ALAANZ AVIATION BRIEFS

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1. Cases

Matters of Class: Jurisdiction and Amendment in the MH17 Litigation

Bradley Hayward, Associate, Carneys Lawyers

Claims against Malaysian Airline System for the shooting-down of flight MH17 on 17 July 2014 are now proceeding through the courts. One of the claims is a representative proceeding in the Federal Court of Australia in which the daughter and personal representative of an Australian passenger claims on behalf of a group, the definition of which has caused complex issues to arise in the litigation. Two Interlocutory Applications have shed some light on those issues regarding jurisdiction and the amendment of the group definition in representative proceedings.

Class and Jurisdiction

The first application, *Gibson v Malaysian Airline System Berhad*,[1] was, by the Respondent airline, seeking orders to dismiss the Statement of Claim as not disclosing a cause of action. According to the Respondent, the definition of the 'group' was inadequate. Paragraph 7 of the Statement of Claim defined the group as follows:

> The group members are:
>
> 1. residents of Australia who are the legal representatives of a passenger who was killed on MH17; or
> 2. not being resident in Australia, who are the legal representatives of a passenger who was killed on MH17 and express the desire to take the benefit of the action (Civil Aviation (Carrier's Liability) Act 1959 (Cth), Section 9D(6)(b)).
>
> [Errors in original pleading.]

Justice Perram considered that this group definition gave rise to claims that are 'not cognisable under the Montreal Convention [1999] by this Court'[2] as a result of Article 33 of the Montreal Convention, which sets out five jurisdictions in which a claim may be made. His Honour set these out as follows:[3]

> a) the State where the carrier is domiciled;
> b) the State where the carrier has its principal place of business;
> c) the State where the carrier has a place of business through which the contract of carriage was made;
> d) the State which is the place of destination; and
> e) the State where the passenger had his or her principal and permanent residence at the time of the accident *and* to or from which the carrier operated services on its own or using another carrier's aircraft by commercial agreement and from which the carrier conducts its business of carriage of passengers from premises leased or owned by the carrier (or other carrier). [Emphasis in original.]

In the Applicant's own claim, the passenger was booked to travel from Amsterdam to Perth, which brings the claim within Article 33(1)(d). However, the identity of the group members, described in paragraph 7, is based on the residence of the *personal representatives*, not the passengers, meaning that '[t]he class is therefore defined in a way which means that group members need not have rights which this Court has jurisdiction to enforce.'[4] His Honour emphasised that these matters cannot simply be left to be resolved

[1] [2016] FCA 1476.
[2] *Ibid*, at [9].
[3] *Ibid*, at [16].
[4] *Ibid*, at [25].

fortuitously, and that these matters of jurisdiction should be dealt with in the group definition.[5] Paragraph 7 was struck out, and the Applicant was given an opportunity to re-plead the cause of action.

In *Gibson v Malaysian Airline System Berhad (No. 2)*[6] (*Gibson (No. 2)*) the Applicant sought leave to amend the Statement of Claim to include a new definition of the group. The new group definition, again at paragraph 7, was:

> The group members are the personal representatives of passengers:
>
> 1. Whose destination on the contract of carriage was Australia;
> 2. Whose contract of carriage was made in Australia where the Respondent has a place of business through which the contract was made; or
> 3. Where Australia was the passenger's principal and permanent place of residence at the time of the accident and to or from which the Respondent operated services on its own or using another carrier's aircraft by commercial agreement and from which the Respondent conducts its business or carriage of passengers from premises leased or owned by the Respondent (or other carrier).

This was accepted by the Respondent, and endorsed by Perram J, as meeting the Article 33 jurisdictional requirements.[7] The upshot of this is quite simple: to engage the jurisdiction of the Court in a representative proceeding, all members of the group must be subject to the Court's jurisdiction. The only way effectively to achieve this is to tailor the group definition to any jurisdictional requirements to make the claim. For claims such as those under the Montreal Convention, where the claim has an international element or is subject to an international treaty, an understanding of the limits of the Court's jurisdiction is highly important.

Amending the Class

Still in *Gibson (No. 2)*, after a complex analysis with many twists and turns, Perram J ordered that the amendment be allowed, but that it take effect from 2 May 2017, being the date when the final form of paragraph 7 was proposed (which happened to be at the hearing of the Interlocutory Application). One of the major difficulties was that the amendment application occurred long after the two-year limitation period provided in the Montreal Convention had expired.

