priority.

The Convention was tabled in the House of Representatives on 1 November 2012 and the Senate on 20 November 2012.

[11] *The Cape Town Convention: An Australian Perspective*," Nick Humphrey and Vernon Nase, *Kluwer Journal of Air and Space Law*, Vol. XXXI, Issue 1 [2006].

FLIGHT DELAYS

In late October 2012 it was reported in the global media that a Jetstar crew had been taken "hostage"[12] by some passengers after the flight was diverted to land in Beijing instead of Shanghai because of fog. This reflects an alarming trend by Chinese passengers in retaliation to flight delays or diversions.

In this special section we include contrasting reviews from Europe, China and the United States on how the courts and carriers are dealing with the vexed issue of flight delays. Most curious is the Chinese carrier Spring Airways which has blacklisted those passengers who claimed for and received compensation for a flight delay.

Editors.

EC Regulation 261/2004 update: recent unpublished case law in The Netherlands, Belgium, France and Austria

There is still no clear-cut interpretation and application of European Union Regulation 261/2004 (Regulation 261) throughout Europe, as uncertainty and controversy reign supreme when it comes to the application of the Sturgeon ruling of the European Court of Justice (ECJ) in 2009. That ECJ judgment, which held that passengers were entitled to compensation under Regulation 261 following long flight delays, is currently being reconsidered by the ECJ in consolidated proceedings referred by the German Court and the English High Court.

The German case (C-581/10) concerns an action brought against Lufthansa by passengers whose flight was delayed by more than 24 hours beyond its scheduled arrival time. In the English case (C-629/10), TUI Travel, British Airways, easyJet and the International Air Transport Association (IATA) commenced proceedings following the Civil Aviation Authority's refusal to interpret the EU provisions in such a way as to relieve airlines from their obligation to compensate passengers in the event of flight delay.

Pending the ECJ's final decision in those two cases, we highlight below the different approaches adopted by various European courts in unreported judgments regarding the application of the Sturgeon decision.

The Netherlands

Until the end of 2011, the Dutch courts strictly applied the Sturgeon decision. However, since then there has been a trend (especially by the courts of Haarlem's-Gravenhage and Alkmaar) to stay claims brought under Regulation 261, pending the outcome of the ECJ's final decision in the consolidated proceedings referred to above. In a ruling on 15 June 2012, this stance was supported by the Supreme Court of the Low Countries.

Belgium

At present, there is no conclusive case law in Belgium regarding the interpretation of the Sturgeon judgment. Although the Commercial Court of Brussels recently strictly applied the Sturgeon judgment, that decision has been appealed (indeed, the Commercial Court is not the natural forum for such cases, which should be heard instead by the Court of First Instance).

France

The situation is far from uniform in France, where local courts have adopted an independent approach. For example, the local court of Aulnay-sous-Bois, which has jurisdiction over Charles de Gaulle airport, is known for several rulings which do not comply with Sturgeon, finding instead that Article 6 of Regulation 261 (which deals with delays), does not entitle passengers to compensation under Article 7. In a similar case, the local court in Paris decided that only Articles 4 and 5 of Regulation 261 (dealing with denied boarding and flight cancellation respectively) provide for the possibility of compensation, and that no financial compensation can be granted in the case of flight delay.

[12] See for example: http://www.telegraph.co.uk/news/worldnews/asia/china/9643036/Jetstar-crew-held-hostage-by-passengers-for-diverted-flight.html

Austria

The local court of Schwechat, which has jurisdiction over Vienna airport, has strictly applied both the Sturgeon and Wallentin-Hermann v Alitalia (Case C-549/07) rulings. In response to arguments from airlines that technical problems amount to "extraordinary circumstances" under Regulation 261, airlines may be challenged by an Austrian court to fund a court-appointed technical surveyor in order to examine this issue. This could, however, easily result in a financial outlay by an airline which is disproportionate to the compensation sought by the passenger.

What next?

The main issues now are whether the ECJ will follow the opinion of its Advocate General in the consolidated proceedings currently before it and confirm the Sturgeon decision, in spite of its flaws and inconsistencies with earlier ECJ case law (not to mention the conflict with the Montreal Convention 1999) and, the extent to which a confirmation of the Sturgeon decision would affect the stance currently being taken by the independently-minded local courts in The Netherlands and in France. Only time will tell.

