

“BIG INTERVIEW

Working to achieve a common purpose

Airlines are now much more interested in defending their reputations than in disposing of claims as cheaply as possible. This presents a number of challenges for insurers



By Rasaad Jamie
Global markets editor

These are interesting times for airlines, their insurers and their lawyers. The aviation market is more competitive than it has ever been, with huge commercial pressures on airlines. This is illustrated by the retrenchments announced by Air France, KLM and Air Berlin, as well as the Chapter 11 proceedings for the holding company of American Airlines, not to mention the comments of numerous aviation underwriters in this newspaper in recent months regarding the profitability of the sector.

As if that is not enough, airlines and their insurers, particularly within the European context, are additionally confronted by a number of challenging regulatory and compliance developments.

Here, the two most notable trends are the criminal prosecutions following aviation accidents in Europe not only of members of the senior management of airline companies but also their employees, and the exposure of the aviation and insurance industries to the UK's anti-bribery legislation, which came into force in July last year. The Bribery Act is widely regarded to be even more punitive than the Foreign Corrupt Practices Act (FCPA) in the US and is all-encompassing, covering not only the activities of senior management and employees, but also those of their subsidiaries, agents and other representatives. The act creates a new, very strict liability of failing to prevent bribery.

No distinction

Sean Gates, senior partner of specialist aviation law firm Gates and Partners, points out that unlike the FCPA, the UK Bribery Act does not make any distinction between



Open Day at the Berlaymont building of the EC: the European flag and the 25 Member States flags in front of the Berlaymont building

facilitation and bribery. "Differences in culture have led most of the civilised world to recognise there is a difference between facilitation and bribery. But the UK government chose to ignore the fact that in most of the world facilitation payments are not only not bribery, but also part of the culture. It is astonishing this country, which has always been international in mind-set, is ignoring the fact businesses are positively disadvantaged by the lack of definition in this legislation. These measures positively discriminate against lawyers in the UK dealing with international disputes in other jurisdictions against other lawyers not so regulated"

Gates, according to most of the annual guides to the legal profession, is the most highly regarded aviation insurance lawyer in the market today. He started his career in the 1970s at the specialist firm Beaumont & Son, then the big name in aviation law but which has since been absorbed into Clyde & Co. After six years as senior partner at Beaumont, he left the firm in 2003 to establish Gates and Partners, a practice which is now synonymous with aviation law.

Preferred position

As Gates' comments suggest, his firm is very much on the side of the aircraft operators. Indeed, the firm's preferred position is to act as defence lawyers for operators instructed by the insurers in relation to liability matters, rather than act for the one against the other. "If we are not named on an airline policy and insurers approach us and say 'we have got a coverage issue, we already got a lawyer doing the defence, you are not named on that policy, can you help us?', yes, we certainly can and have done that routinely. If we are named on a policy as defence lawyers, we really have no place getting involved in disputes between the airline and its insurers."

He says under the old regula-



Sean Gates CV

Career

- Established Gates and Partners, London, 2003
- Senior partner, Beaumont & Son, London, 1997 to 2003
- Head of the aviation department, Beaumont & Son, London, 1991 to 1997; partner, 1978 to 1997; solicitor, 1974 to 1978
- Solicitor, admitted in England and Wales, 1972

Professional affiliations

- Legal Adviser to the International Union of Aviation Insurers (IUAI)
- IUAI representative at the Rome Convention for Surface Damage
- IUAI Observer at the Montreal Convention
- Arbitrator for the Cour International d'Arbitrage Aerien et Special
- Member and past Chairman of the Air Law Group of the Royal Aeronautical Society

tions governing solicitors' practice in the UK, if a law firm was named in a policy to defend an airline in relation to a liability matter, particularly an air crash, the appointment meant the firm's clients were both the insurer and the airline.