Since the group definition appeared in the Statement of Claim, rather than the Originating Application, the power to amend it was in r 16.53 of the *Federal Court Rules* 2011 (Cth) (FCR), rather than s 33K of the *Federal Court of Australia Act* 1976 (Cth).[8] But r 16.53 is silent as to when the amendment should take effect. Usually, an amendment to a pleading takes effect from the date of commencement of the proceeding,[9] unless it adds a party, in which case it applies from the date of amendment.[10] Since amending a group definition does not add a party, the usual rule applies.[11]

However, the amendment effectively pleads a new cause of action where it would otherwise be barred by statute at the time of the amendment,[12] which is not usually permitted except in 'very peculiar circumstances'.[13] Legislative changes in recent decades overcome this restriction. Applying *Voxon Pty Ltd v Telstra Corporation (No. 7)*,[14] Perram J drew a parallel between r 16.53 and the power for amending originating applications under r 8.21, holding that amendment is allowed where the new claim arises out of the same, or substantially the same, facts as those already pleaded.[15] This power, though,

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[5] *Ibid.*
[6] [2017] FCA 701.
[7] *Ibid*, at [10].
[8] *Ibid*, at [11]-[16].
[9] *Ibid*, at [12], citing *Baldry v Jackson* [1976] 2 NSWLR 415 at 419.
[10] *Gibson (No.2)*, at [12], citing *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 230 at [46]-[47] per Brereton J; *Kettleman v Hansel Properties Ltd* [1987] AC 189 at 200 per Lord Keith of Kinkel.
[11] *Gibson (No. 2)*, at [12].
[12] *Ibid*, at [31].
[13] *Ibid*, at [19]-[21], citing *Weldon v Neal* (1887) 19 QBD 394 at 395 per Lord Esher MR.
[14] [2017] FCA 267.
[15] *Gibson (No. 2)*, at [27] and [29]-[30].

is discretionary.[16] His Honour followed the reasoning of Jacobson J in *Brisbane Broncos Leagues Club v Alleasing Finance Australia Pty Ltd*,[17] applying an analogy between adding a party and varying the members of a group. Accordingly, the amendment was allowed, but with effect from the date its final form was proposed.

The Respondent argued that the amendment would be futile.[18] His Honour said that is not so, and that the group may now include those persons at the intersection of the original definition and the final definition of the group, since their claims were commenced in time.[19] Even so, it is apparent that obtaining leave to amend a group definition is not assured, and is even less assured when the effect could be to include additional group members after a relevant limitation period ends.

From these two applications, it has become clear that when describing the group in representative proceedings, practitioners should have an eye to the limits of the Court's jurisdiction over potential group members. Errors will not be easily rectified by amendment, especially after a relevant limitation period has expired.

[16] *Gibson (No. 2)*, at [32].
[17] [2011] FCA 106.
[18] *Ibid*, at [35].
[19] *Gibson (No. 2)*, at [36].

When an aircraft and a kangaroo collide: *Five Star Medical Centre Pty Limited v Kempsey Shire Council [2017] NSWDC 250*

Jessica Luppino, Senior Associate, GSG Legal

Facts

On 25 February 2014 the plaintiff's aircraft collided with a kangaroo that had strayed onto the runway whilst landing at Kempsey aerodrome. The pilot first saw the kangaroo emerging from long grass adjacent to the runway shortly after touching down. The pilot took evasive action but was unable to avoid a collision. Fortunately no person was injured. The kangaroo was not so lucky. The plaintiff sued the defendant for the property damage sustained to its aircraft. The defendant was the owner and registered operator of Kempsey Aerodrome. Quantum was agreed before trial.

There were no factual disputes in the case, rather the key issues involved the application of the principles in the *Civil Liability Act 2002* ("**CLA**") to the facts.

The defendant Council was aware that since at least 2005 there was a serious wildlife hazard. There had been numerous reports of near misses with kangaroos on the runway prior to the plaintiff's collision but no actual collisions. CASA issued a Request for Corrective Action in 2005 and the defendant Council agreed to ensure that the ERSA for the aerodrome noted "kangaroo hazard exists".

The defendant Council's annual safety inspection reports for the aerodrome repeatedly referred to the wildlife hazard as "urgent", a "major safety hazard" and made recommendations that the defendant Council "look at the provision of kangaroo-proof fencing, particularly the forestry area west of 04/22 which seems to be the wildlife habitat". Although the aerodrome had perimeter fencing its features were such that it could not be referred to as "kangaroo-proof fencing".

A Wildlife Hazard Management Plan was promulgated by the defendant Council in August 2013 which noted the eastern grey kangaroo as the number one risk. The Plan's management actions included the installation of an appropriate fence to deter kangaroos from entering the operational area, to issue a NOTAM for increased kangaroo activities, the dispersal of kangaroos and the culling of kangaroos.

At a Council meeting on 16 July 2013 funding of $150,000 to erect a kangaroo-proof fence was allocated from the Regional Development Australia Fund. Various quotations for fencing were subsequently obtained for less than that funding. However due to a change in government, the funding was subsequently withdrawn and a kangaroo-proof fence was never built.

In the month preceding the plaintiff's collision, the defendant Council's daily serviceability inspections recorded observations such as "wildlife numbers increasing to dangerous levels", "wildlife management program urgently required" and on 21 February 2014 (four days before the collision) "corrective action taken, roos chased - NOTAM issued". The evidence showed that no such NOTAM was issued. To do so would have been of little or no cost to the defendant Council. The plaintiff's evidence was that, had such a NOTAM been issued, the pilot would not have flown on the day of the collision.