Pierre Frühling, Partner, Elisabeth Decat, Associate, & Stéphanie Golinvaux, Associate, Hollman Fenwick Willan, Belgium

China - Passengers blacklisted by airline after claiming damages for flight delay

A recent decision by a Chinese low-cost carrier to blacklist passengers who demanded and obtained compensation for an extended flight delay has put the airline in the spotlight and been the subject of much public debate.

According to reports, the Spring Airlines flight was delayed by eight hours in April 2012. Some passengers on the flight received Rmb200 (about $31.40) from the airline as compensation. However, Spring Airlines subsequently blacklisted passengers who used forceful methods to claim compensation for flight delays, stating that these passengers will no longer be allowed to board any of the airline's flights.

Spring Airlines has confirmed that it has blacklisted the passengers for their unruly behaviour. But questions have arisen as to whether airlines have the right to create blacklists or otherwise refuse to admit passengers onboard.

Some commentators have supported the airline's position, asserting that the blacklist is acceptable if some passengers' "unruly behaviour" is irrational and affects other passengers. Others claim that as long as Spring Airlines does not have a monopoly, it should be free to set up a blacklist, as it will bear the consequences alone – whether economic losses, bad publicity or both.

However, disapproval of the airline's actions has also been expressed, with many asserting that it is unreasonable to blacklist passengers if the airline provided all the services that were required and that the dissatisfied passengers were not acting irrationally.

Spring Airlines is one of a handful low-cost carriers in China. They do not provide meals or water on board and they do not usually compensate for flight delays, but their ticket prices are low and very competitive. The Civil Aviation Administration of China has also acknowledged that there are no specific laws or regulations which require airlines to compensate passengers for delayed flights, and that low-cost carriers such as Spring Airlines are free to create their own service model.

Zou Jianjun, a professor at China Civil Aviation University, supports the Spring Airlines policy:

> "*When the passengers purchased tickets from Spring Airlines, they were informed that there was no compensation. But the airline company did compensate the passengers under extreme circumstances. I personally support blacklisting passengers for their irrational behaviour*."

Some lawyers disagree, arguing that although Spring Airlines, as one of the parties to the contract, has the right to refuse to compensate passengers from a business perspective, it is a commercial entity providing a public service and thus automatically takes social responsibility as a public service provider under the law – thereby making the blacklist unjust.

At the same time, Article 289 of the Contract Law forbids airlines to reject any normal and reasonable carriage requirement made by passengers.

This is not an isolated case; a similar incident regarding a flight delay occurred two years ago. Many airlines have created blacklists to restrict or limit 'problem passengers'. Lawyers have suggested that the authorities should promulgate rules for airlines to follow concerning passenger blacklists, since airlines have different policies regarding compensation for flight delays.

Also under consideration is the common practice among US airlines of using more stringent security checks for high-risk passengers, rather than refusing to take them.

Yi Lui, Partner, Run Ming Law Office

Storm on the Runway: Compensation for Passenger Delays in China

A recent spate of incidents involving runway incursions by angry passengers has caused the industry to shine a spotlight on flight delay issues which are hindering the ambitious growth of civil aviation in China.

On 11 April 2012, 28 passengers waiting for a flight at Shanghai Pudong International Airport rushed onto a runway to protest against their treatment after their flight was delayed due to a thunderstorm. According to sources, passengers were asked to board and then disembark the aircraft three times and then endured a sleepless night as they waited nearly 21 hours for the flight to depart. Two days later, on 13 April 2012, several passengers waiting for a flight at Baiyun Airport in Guangzhou also rushed onto the tarmac after heavy rains delayed their flight. Eyewitnesses said that one male passenger was so incensed that he took his shirt off and lay on the ground on the tarmac to prevent the progress of a van carrying VIP passengers! Both incidents demonstrate the growing dissatisfaction among the Chinese public with flight delays, which have become increasingly commonplace in the country.

Frequency and causes

According to statistics from the Civil Aviation Administration of China (CAAC), 23.5% of Chinese flights were delayed in 2011. By comparison, in the same year, the US Department of Transportation reports that 85% of US flights arrived on time.

China suffers from frequent and unpredictable bad weather, and many airlines have protested that this is a factor beyond their control. However, some industry commentators have stated that procedures have not kept pace with demand in the world's fastest growing aviation market.

An additional problem is the restriction of a large part of Chinese airspace for military use. According to a recent military study, 42% of airspace in eastern China is closed to commercial flights and reserved for the Chinese air force. This region includes areas around Beijing and Shanghai, the country's political and economic hubs respectively.