"So our job was to protect the airline for which we were paid by the insurer, which would have input into the way in which the defence was managed. Now the regulations governing solicitors are less prescriptive, but it seems to me our role continues to be one where we treat both insurers and the insured as our clients, which avoids any conflicts of interest that might otherwise arise" Gates says.

However, airlines nowadays are

much more interested in the way in which they are defended. When Gates started out as a lawyer, there was never much discussion about protecting the brand or reputation of an airline when it suffer a disaster. The sole source of direction, he says, came from insurers and the spirit of the instructions were to get rid of the claims as economically as possible. "And so, without breaking any laws or using any undue influence, our direction was always towards dealing with things in that way. Most of the time that sat fairly comfortably with the interests of the airline. But airlines now are much more interested in defending their brand, so they get involved to a much greater extent."

Trend

This trend presents certain challenges for insurers, he says. "The forward-thinking companies now meet with their airline clients and their lawyers and plan how they would together respond if a given event occurs, how they would work to achieve a common purpose. Disaster planning can represent a significant expense for insurers but those that embrace it deserve to be recognised and, over the long term, will save money since, in my experience, there is no doubt if an airline is well prepared this will not only preserve the airline's brand but also facilitate relations with the families of the victims, who will be more amenable to dealing with their claims and less likely to wage a campaign against the business. This can represent a substantial saving in the legal expense of handling the claims aftermath of a disaster."

The changes in terms of how and where airlines, insurers and law firms position themselves in a world increasingly concerned with brand value, corporate social responsibility and reputation is very much reflected in Gates and Partners' relationship with Kenyon International, the biggest disaster-management services provider in the world. Kenyon, which was featured in *Insurance Day* last November, is best known for its expertise in recovery and identification of human remains in the aftermath of mass fatality events such as floods, earthquakes and air and rail crashes and of the support it gives to members in family assistance. Kenyon's chief executive, Robert Jensen, is highly critical of the practices of some aviation insurers in the aftermath of air disasters.

"[Jensen] can be adversarial and I have discussed with him the comments he made in the *Insurance Day* interview, some of which I think were actually counter-productive. I warmly disassociate myself from his criticisms of insurers. Clearly, my orientation is towards insurers and airlines. He is oriented towards airlines and victims. But I think we are all possibly missing a trick and I believe Kenyon and insurers should work more closely together because the experience Kenyon brings in relation to air accidents can add real value and save money for insurers as well as better protect airlines," Gates says.

In the shoes of the families

"The piece which we as airline lawyers often miss is to put ourselves in the shoes of the families of the victims. It is too easy for us to fall into

the trap of regarding the families in some way as opponents, which can arise when families are represented by the less professional plaintiff law firms, some of whose methods and practices can be close to the ethical line. But we may actually create the space for those lawyers to operate in by not taking the time to understand the needs of the families of the victims."

Kenyon's unique service to the airlines, Gates explains, is to connect with the families of the victims. "[Jensen] and his team have very valuable insights and understanding of what the families need and how they can be better treated and how they are not treated as well as they could be."

However, he says Kenyon should not regard insurers as inimical to the cause of resolution in the aftermath of accidents "because that is just as bad as treating the families as adversaries. That has got to change. [Jensen] says those things out of conviction and out of passion because of his years of experience with how families feel. I understand that and I would like to persuade other people to recognise that."

Leaving Beaumont

Gates cites philosophical differences as the reason for leaving Beaumont, which, at the time, was undoubtedly the leading practice in aviation defence in the world. "The firm had a wonderful name in aviation. It was so far ahead of its competitors it was almost necessary for the partners to compete with each other so as to stay ahead of the game."

Gates recalls a particular competitor at that time was Barlow Lyde & Gilbert (BLG). "It was changing from being purely a product liability firm and seeking also to represent airlines and it was succeeding in winning quite a lot of business. So, at Beaumont, we were beginning to feel the pinch. Funnily enough, almost immediately after I left and after Beaumont merged with Clyde & Co, Clyde & Co was instructed in a substantial number of new major accidents. So it may be my timing was not perfect after all."