On the Section 42 of the CLA defence, the defendant Council led evidence that it had decided not to fund operational expenditure by loans due to its financial position since 2010, that the aerodrome operated at a loss and was kept open solely based upon the community's desire for its utility for emergency services.

Decision

The Court (Judge Russell) found:

1. The defendant Council owed a duty to take reasonable care to avoid the foreseeable risk of a collision between an animal and an aircraft at Kempsey Aerodrome causing damage to the aircraft or harm to its occupants.
2. The defendant Council breached its duty of care owed to the plaintiff in two ways:

   a. failing to follow the requirements of its own Wildlife Hazard Management Plan (including failure to issue a NOTAM); and
   b. failing to erect a kangaroo-proof fence around the entire aerodrome. To this submission, the defendant raised Section 42 of the CLA as a defence.
3. On causation his Honour considered that:
   a. had the appropriate NOTAM been issued then the harm would not have occurred; and
   b. had the Defendant erected the suitable fence then the harm would likely have not occurred.
4. In deciding the above his Honour found that the risk of harm was not "insignificant", a reasonable person in the defendant Council's position should have taken precautions against the risk of harm, the possibility of collision was not high but was a definite prospect, the harm which could have occurred was extremely serious, the burden of taking precautions to avoid the risk of harm was minimal to nil in respect of the NOTAM and was about $100,000 in respect of the full fence, the social utility of the aerodrome for providing access for emergency medical services was high and the special utility of its use for private and recreational purposes was not great.
5. The presence of the kangaroo on the day of the collision was not an obvious risk and the pilot was not aware of the risk on the day. His Honour considered that "the words contained in the ERSA did not constitute a sufficient warning of the degree of risk on the day of the collision, at a time when the level of the kangaroo population on the aerodrome had increased to dangerous levels, to use the defendant's words".
6. On the Section 42 of the CLA defence:
   a. his Honour accepted the plaintiff's expert evidence that provision of a two metre high kangaroo proof fence would have dramatically decreased the risk of harm; and
   b. as the defendant Council elected to keep the aerodrome open voluntarily, Section 42 of the CLA had no application. If that finding was overturned on appeal, his Honour considered that the defendant Council's evidence did not adequately address the question as to why the defendant Council did not have adequate resources to build the appropriate fence and further, the obligation to take reasonable care arose before the defendant Council decided to cease taking out loans in 2010.
7. On the question of contributory negligence, his Honour found that the plaintiff's actions did not contribute to the occurrence of the collision.

Comment

The decision outlines liability considerations that public authorities must have regard to notwithstanding Section 42 of the CLA including whether the relevant services are provided voluntarily. Public authorities should also ensure that they comply with their own procedures that have been established for the purpose of addressing foreseeable risks of harm.

The author has noted that an appeal is pending.

Do family members of a deceased passenger have a right to sue an air carrier for nervous shock?

Jess Harman, Associate and Olivia Puchalski, Paralegal, Clyde & Co

The NSW Court of Appeal in *South West Helicopters v Stephenson* [2017] NSWCA 312 recently held that family members of a deceased passenger do not have the right to sue the carrier in separate common law claims for psychiatric injury, in addition to their statutory right to recover losses under the *Civil Aviation (Carriers' Liability) Act 1957* ("**NSW CACL Act**"), which incorporates Part IV of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) ("**Commonwealth CACLA**").

Facts

In February 2006, Parkes Shire Council ("**the Council**") arranged for an aerial survey of noxious weeds. South West Helicopters Pty Ltd (**"South West**") was engaged to provide the helicopter and pilot, and two Council employees travelled on-board the helicopter to undertake the survey. During the survey on 2 February 2006, the helicopter struck a powerline and crashed, tragically killing all passengers on-board, including Council employee Mr Stephenson.

Mr Stephenson's relatives ("**the relatives**") commenced proceedings against South West and the Council, which led to the joining of third parties, including the owners of the power line and the helicopter, and the making of a number of complex claims and cross-claims.

The Court of Appeal judgment addresses a number of questions relevant to the determination of liability as between the parties and their respective claims. This case note focuses on the decision of the majority of the Court of Appeal regarding the relatives' common law claims for psychiatric injury (commonly referred to as '"nervous shock" claims) against South West and the interaction of these claims with the operation of the Commonwealth CACL Act.

Liability of South West Helicopters Pty Ltd to Mr Stephenson's relatives

Where the CACL Act applies, it provides an exclusive remedy to passengers and non-passengers in respect of the death of a passenger. This is because the CACL Act states that the liability of the carrier under the CACL Act "*is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger.*"

By way of defence to the relatives' claims, South West contended that it was only liable in damages in respect of the death of Mr Stephenson under the Commonwealth CACL Act, which it argued applied exclusively to the claims by operation of the NSW CACL Act. If the Court was satisfied that the Commonwealth CACL Act applied, South West would have a complete defence on the basis that the claims were brought outside the two year limitation period prescribed by the Commonwealth CACL Act. South West's defence relied upon two factors:

(1) that Mr Stephenson was a "passenger" for the purposes of the Commonwealth CACL Act; and
(2) that the relatives' claims arose "by reason of" or "in respect of" the death of Mr Stephenson.

