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Client Alert Commentary

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Court of Appeal and English High Court Reshape Cartel Damages Litigation Landscape in Air Cargo

Court of Appeal confirms presumption of innocence is absolute and strikes out economic tort claims; English High Court strikes out entirety of claim brought on behalf of over 60,000 Chinese claimants

Background

The appeals and the strike out application relate to claims brought by over 65,000 claimants against British Airways plc (BA) for losses arising out of an alleged cartel said to have operated on a worldwide basis between 1999 and 2007 (the Air Cargo litigation). The matters follow a 2010 European Commission decision (presently under appeal before the EU courts) which found that 11 airlines had infringed Article 101 the Treaty on the Functioning of the European Union (TFEU) (and certain equivalent treaty provisions covering the European Economic Area (EEA) and Switzerland) by colluding on certain elements of the price of air cargo services. The 2010 decision imposed a fine of €799 million. BA in turn brought contribution claims against 23 airlines involved in the alleged cartel.

The Air Cargo case is one of the largest cartel damages actions in the English courts; parallel actions have been brought in the Netherlands and in Germany against the airlines in respect of the same alleged cartel conduct. The impact of these rulings on these parallel cases, and future cases brought in courts in England and across Europe, is likely to be significant.

The Pergan Appeal – Presumption of Innocence

In *Air Canada & Ors v Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024 (14 October 2015), the Court of Appeal heard two appeals brought by certain airlines, including Singapore Airlines Limited and Singapore Airlines Cargo Pte Ltd.

In the first appeal, the appellant airlines successfully appealed an order for disclosure to the claimants of material in the European Commission's decision covered by the principle identified in *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* (Pergan). This material described conduct that was not found to be an infringement of EU law in the European Commission's decision and therefore its inclusion in the decision could not be appealed before the EU courts.

The Court of Appeal allowed the appeal, agreeing with the appellant airlines' argument that the disclosure of such material would infringe the airlines' absolute right to the presumption of innocence. The case marks the first time that the Pergan principle has been applied to protect addressees of a European Commission decision (the Pergan case itself concerned a non-addressee).

The Strike-Out Appeal – Economic Torts

In the second appeal, the Court of Appeal struck out claims based on the "economic" torts of unlawful means conspiracy, and unlawful interference with trade, on the basis that the claimants could not show that the airlines had the requisite "intention to injure". The judgment is significant, not only for its implications in the current Air Cargo case, but also for future damages claims. In particular, the judgment limits claimants' ability to seek disclosure of material contained in the non-operative part of Commission decisions. The judgment also limits claimants' ability to rely on economic torts in an effort to extend their damages claims beyond the geographical and temporal scope of EU/EEA law.

The Bao Xiang Strike-Out – Abuse of Process

Finally, the High Court in *Bao Xiang International Garment Centre & Ors v British Airways Plc* [2015] EWC 3071 (Ch) (27 October 2015) struck out claims purportedly brought by Hausfeld on behalf of over 64,000 Chinese claimants on the grounds that Hausfeld lacked the requisite authority to bring the claims and also that bringing such claims constituted an abuse of process.

Whilst clearly representing a significant victory for the airlines in the Air Cargo proceedings, the judgment is also a timely reminder to solicitors of the importance of identifying a proper cause of action prior to issuing a claim and the significance attached to statements of truth. The judgment also highlights the importance of ensuring that clients (particularly those abroad) understand their obligations as parties to litigation before the English courts.

Daniel Beard QC and Thomas Sebastian of Monckton Chambers were instructed by Latham & Watkins on behalf of Singapore Airlines Limited and Singapore Airlines Cargo Pte Ltd.

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