

Trade & Transport Alert

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The High Court of Australia decides how the application of the limitation period can be avoided in actions brought under the *Civil Aviation (Carriers' Liability) Act 1959*

The High Court of Australia, in hearing together *Air Link Pty v Paterson (Airlink)* on appeal from the Supreme Court of New South Wales, and *Agtrack (NT) Limited v Hatfield, (Agtrack)* on appeal from the Supreme Court of Victoria, has determined that actions which have been brought properly and pleaded sufficiently will not invoke the 2 year limitation period under the *Civil Aviation (Carriers' Liability) Act 1959 (Carriers' Act)*.

Facts in Airlink

The Airlink litigation commenced by way of a statement of claim in which Paterson sought damages in respect of personal injuries sustained when alighting from an interstate flight. Although his statement of claim did not refer to Part IV of the Carriers' Act, Airlink pleaded in its defence that liability was governed by the Carriers' Act. The parties accepted that Part IV was the only legal basis for the action. Paterson sought to amend his statement of claim to plead an action based exclusively on the Carriers' Act. Airlink argued that, as that amendment had been made more than 2 years after the event, Paterson's action was extinguished and should be struck out.

Facts in Agtrack

In the Agtrack litigation, which was commenced by writ and statement of claim, Hatfield claimed damages for the death of her husband in an aircraft accident. Neither the writ nor the statement of claim referred to

the Carriers' Act which was the only basis upon which Mrs Hatfield could claim damages. In its defence, which was filed within the 2 year limitation period, Agtrack pleaded that the action was not maintainable. The 2 year time period expired and Agtrack argued that any action was now extinguished.

The issues

The High Court considered 2 issues:

- Were the actions extinguished due to the expiration of the limitation period?
- If the actions were not brought within the limitation period, can the trial court in which the action has been brought allow amendments to the pleading by which specific reference is made to the Carriers' Act?

Lessons learnt

The following lessons are relevant when drafting a pleading in relation to an action brought under the Carriers' Act:

- In order to avoid confusion, it is preferable that the pleading in an action arising from domestic or international carriage of air should refer specifically to the Carriers' Act, where the action is brought under the Carriers' Act. However, if it does not, the action will not be extinguished if sufficient facts are pleaded from which it is apparent that the action is brought under the Carriers' Act.
- If the limitation time has expired, an amendment to the pleading otherwise allowed by the relevant State procedural legislation will not be permitted so as to extend the time.



Were the actions extinguished?

Section 34 of the Carriers' Act, which is in identical terms to Article 29 of the Warsaw Convention regime, states:

"The right of a person to damages under this Part is extinguished if a claim is not brought by him or for his benefit within 2 years after the date of arrival of the aircraft at the destination, or where the aircraft did not arrive at the destination;

- (a) *the date on which the aircraft ought to have arrived at the destination; or*
- (b) *the date on which the carriage stopped*

whichever is the later."

Each proceeding had been commenced within the relevant 2 year period. The question was whether the words "a claim.... brought by him" meant the commencement of a proceeding or that the proceeding, which had commenced, stated that the action was being brought under the Carriers' Act. In *Airlink*, the statement of claim was framed as an action under the New South Wales common law in tort and contract. In *Agtrack*, although the statement of claim did not specifically state the legal basis, the action was brought under the relevant Victorian legislation which allows a dependent widow to recover damages for the death of her husband. The pleading was in the form normally used for that type of action. However, such an action was not available, as section 35(2) of the Carriers' Act states that liability under the Carriers' Act itself is in substitution for any civil liability of the carrier under any law.

The relevant State procedural legislation in each case allowed for amendment of the pleading outside the limitation period. In both cases it was argued that, despite there being no specific reference to the Carriers' Act in the pleading, sufficient facts were pleaded to support each action brought under the Carriers' Act so that each action had been made within the 2 year time period. In both cases the High Court held:

- It is unnecessary to show that the claimant or its lawyers had the provisions of the Carriers' Act in mind when drafting the statement of claim; and
- Even though there was no allegation in the *Airlink* statement of claim that *Airlink* held the necessary Air Operators Certificate, as required under the Carriers' Act, sufficient facts had been pleaded to found an action under the Carriers' Act.

Can a trial court allow amendments to the pleading beyond the 2 year limitation period?

In accordance with s 79 of the *Judiciary Act 1903* (Cth) (**Judiciary Act**), requirements as prescribed by State procedural legislation are binding on courts exercising Federal jurisdiction in so far as they are consistent with Commonwealth legislation. As the action made by *Patterson and Hatfield* were actions brought under the Carriers' Act, which was Commonwealth legislation, the Courts were exercising Federal jurisdiction despite the fact that each proceeding was filed in a State court.

Unanimously in both cases, the Court found that if an action had not been brought properly or pleaded sufficiently so as to invoke the Carriers' Act within the 2 year time period, s 79 of the *Judiciary Act* could not operate so as to allow an amendment correcting the pleading. The Court's reasoning was that to allow an amendment would have extended the time to file proceedings beyond the 2 year period prescribed by the Carriers' Act. As the State procedural legislation and the Carriers' Act were inconsistent, the Carriers' Act prevailed.

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