Was Mr Stephenson a "passenger"?

The Court of Appeal overturned the decision at first instance and held that Mr Stephenson was a passenger for the purposes of the Commonwealth CACL Act. This was based on the determination that:

(1) "passengers" are persons other than those involved in the operation of the flight;
(2) although Mr Stephenson could give directions to the pilot as to where the helicopter was to fly in order to conduct the survey, there was no evidence that the pilot was required to submit to the directions of Mr Stephenson; and
(3) Mr Stephenson had no control over the operation of the helicopter and was not a member of the crew or a person operating the helicopter.

On the basis that Mr Stephenson was a "passenger", the NSW CACL Act applied with respect to the

carriage of Mr Stephenson. Part IV of the Commonwealth CACL Act applied by operation of the NSW CACL Act.

Were the relatives' nervous shock claim "by reason of" or "in respet of" the death of Mr Stephenson?

The Commonwealth CACL Act provides that:

(1) the carrier is liable for damage "sustained by reason of the death of the passenger" (emphasis added) (section 28); and
(2) the liability of the carrier under the CACL "is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger" (emphasis added) (section 35(2)).

The majority (Basten JA and Payne JA) held that the claims for nervous shock were "in respect of" or "by reason of" the death of Mr Stephenson based on the following:

(1) the scope of the phrase "in respect of" focuses on the timing and the event, not the cause of action. The salient event giving rise to the liability was the death of the passenger which occurred during the course of carriage by air;
(2) the psychiatric injuries suffered by the relatives met the description in s 35 of "any civil liability of the carrier under any other law";
(3) the "damage" sustained by reason of the death of the passenger is not limited to damage sustained by the deceased passenger. Section 35(3) states that the "*liability is enforceable for the benefit of such of the passenger's family members as sustained damage by reason of his death*";
(4) the present case should be distinguished from the decision in *South Pacific Air Motive Pty Ltd v Magnus* [1998] FCA 1107 that the CACL Act does not preclude common law claims for damages for nervous shock by non-passengers. In *South Pacific,* the Federal Court considered the carrier's liability for claims of non-passengers in the context of injuries (i.e. not death) suffered by passengers, which are dealt with under a separate section of the CACL Act which contains different wording; and
(5) the court rejected the relatives' argument that a claim by a non-passenger should be distinguished from a claim by a passenger because a non-passenger has no contractual relationship with the carrier and should not be bound by the same statutory limitations on the rights of recovery. The Court held that this reasoning was not supported by the text of the relevant Conventions and was inconsistent with UK and US authorities.

The Court of Appeal therefore concluded that the CACL Act applied to the relatives' nervous shock claims, as these were claims for damages in respect of the death of a passenger. South West therefore had a statutory immunity from the suit as the relatives' claims were made outside the prescribed two year limitation period.

Analysis

The *South West v Stephenson* decision is significant as it seemingly represents a material shift from the position which has stood for almost twenty years, as set down by *South Pacific Air Motive v Magnus*, that the CACL Act does not apply to claims by non-passengers for nervous shock. Instead, the NSW Court of Appeal found that such claims do correctly fall within the exclusive CACL Act regime and, as such, are subject to the conditions and limitations that ordinarily apply to carriage by air claims. The impacts of this change could include a potential reduction in the exposure of carriers and their insurers to future claims brought by non-passengers in Australia in respect of passenger deaths, including some unresolved claims in Australia flowing from recent major loss events internationally.

'Covering the Field' of Air Navigation

Robert Csillag, Solicitor, GSG Legal

Overview

The NT Court of Appeal has unanimously upheld the principle that the Commonwealth Civil Aviation Law is a "complete statement" of the law governing the safety of air navigation both on the ground and in-flight. The following is an analysis of the decision in *Outback Ballooning Pty Ltd v Work Health Authority & Anor* [2017] NTCA 7.

Facts

Outback Ballooning Pty Ltd **("Outback")** operated a ballooning business in Alice Springs. An intended passenger was fatally injured in the course of embarking when her scarf became caught in the blades of a fan that was being used to inflate the balloon.

The Work Health Authority of the Northern Territory **("the Authority")** brought a complaint under Section 19(2) of the *Work Health and Safety (National Uniform Legislation) Act* that Outback failed to comply with its duty to eliminate or minimise risks to embarking passengers.

The complaint was initially dismissed in the Court of Summary Jurisdiction by the Second Respondent, the Hon. David Bamber SM. His Honour found that the complaint did not disclose an offence as the Commonwealth Civil Aviation Law evinces *"an intention to exhaustively and completely 'cover the field' for all aspects of the safety of air operations".*

The Primary Judge, Barr J, quashed this decision. His Honour held that the Commonwealth legislative and regulatory scheme was only concerned with safety *in-flight.* His Honour considered that the Commonwealth Civil Aviation Law did not evince an intention to cover the safety of passengers prior to flight despite the fact that the *Warsaw Convention* specifically extended the liability of a carrier for damage or loss caused by operations of air carriers in the embarking or disembarking process and not just in-flight.