Punishment and compensation

According to reports, passengers in the Shanghai and Baiyun incidents received RMB1,000 (c. US$160) and RMB500 (c. US$80) respectively in compensation. This is despite the fact that under Chinese criminal law, "assembling crowds to disturb order at civil aviation stations" is a specific offence punishable by a minimum fine of RMB200 (c. US$32), or as much as five years in prison. A microblog for the Shanghai airport police stated that the passengers who entered the taxiway had been "punished", without providing further information. The police have also confirmed they will hand down

administrative punishment to those concerned.

Given the potential for criminal conviction, why are passengers taking such drastic risks to protect their consumer rights? The reason many passengers feel so aggrieved could be that there is no unified standard for the handling of passenger delay claims in China. The CAAC issued guidance in 2004, which suggests that airlines should compensate passengers if flights are delayed for more than four hours, but does not recommend a standard compensation figure. Airlines are therefore free to set standards that they feel are appropriate, with most paying around RMB500 (c. US$80). Airlines can, of course, choose not to make any compensation payments at all. Although RMB500 is not an insignificant amount, the growing Chinese middle classes - the main demographic of air passengers in China - are likely to find this unsatisfactory.

Time for EU Reg 261 - a unified standard for passenger compensation?

The question has been asked whether legislation similar to European Union Regulation 261/2004 should be implemented in China. The CAAC seems keen to resist the adoption of such a measure. There is a widespread view in the industry that the scope and application by the courts of EU Regulation 261 has tilted the balance too far in the direction of consumer protection.

Adopting EU Regulation 261 as a model for passenger rights legislation in China would prove deeply unpopular with the airlines that are investing significant amounts in China's civil aviation industry. The majority of Chinese airlines are state-owned, and creating compulsory passenger compensation could represent a significant cost to the government. It is worth noting, however, that there is an appetite for this type of legislation in Greater China, and that Macau is in the process of amending its domestic legislation to provide passenger rights in the event of denied boarding, cancellation and delay. Although a unified compensation regime seems a step too far for the mainland, the issues surrounding passenger delays need to be addressed at an operational, regulatory and governmental level.

Quelling the storm - addressing the passenger delay problem

China plans to invest more than RMB1.5 trillion (c. US$238 billion) in its aviation industry by 2015. With such investment should come an improved passenger experience, with airlines and airports better placed to handle delays. A relaxation of the strictly controlled military airspace would also enable commercial flights to operate on different routes in the event of bad weather. As Chinese consumer expectations increase, airlines need to take significant steps to ensure that even when delays are unavoidable, procedures are in place to keep passengers happy. Airlines could, of course, follow Dalian Airport's recent strategy to calm 30,000 passengers who were stranded due to bad weather, by hiring dancers to entertain the crowds - no runway incursions were reported!

James Jordan, Associate, Holman Fenwick Willan, Hong Kong

United States - Failure to Check-in On Time Is Fatal to Passengers' Claims

A recent decision by the U.S. District Court for the Eastern District of New York, *Giuffre v. Delta Air Lines,*[13] denied plaintiffs' claims against the carrier based on allegations that the carrier did not allow them to board a flight even though they checked in only a few minutes late. Plaintiffs' sought monetary damages for: (1) violation of the U.S. regulations regarding "denied boarding;" (2) breach of contract; and (3) breach of the covenant of good faith and fair dealing. The Court granted the carrier's motion for summary dismissal on all three claims.

The denied boarding regulations set out in 14 C.F.R. Part 250 require that a carrier provide compensation to any passenger who is denied boarding involuntarily when the flight on which the passenger holds a

[13] No. 10-cv-1462, slip op. (E.D.N.Y. Sept. 11, 2012).

confirmed reservation is oversold.[14] However, passengers who do not comply fully with a carrier's contract of carriage or tariff provisions regarding ticketing, reconfirmation and check-in are not eligible for denied boarding compensation.

In *Giuffre*, Delta argued for summary dismissal based on the fact that the family was unable to complete the check-in process prior to one hour before departure, as required by its tariff. Delta's tariff provides that the passenger is responsible for arriving at the airport in sufficient time to complete all "ticketing, baggage check, and security clearance procedures." Furthermore, "check-in" is defined in Delta's tariff as the "face-to-face contact with a Delta representative," such that the passenger's reserved seat status is changed from reserved to checked-in. The tariff refers passengers to the carrier's website for the appropriate check-in deadlines, which is one hour before departure in the case of customers with checked baggage departing from JFK.