Competition

The competition between the leading aviation firms such as Gates and Partners, Holman Fenwick Willan (HFW) and Clyde & Co remains intense. A significant number of people now working at Gates and Partners came from Beaumont (after it was taken over by Clyde & Co) and others came from BLG's aviation team before it moved

Sean Gates on...

The UK Bribery Act

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The European Commission

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more or less en masse to HFW. It is a source of pride to Gates his firm is now similar in size to what Beaumont was when he left in 2003.

Indeed, the opportunity for Gates and Partners to establish an office in Singapore came when the Singapore team at BLG, led by his old colleague and friend David Johnston, decamped and joined Gates and Partners and is now one of the most successful parts of the firm.

Similarly, Gates and Partners set up in Dubai in July last year after the firm was approached by two lawyers from Clyde & Co based in the Gulf state. The Gulf region is a source of increasing amount of aviation work for London-based international law firms, given the number of airlines and business jets based there, not to mention the volume of legal advisory work generated by the aircraft finance deals emanating from the region.

Gates describes the Dubai office as very successful. "The office has already grown and we now have liability capabilities, as well as aircraft finance capabilities in the region. That is pretty well the consistent story about Gates and Partners. When we started up, we intended to be a small practice. But people have approached us with business propositions which were sufficiently attractive to change our philosophy."

In addition to London and Dubai, Gates and Partners also has offices in Paris, Brussels and Singapore. "You could service the whole world from London back in the early Beaumont days. But airline clients increasingly want people who are more or less in the same time zone."

Accident investigations

Gates is as critical of the increase in criminal prosecutions arising out of aircraft accidents within Europe (and also, albeit much less frequently, in other jurisdictions such as Brazil and the US) as he is of the implications of the UK Bribery Act for airlines.

He ascribes this particular development to the growth of a "victim culture". Politicians, reporters and civil servants seek to cloak themselves in the role of the victim's friend and axiomatically the enemy of the villain, which in the case of an aircraft accident can appear to be the airline or some part of it. "Hence the call for prosecutions, which usually lead to acquittals, but which financially ruin the accused and leave their reputations in tatters after proceedings that in Europe can last 10 years or more. During this time, employment in their

former careers will usually be impossible. The trend clearly operates against the interests of aviation safety and the public interest. Why should airline employees co-operate with investigators when, as has happened many times, the accident investigation reports are used to apportion blame and institute prosecutions instead of as a means to improve airline safety? Sadly, the EU missed several tricks when it was considering how to manage accident investigations recently."

The EU, he says, issued a regulation that referenced many of the problems of aviation accident investigation in Europe. These include the differing levels of expertise in the national investigation authorities of member states; the need to ensure investigations are not used to criminalise individuals; that confidential incident reporting should be immunised from criminal investigations; and that the pernicious effects of the party system whereby investigators, for want of specialist expertise, are forced to rely on manufacturers whose products may be implicated, should be avoided by adequate funding of investigation boards. "The EU, however, failed to resolve any of the issues in the body of the regulation, apparently because of an unwillingness to make the necessary investment."

Disappointed

Gates is disappointed by the outcome, particularly as a number of aviation bodies had lobbied the European Commission regarding the issue of air accident investigations and because, initially, it appeared as if the authorities were seriously addressing the issues. "Indeed, they even stressed the need for confidentiality of the information acquired during investigations and they emphasised the quality and independence of the investigators. They then go and create something which does not substantially change a thing. You see in the Air France Concorde case how, rightly or wrongly, the BEA [the Bureau d'Enquêtes et d'Analyses, France's civil aviation accident investigator] is criticised by the Air France pilots' union for being partial towards Airbus. Now, if there were a supranational body and if non-French investigators had been assigned to that accident, that criticism could not be made and justice would be seen to be done. But no, the European Commission failed to address the core issues and ticked a box to meet its quota of regulation-issuing activities." ■