Decision

The Northern Territory Court of Appeal unanimously dismissed the Primary Judge's decision and found that the Territory law was rendered inoperative in the circumstances. The Court found that:

(1) Within its field of operation, the Commonwealth Civil Aviation Law (as discussed at length in the judgment) is intended to be a complete statement of the law of air safety both in-flight and on the ground (insofar as it relates to the loading of balloon passengers in the above circumstances);

(2) Even if both Commonwealth and Territory laws are capable of being simultaneously applicable, this is not to the point when the intention of the Commonwealth Parliament is to 'cover the field'.

Comment

This decision clarifies and extends the decision in *Heli-Aust*[20] to state that the Commonwealth Civil Aviation Law regime covers aspects of air safety both in-flight and (in some circumstances) on the ground.

The Court in this instance did not define the extent of the field covered by the Commonwealth Civil Aviation Law. Southwood J was of the opinion that *"an incremental approach should be adopted"* to defining the field.

This decision will no doubt be an important reference point in future matters where the extent of the field covered by the Commonwealth Civil Aviation Law is in dispute - particularly where those disputes concern issues relating to the embarkation and disembarkation of passengers.

Update

The Authority filed an Application for Special Leave to Appeal to the High Court of Australia on 16 November 2017 **("the Application").** At this time no date has been fixed for the hearing of the Special Leave Application.

The Authority contends that the Court of Appeal failed to take into account the *Work Health and Safety Act 2011 (Cth)* which it contends was intended to provide a national framework for a national legislative scheme to regulate health and safety in workplaces (including aircraft). The Authority contends that because of this it was

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[20] *Heli-Aust Pty Ltd v Cahill & Anar (2001) 194 FCR 502*

not Parliament's intention to deal completely and exclusively with the law governing the safe use of inflation fans in balloon operations. The Authority contends that where the Commonwealth Civil Aviation Law can accommodate the operation of the Commonwealth Work Health and Safety Law, it should follow that it can accommodate the same subject matter of the State and Territory legislative counterparts.

Outback has opposed the Application on several bases.

First, Outback contends that nothing in the Commonwealth Civil Aviation Law's text, structure or context supports the Authority's primary contention that the Commonwealth Civil Aviation Law exclusively regulates safety *in flight* but leaves other aspects of the safety of civil aviation open for State or Territory regulation.

Secondly, Outback contends that if the Authority's propositions regarding the operation of the *Work Health & Safety Act 2011* (Cth) were accepted (and therefore the notion that the Commonwealth Civil Aviation Law did not exclusively regulate any aspect of air safety) this would fly in the face of the long-accepted position that the Commonwealth is obliged by the Chicago Convention to *"secure uniformity of regulations, standard practices, procedures and organisations in air navigation throughout Australia as a step towards achieving uniformity as between Australia and other contracting States".*

Thirdly, Outback opposes the Application on the basis that any Special Leave question would be highly specific to the particular facts of this case.

Finally, Outback opposes the Application on the basis that the Authority sought to agitate questions that were not squarely raised in the Court of Appeal.

In reply the Authority contends that it will establish that all of the issues that were raised in the Application were squarely put before the Northern Territory Court of Appeal. The Authority contends that the fact that the Northern Territory Court of Appeal failed to grapple with these concepts is evidence to support Special Leave being granted.

IN BRIEF

Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd [2017] NSWCA 216

- By Peter McQueen, Consultant, GSG Legal

The New South Wales Court of Appeal has considered the application of Articles 18 and 20 of the Montreal Convention in the context of the transportation of livestock by air.

Principle International Pty ltd ("**Principle**") contracted with Singapore Airlines Cargo Pte Limited ("**SIA Cargo**") for the carriage by air of cattle from Australia to China. On one of three flights 18 head of cattle were found dead on arrival. Those cattle had been loaded by Principle into 2 crates, with 9 cattle in each crate, which were then stowed by SIA Cargo on the lower deck of the cargo hold. The agreed expert evidence was that there was inadequate ventilation to these 2 crates.

The trial judge held that SIA Cargo was liable under Article 18(1) of the *Montreal Convention* ("the **Convention**") for the loss of the cattle and that SIA Cargo could not avoid liability under Article 18(2) of the Convention because it could not prove that the loss resulted from defective packing of the cattle performed by a person other than SIA Cargo or its servants or agents. However it was further held that, pursuant to Article 20 of the Convention, the loss was contributed to by a wrongful act or omission of Principle and accordingly liability was apportioned 60 per cent to SIA Cargo and 40 per cent to Principle.

The Court of Appeal of the Supreme Court of New South Wales examined the meaning of the terms "event" in Article 18(1), and "defective packing" in Article 18(2), of the Montreal Convention 1999 in the context of the carriage by air of live animals.