Plaintiffs argued that their arrival in the check-in line more than one hour before departure, although barely so (the family arrived in the check-in line at approximately 7:06 a.m. for an 8:15 a.m. departure), should redeem their claims. Plaintiffs creatively, attempted to rely on a DOT Consent Order finding that it is an unfair deceptive practice in violation of federal consumer protection laws when an airline declares a passenger late when they are in the check-in line on time but cannot reach the check-in counter because the line is too long. The Court disagreed, affording little weight to the DOT Consent Order as it relates to practices in connection with oversold flights, and it was undisputed that the subject flight was not oversold.

The Court also noted that Part 250 does not provide for a private right of action. As to plaintiffs' breach of contract claim, the Court found the terms of the contract of carriage unambiguous, namely that the passenger is responsible for arriving at the airport in sufficient time to complete all "ticketing, baggage check, and security clearance procedures." Plaintiffs could not establish their own adequate performance of the contract of carriage, *i.e.* "check-in" one hour prior to departure, and therefore, their claim for breach of contract failed as a matter of law.

Dismissal of plaintiffs' breach of contract claim necessarily warranted dismissal of their breach of the covenant of good faith and fair dealing claim, which New York law does not recognize as a separate cause of action distinct from breach of contract.

John Maggio, Esq., & Allison M. Surcouf, Esq., Condon & Forsyth LLP

[14] Denied boarding compensation has recently been increased. Passengers who are bumped from an oversold flight may now receive 200% of the fare, with a maximum of $650, if comparable air transportation gets the passenger to the next stopover or destination within two hours (four hours for foreign air transportation) of the originally scheduled flight. The maximum amount is doubled, however, to $1,300 if the passenger cannot arrive at his next stopover or destination within four hours. *See* Condon & Forsyth LLP July 2010 Client Bulletin,

http://condonlaw.com/newsletters/cbjuly2010.pdf

FOCUS ON MACAU

Draft law to implement Chicago Convention rules

Introduction

The Convention on International Civil Aviation was ratified by China on February 20 1946 and by Portugal on April 28 1948. On December 6 1999 the Chinese government notified the secretary general of the International Civil Aviation Organisation (ICAO) that after December 20 1999, China would exercise sovereignty over Macao; thereafter, the convention and some of its protocols would apply to Macao.

Under the convention, Macao is subject to certain obligations relating to the operational safety of civil aviation. Although operational safety is already regulated by Circulars AC/GEN/002R01, AC/GEN/003R01 and AC/GEN/005R01, the ICAO conducted an audit in Macao in March 2009 and decided that the issue should be governed by law.

The Draft Law on the Investigation of Aeronautical Accidents and Incidents and the Protection of Air Safety Information lays down the principles governing:

- the investigation of aeronautical accidents and incidents over which Macao has jurisdiction; and
- the processing and protection of air safety information.

Key provisions

The draft law begins by defining a number of key concepts, including 'accident' and 'incident', which are already defined in similar terms in Circular AC/GEN/002R01.

Scope of duty and timeframes for reporting

The draft law applies to accidents and incidents involving:

- a civil aircraft in Macao or within its airspace; or
- an aircraft registered in Macao or operated by a Macao operator, if an investigation is not undertaken by the relevant body in the jurisdiction where the incident or accident occurs.

The sole objective in investigating an accident or incident is to prevent such events in future - it is not the purpose of the investigation to attribute blame or establish liability.

The Civil Aviation Authority of Macao (CAA) is responsible for the investigation of air accidents within the jurisdiction of Macao or involving Macao-registered aircraft. It is charged with supervising compliance with the law and applying the fines and other penalties stipulated therein. Under the draft law, this responsibility is extended to include:

- the investigation of incidents;
- the promotion of related studies;
- the development and proposition of accident prevention measures;
- the preparation of technical reports; and
- coordination with the activities of international organisations.

All accidents and serious incidents recorded in Macao or in its airspace - involving aircraft of any type, nationality or registration - must be notified to the CAA as soon as possible, but no later than six hours after an accident or 12 hours after an incident. Accidents or serious incidents that occur outside Macao, but involve an aircraft that is registered in Macao (or operated by an entity which is resident in Macao or has a registered office there) must be reported promptly.