Decision

The Court of Appeal Found:

1. The "event", which exposed the cattle to the lack of ventilation and which resulted in their death was the stowage of the 2 crates on the lower deck given the conditions on the lower deck. This occurred whilst the cattle were in the charge of SIA Cargo during the carriage by air. Accordingly SIA Cargo was liable for the loss of the cattle.
2. The packing of the cargo here comprised the placement of cattle in crates of a particular design, which were not found to be defective. Therefore it could not be said that their death resulted from defective packing performed by someone other than SIA Cargo.
3. Principle knew the risk of placing the 2 crates, each of which contained 9 cattle, on the lower deck and neither took steps to inform SIA Cargo of this risk nor to provide SIA Cargo with a request or specific instructions as to the stowage of these particular crates on the aircraft, albeit that Principle had prepared a load plan. Also SIA Cargo did not provide Principle with relevant loading documentation by which Principle could have provided such a request or those instructions. There was expert evidence that those loading the aircraft probably knew that the crates containing 9 cattle should not have been put on the lower deck. In these circumstances the appropriate apportionment of liability was 80% to Principle, rather than 40%, and 20% to SIA Cargo, rather than 60%, as apportioned by the trial judge.

Comment

What is demonstrated by the factual matrix in this decision is the requirement that all parties to such carriage arrangements involving live animals must remain vigilant to ensure the sharing amongst them of all relevant packing, loading and stowage information, appropriate documentation and clear instructions in advance of and during the actual loading and stowage operations.

Meyerowitz-Katz v American Airlines Group trading as American Airline [2017] NSWLC 17

- By Peter McQueen, Consultant, GSG Legal

The Local Court of New South Wales has considered whether a ticket issued to a passenger contained terms that were incorporated by reference, and if so whether such terms were 'unfair' within the meaning of the Australian Consumer Law in circumstances where they resulted in the passenger's ticket being cancelled.

Facts

Mr Meyererowitz-Katz **(passenger)** purchased reservations for a series of flights with American Airlines **(carrier),** through the carrier's website, namely Sydney/Los Angeles, Los Angeles/Washington Dulles, Newark/Charlotte, Charlotte/Los Angeles, Los Angeles/Sydney. He did not board the Newark/Charlotte and the Charlotte/Los Angeles flights and nor did he cancel them. Upon attempting to check-in for the last flight Los Angeles/ Sydney, he was informed that his ticket reservation had been cancelled and that he was required to purchase a new ticket. The passenger sought to recover the cost of that ticket on the basis that the carrier was not entitled to cancel his original reservation.

The carrier submitted that it was entitled under the terms of the contract, that being Rule 72, which is headed "RESERVATION CANCELLATION", to cancel the remaining flight reservations, following the passenger's failure to attend for or cancel the Newark/Charlotte flight and also to charge cancellation fees and charge for a new ticket for the Los Angeles/Sydney sector.

The passenger argued that the cancellation of the reservations constituted a wrongful breach of contract and a fundamental breach; alternatively that the relevant contractual term, if incorporated into the contract was void as being an "unfair term" within the meaning of section 23 of the ACL (the parties agreeing that the contract was a standard form consumer contract to which the ACL applied), or constituted a penalty provision and that the further payment resulted from economic duress or a penalty.

Decision

The Court (Assessor Olischlager) found, based on well researched reasons, as follows.

The carrier gave adequate notice to the passenger of Rule 72, albeit that Rule 72 was incorporated into the contract only by reference and that the carrier had "only done just enough" to give adequate notice, noting the notice given was not "best practice".

However,:

1. Rule 72 was unfair within the meaning of sections 24 and 25 of the ACL, noting that the assessment required consideration of whether the term caused a significant imbalance in the parties' rights and obligations; whether the term was reasonably necessary to protect the legitimate interests of the party advantaged by the term; and whether the term caused detriment to the passenger.

2. On the test of transparency, the carrier had presented the term in a form that fell squarely into the "muddy end of the range".

3. The failure by the carrier clearly to inform the passenger of his obligations to contact the carrier and cancel the reservations Newark/Charlotte and Charlotte/Los Angeles prior to departure effectively deprived the passenger of the opportunity to preserve the reservation Los Angeles/Sydney.

4. As Rule 72 was unfair it was void and by cancelling the flight the carrier repudiated the contract and the passenger was entitled to recover damages and be compensated the cost of the new ticket for the Los Angeles/Sydney flight.

Given these findings it was unnecessary for the Court to consider the alternate claims for economic duress or penalty.

Comment

The decision demonstrates the need for drafters of consumer contracts to ensure that their terms meet the required standard of fairness and transparency, as prescribed in the applicable consumer legislation and the necessity of prior adequate notice of the terms of such contracts being given in the clearest terms in the pre-contract documentation provided to each potential contracting party by the contract service provider.