The draft law requires the crew, operator or owner (or its legal representative) to prepare a written report on the accident or serious incident involving the aircraft, describing the relevant facts and circumstances. This report must be submitted to the CAA within 72 hours.

All accidents or serious incidents that fall within the scope of the draft law are subject to investigation. However, such investigations may be fully or partly delegated to another convention state or region.

Role of chief investigator

A chief investigator must be appointed. If necessary, further investigators may be appointed, who then constitute a commission of inquiry under the guidance of the chief investigator.

The chief investigator enjoys independence and full authority over the investigation, and must ensure that it is conducted according to the ICAO's standards and recommended practices.

The chief investigator must immediately arrange for the collection of wreckage and other relevant evidence for examination, as well as arranging for alcohol and drug testing of the operational staff involved. He or she must also request a meteorological report and hear the testimonies of those who were involved in or witnessed the incident, ensuring that their confidentiality is preserved.

If the chief investigator finds evidence of a criminal offence, he or she must immediately inform the judicial authorities or the police.

Except with the permission of the chief investigator, it is prohibited to:

- alter the conditions of the site of an accident or serious incident;
- remove anything from the site; or
- manipulate or move the aircraft or its components, except in the interests of safety or rescue.

Cooperation

The CAA may require the collaboration of specialists and experts in specific areas. In the event of an accident or serious incident involving an aircraft registered in another state or region, the CAA must inform the state of registration and the ICAO of the aircraft's operator and its model or design.

Reports and confidentiality of findings

The draft law generally provides for the confidentiality of:

- eyewitness evidence;
- the medical and other private information of individuals involved in the accident or incident; and
- sound and image recordings from the cockpit, recordings of air traffic control communications and transcripts thereof.

Such information may not be disclosed, except for the purposes of the investigation. The chief investigator and all CAA personnel are subject to secrecy in respect of all information obtained as a result of their collaboration with the judicial authority.

The chief investigator must prepare a preliminary and a final report, subject to consultation with, and approval by, the president of the CAA. The president then submits the report to the chief executive and sends it to the authorities listed in Annex 13 of the convention. If new facts or evidence come to light within 10 years of approval of the final report, the investigation must be reopened.

The draft law also provides for the processing and protection of air safety information, which - along with its sources - must remain confidential. Such information may not be used for purposes other than those for which it was collected.

Implementation

The draft law, which is still under discussion by the Legislative Assembly, is intended to come into force 120 days after its publication.

Comment

The draft law aims to transpose the convention's rules into Macao's legal system, although some aspects are already regulated by the aeronautical circulars. Over the past decade, the rate of accidents in civil aviation has been low. The introduction of the new law is expected to reduce the accident rate still further, despite the projected increase in air traffic in Macau.

Pedro Cortés and Marta Mourão Teixeira, Rato Ling Vong Lei & Cortés Advogados, Macau.

AIRCRAFT FINANCE

British Virgin Islands Introduces Law for Registration of Aircraft Mortgages

The efforts of the Government of the British Virgin Islands to ensure continued and sustainable development of the Territory's financial services and related offerings continue with the coming into force on 15 October 2012 of the Mortgaging of Aircraft and Aircraft Engines Act, 2011, and the Mortgaging of Aircraft and Aircraft Engines Regulations, 2012.

The new law complements the jurisdiction's status as a US Federal Aviation Authority Category One aircraft register under the International Aviation Safety Assessment programme by creating a framework for registration in the British Virgin Islands of security over aircraft, and separately, aircraft engines. The regime contemplates the appointment of a Registrar who is mandated to establish and maintain a register of aircraft mortgages, and a register of aircraft engine mortgages, that will be available for inspection by the public, and over which the Registrar will have administrative and operational control.

Aircraft registered in the Virgin Islands Aircraft Register or capable of being so registered, and aircraft engines, in either case owned or otherwise in the lawful possession of a British Virgin Islands company, may be made the subject of a mortgage for the purposes of registration under the new law. Practically, the application for registration of an aircraft or aircraft engine mortgage must be in the prescribed form, and must be made to the Registrar by or on behalf of the mortgagee in question. It must be accompanied by a certified true copy of the mortgage and the prescribed fees.

Lenders in particular will be comforted by provision in the legislation for the filing of priority notices (which reserve and protect a particular priority position for a prospective mortgagee, for fourteen days), and clear provisions on enforcement, transfer, transmission and, inter alia, discharge of mortgages. This development paves the way for new business opportunities which complement and support the British Virgin Islands' position as *the* premier offshore corporate domicile with over 850,000 companies incorporated to date.