Collins and Civil Aviation Safety Authority, Re [2017] AATA 2564

- By Dylan Moller, Lawyer, Sparke Helmore Lawyers

Conditional class 2 medical certificates, medical standards and the likelihood that a pilot may become incapacitated in flight: a review of a decision of the Civil Aviation Safety Authority (CASA) to impose a safety licence condition on the grounds that the pilot did not meet certain medical standards.

Since about 1992, Mr Collins, a 77yearold pilot, regularly flew between two properties he owned. In 2007 Mr Collins had surgery to repair his mitral valve and every year from then on he was examined by a cardiac specialist to satisfy the Civil Aviation Safety Authority (**CASA**) that he was medically safe to fly.

In 2015, Mr Collins was admitted into hospital and diagnosed with cryptogenic cerebellar infarct. Mr Collins recovered, however, he remained on medications 3 months post-injury.
On renewal of his licence, the CCMR found that Mr Collins did not meet the medical standards set by Table 67.155 of the Civil Aviation Safety Regulations 1998 due to: A condition which "*presented an unacceptable risk of in-flight incapacitation because there was increased risk of stroke…and post-stroke seizure*." CASA declined to renew Mr Collins' pilot licence, but said it would consider a review of the risk posed by Mr Collins 12 months post-stroke.

Mr Collins subsequently reapplied for a pilot licence. CASA ultimately issued Mr Collins with a licence conditioned by a Safety Pilot condition, which required the aircraft flown by Mr Collins to be configured with side-by-side seating in the cockpit and to have dual flying controls.

Mr Collins' application to the Tribunal sought a review of the following:

1. Did Mr Collins meet the medical standard set out in Table 67.155 of the CASR i.e. did Mr Collins have an established medical history or clinical diagnosis of a safety-relevant disease of the nervous system; if no,
2. Was the extent to which Mr Collins failed to meet the relevant medical standard "likely to endanger the safety of air navigation" within regulation 67.180(2)(e)(ii) of the CASR; and, if yes,
3. Can any conditions be imposed under regulation 11.056 of the CASR which would ameliorate the threat to the safety of air navigation.

Judgment

The Tribunal found:

- an established medical history does not require multiple, or a series of episodes/events: one particular complication is sufficient;
- the medical standards require minimum standards of health of persons seeking a license to fly aircraft;
- the 'usual likelihood' test is not sufficient because the aviation licence looks to protection of public safety rather than individual entitlements; and
- international standards set a 1% annualized risk of incapacitation as a risk capable of satisfying the relevant standards.

The Tribunal relied on the Full Federal Court decision in *Neal v Secretary, Dept of Transport* (1980) 3 ALD 97 for the authority that an established medical history does not require "*a number or series of episodes or events to occur*", rather, one particular complication is sufficient. The Court in *Neal* considered the purpose of the medical standards, being, "*to require minimum standards of health of persons seeking a licence to fly aircraft*". The four medical experts all agreed Mr Collins had a condition which satisfied Table 67.155. The issue then became, is the condition safety-relevant?

A safety-relevant condition in rule 67.015 of CASR is one that reduces, or is likely to reduce, the pilot's ability to fly. Because the licence has more regard to the protection of public safety than the individual's entitlements, the usual likelihood test is not sufficient. Rather, international aviation standards set a 1% annualized risk of incapacitation as a risk capable of satisfying the relevant standards.[21]

The Tribunal found, in accordance with medical evidence that Mr Collins was at an increased risk of stroke and was likely to endanger the safety of air navigation, requiring a Safety Pilot Condition.

[21] CASA sets 2% annualised risk for Class 2 licences (like the Plaintiffs)

2. Government update

Summary of Preliminary Report into the Hawkesbury Seaplane Incident

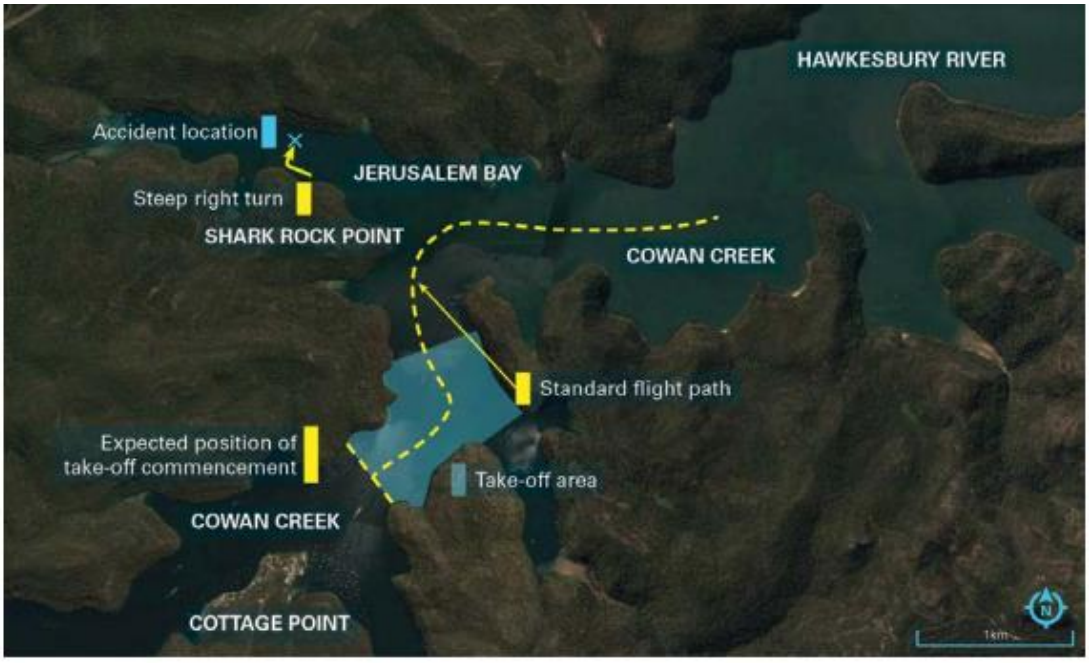
Stephanie Barclay, Associate and Marcus Vella, Law Graduate, Sparke Helmore Lawyers