Johann E. Henry, Partner, Harney Westwood & Riegels

Ireland - Aircraft Leasing Dispute Raises Issue of the Remedy of Summary Judgment for Non-Liquidated Sums

In *Abbey International Finance Limited v. Point Ireland Helicopters Limited and Elitaliana S.p.A*[15] *the High Court in Ireland* (the "**Court**") considered whether a plaintiff can seek summary judgment for non-liquidated sums such as delivery up of an aircraft on default and termination of an aircraft lease. The Court considered the availability of summary judgment procedures to litigants in Ireland as a means of speedy resolution of disputes where it can be shown that the defendant lacks a reasonable prospect of success.

The judgment in the case was delivered ex-tempore by Mr Justice Kelly on 27 July 2012.

Background

Abbey, a limited liability Irish company was engaged in the business of aircraft leasing. Abbey agreed to lease three (3) helicopters (the "Aircraft") and a medical kit to Point Ireland Helicopters ("Point").[16] Point subleased the Aircraft and medical kit to Elitaliana SpA. The defendants defaulted in payment of rent under the leases and subleases and the leases contained usual *"hell or high water clauses",* absolute obligations and no deduction provisions. The defendants accepted that arrears of €3,195,000 were owed.

[15] There were four separate lease agreements, one with respect to each helicopter dated 25 August 2008, 25 March 2009 and 29 September 2009 respectively and one for the medical kit dated 21 October 2008.
[16] [1981] IR. 306

The Court, commented that it would be difficult to conceive more "watertight obligations to pay rent in accordance with the terms of the lease". Abbey served notice of termination of the leases and subleases and went about exercising its rights under the security assignments. Shortly afterwards it commenced proceedings.

Abbey sought both liquidated amounts and substantive relief in respect of the Aircraft and medical kit, in particular an order for specific delivery up of the Aircraft and the medical kit to Abbey. Given the mix of reliefs, Abbey opted to proceed by way of plenary summons.

Abbey contended that there was no defence to any aspect of the claim and therefore brought a motion seeking summary judgment on the entire of its claim - the liquidated and non-liquidated sums - and sought summary judgment for the monies due and delivery up of the aircraft. Alternatively, Abbey sought injunctive relief.

The first issue was whether or not it is open to Abbey to bring a claim for summary judgment in respect of non-liquidated sums.

Jurisdiction of the Court

Kelly J. looked at the procedural steps to judgment for liquidated and non-liquidated sums. He noted that in proceedings for liquidated sums, a judgment may be marked against defendant in default of appearance or defence. A defendant is permitted to put his defence on affidavit and have it judicially tested against the low threshold of proof that needs to be achieved in order to avoid summary judgment. The Court held that in the absence of an ability to seek summary judgment in a non-liquidated claim, an unmeritorious defendant could delay proceedings for months or years. Kelly J. noted that this position would be unjust for an opposing meritorious plaintiff.

The question posed was *"is it open to a plaintiff to seek summary judgment in respect of the un-liquidated claims?"* Kelly J. answered the question in the affirmative and went on to say that he can *"see no reason in either law or logic why a defendant who has no defence to a liquidated claim may be subject to an application for summary judgment, but, not be so in the case of an action seeking un-liquidated damages or other substantive relief."*

Kelly J. held that the Court had an inherent jurisdiction to hear the application and referenced, among other judgments, the judgment of Costello J. in the case of *Barry v. Buckley*[17] where Costello J. held the court has an inherent jurisdiction to strike out or stay proceedings which are frivolous, vexatious or without reasonable prospect of success.

In addition, Kelly J. referenced the judgment of Geoghegan J. in the case of *Dome Ireland Limited v. Eircom Limited* to support his view that the mere fact that the Rules of the Superior Courts do not expressly provide for summary judgment for non-liquidated sums is no bar to such an application being made successfully.[18]

Commercial List of the High Court

Abbey had sought to have the case dealt with in the Commercial Court. In considering this Kelly J. cited his own judgment in *IIB Services Limited v. Motorola Limited*[5] where he indicated the purpose of setting up the list was to achieve the objective of *"speedy, efficient and just determination of commercial disputes".*