On 31 January 2018, the Australian Transport Safety Bureau ('**ATSB'**) released its preliminary report into the tragic fatal seaplane crash which occurred in 'Jerusalem Bay', on the New South Wales Hawkesbury River on New Year's Eve last year (31 December 2017).

The ATSB's preliminary report sets out the sequence of events that led to the crash and examines a range of possible causes. The preliminary report is based upon the ongoing joint investigation being conducted by the NSW Police, Marine Area Command and Police Diving Unit, NSW Fire and Rescue and other associated bodies.

Sequence of Events

At around 3pm, the pilot and his five passengers departed Cottage Point on an aircraft owned by Sydney Seaplanes, with an intended destination of Rose Bay. Instead of following the aircraft's expected flight path north over the water before turning right into Cowan Creek, the seaplane instead continued north into Jerusalem Bay at an altitude described as *"below the height of the surrounding terrain"*. At this point, witnesses observed the plane make *"a steep right turn"* and nosedive into the water in a *"near vertical position"*. Based on data from surrounding weather stations, the ATSB determined that the aircraft experienced a slight tailwind at the time it entered Jerusalem Bay.



Source: Google earth, modified by the ATSB

According to witnesses, the aircraft made no unusual sounds prior to decent and took over 10 minutes to completely submerge with its tail section still above the waterline. A quantity of fuel was observed in the water surrounding the aircraft, and sadly, all 6 occupants received fatal injuries.

The ATSB's Preliminary Findings

By 4 January 2018, all major sections of the aircraft had been recovered from the water and transported to the ATSB's secure facilities for examination. The ATSB's initial examination of these aircraft components indicated that there was no evidence of:

- a bird-strike or collision with an object at any point;
- an in-flight break-up or any pre-impact structural damage;

Source: Sydney Seaplanes

- flight control issues and control continuity had been maintained throughout; or
- fuel quality concerns and no particle matter was found in the fuel samples recovered.

It also found that following:

- the front of the aircraft and float tips had been significantly damaged at impact, and both the wings and floats had separated from the fuselage during the crash;
- damage to the wings was consistent with the aircraft being banked to the right at the time of impact, and the flaps were in the 'climb' position of 15 ± 1 degrees; and
- there had been no cockpit voice, flight data or commercial video recording equipment fitted to the aircraft (nor was there any regulatory requirement for such recording equipment to be fitted to an aircraft of this size).

The ATSB recognised the pilot's competency and did not suggest that inexperience or mid-flight health issues were at play. The ATSB noted that the pilot held a current commercial pilot's licence and had over 10,000 hours of total flying experience. Records also showed that he had extensive training in the use of this particular aircraft and that the pilot maintained *"a high standard of health".*

Previous history of the aircraft

The aircraft had previously been involved in a fatal accident. That accident occurred in 1996, when the aircraft was being operated as an agricultural 'crop duster' plane.

The aircraft, which is 55 years old, was built in Canada in 1963 and was initially configured to agricultural specifications. Following the 1996 crash, the aircraft was subsequently repaired and retrofitted as a seaplane, receiving a Certificate of Airworthiness in 2000. The aircraft was then acquired by Sydney Seaplanes in 2006.

It was noted that the aircraft's 'Pratt & Whitney' engine had been installed less than two months before the incident on 6 November 2017, and had only had 95 hours of time-in-service at the time of fitment. Under Australian regulations, these engines are to be replaced every 1,200 hours. Notwithstanding the history of the aircraft, the ATSB found no evidence to indicate that there were systemic problems with the aircraft.

3. Contributors

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Thank you to all the contributors. The editors welcome regular and new contributors, and are happy to receive any contributions towards future editions of Aviation Briefs, either directly or through the ALAANZ branch representatives.

4. Editors and Secretariat

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Congratulations to Genevieve, who on 13 February 2018 gave birth to a beautiful daughter, and no doubt future aviator, Julia-Rose. We wish you and your little girl all the very best, and also look forward to having you back!

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