Kelly J. further cited the wide powers afforded to the Commercial List of the Court by referencing Order 63A, rule 5, of the Rules of the Superior Courts. He concluded that given these wide powers, it was open to a plaintiff, in plenary proceedings being heard in the Commercial List to seek a summary disposal of such proceedings in circumstances where a defendant is alleged to be unable to demonstrate a real or bona fide defence. Kelly J. summarised the position when he said:

"If the defence offered is alleged to be lacking any reasonable prospect of success

[17] [2008] 2 I.R. 726: Geoghegan J. stated, among other things, that "The rules of court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was an applicable rule, the court is not necessarily hidebound by it"

[18] [2011] 2 ILRM 326

then the plaintiff should have the ability to seek to recover judgement regardless of the type of proceedings. I believe that there is no good reason why such an application cannot be brought and considered by the court."

Test to be applied on applications for summary judgment (both liquidated and non-liquidated sums)

Kelly J. held that the test to be applied in applications for summary judgment in respect of non-liquidated debt claims is the same test that the Court and Supreme Court have applied in several situations in applications for summary judgment for liquidated claims. The leading case on the principals to be applied is the decision of the Supreme Court in *Aer Rianta cpt v. Ryanair Limited*.[19] Hardiman J formulated the test to be applied in the following terms:

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

As the judgment and note in Abbey Case were prepared by Kelly J in respect of the general procedural question, he did not find it necessary to deal with what occurred in the particular case in any detail suffice to record that summary judgment was given in respect of the liquidated claim for arrears of rent and conditional leave to defend was granted in respect of the other aspects of the claim.

Comment:

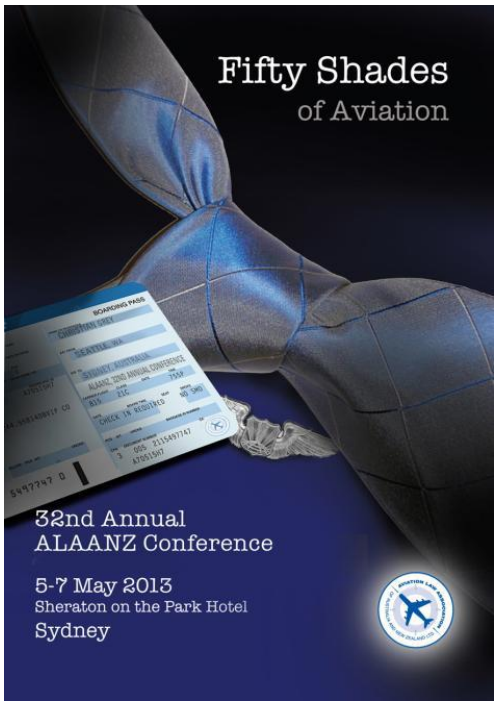
The judgment of Kelly J. in this case provides welcome guidance to plaintiffs to launch an action in the Court for summary judgment, notwithstanding that proceedings may have commenced by way of plenary summons due to a mixture of reliefs sought. The success or otherwise of such action for non-liquidated sums will depend on, among other things, the plaintiff being able to prove that the defence offered is lacking any reasonable prospect of success and the defendant successful rebuttal before the Court and ability to demonstrate an arguable case for full plenary hearing.

Christine O'Donovan, Partner, Neil O'Donnell, Solicitor, Mason Hayes & Curran, Dublin office

[19] [2001] 4 I.R. 607

NEWS FROM ALAANZ

32nd Annual ALAANZ Conference



The 32nd Annual ALAANZ Conference is being held in Sydney, 5-7 May 2013. A comprehensive program is currently being developed, including many well renowned international speakers.

We are pleased to announce the Honourable TF Bathurst, Chief Justice of NSW, will open the Conference and provide the Keynote Address

The conference dinner will be held at one of Sydney's iconic venues – the Opera House. The preliminary program, and registration information, will be distributed early in the New Year.

Don't miss this opportunity to be involved with your colleagues from Australia, New Zealand and abroad.

ALAANZ in the Social Media

In 2012, ALAANZ took its first steps to move into the social media with the launch of a LinkedIn Group Page and a Twitter account.

For ALAANZ on LinkedIn go to:

http://ae.linkedin.com/groups/Aviation-Law-Association-Australia-New-4435989

The purpose of this page is to share amongst the group members aviation legal and regulatory developments, news and upcoming events. You may also wish to post job advertisements and other information which might be of interest to the membership.

Also, follow us on Twitter at:

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Editors.