

A Greek Tragedy, Act II: ACG v Olympic Airlines – Court of Appeal upholds conclusive Certificate of Acceptance

Almost a year ago, we reported¹ on the decision of the High Court in *ACG Acquisition XX LLC v Olympic Airlines (in special liquidation) [2012] EWHC 1070 (Comm)*, involving an aircraft leased by ACG to Olympic which was found to be in a defective condition, after delivery and acceptance under the relevant lease. Olympic appealed on the basis that the trial judge was wrong to find in favour of ACG on the grounds of estoppel by representation. The Court of Appeal has dismissed the appeal² and its reasoning should reassure operating lessors and financiers seeking certainty in their English law governed lease agreements with airlines and other operators.

Facts

In 2008, ACG and Olympic entered into a 5 year operating lease of a 17 year old Boeing 737-300. Shortly after Olympic accepted the aircraft and put it into service, serious defects were discovered, including corrosion, and the Greek Civil Aviation Authority withdrew its airworthiness certificate. Olympic grounded the aircraft and ceased paying rent under the lease. In 2010, ACG terminated the lease and demanded return of the aircraft. It brought a claim in the English court against Olympic for rent and maintenance reserves up to the date the aircraft was returned and for damages for loss of rent from such date up to the scheduled lease expiry.

First instance decision

As explained by Lord Justice Tomlinson, the essential question before the Court was "whether a claim for damages for defective delivery survives execution by the parties of the Certificate of Acceptance". ACG submitted that, as a matter of construction of the specific lease, the parties had agreed that the Certificate of Acceptance was conclusive proof that the aircraft complied with the delivery condition under the lease and therefore, Olympic was contractually precluded from subsequently denying the aircraft was in such condition (that is, a "contractual estoppel" arose against the airline). The trial judge, Mr. Justice Teare, rejected this submission, but agreed with ACG's

argument in the alternative that Olympic's execution of the Certificate of Acceptance gave rise to an estoppel by representation.

Under this English law principle, by signing the certificate, Olympic was prevented from later contending that the aircraft was not in the delivery condition, as it had made a clear and unambiguous representation intending it to be acted upon and upon which ACG relied, to its detriment. Prior to delivery to Olympic, the aircraft had been on lease to Air Asia and the Court accepted ACG's claim that it would not have accepted re-delivery of the aircraft from Air Asia had it not believed Olympic had confirmed the aircraft was in the required delivery condition under the Olympic lease.

Olympic's appeal

Olympic contended that Mr. Justice Teare was wrong to find that the lease provisions which were ineffective to establish contractual estoppel against Olympic were nonetheless effective to give rise to an estoppel by representation. ACG responded that the trial judge should have agreed with its primary case, namely that of contractual estoppel.

Court of Appeal decision

Aircraft operating lease context

The Court emphasised that the case involved "an aircraft operating (dry) lease" under which the lessor is not the operator of the aircraft; upon taking possession, the lessee becomes responsible for its maintenance and insurance; and, after delivery, every part of the aircraft is "at the sole risk of the lessee". The Court accepted that it is "commonplace...in this market" for parties to agree on a structure whereby "a lessee elects...to accept an aircraft on lease and with it the risk of non-compliance with required delivery condition becoming apparent later."

Risk of undiscovered defects at delivery; allocation of risk

Further, the Court appreciated that, given the complexity of modern passenger aircraft, without "some contractual mechanism whereby compliance with the contractually required delivery condition can be conclusively determined, parties to leases...could face years of uncertainty as to the allocation of responsibility for defects of which neither of them were aware on delivery." While Lord Justice Tomlinson did not go so far as to hold that the particular defects of the subject aircraft were in a category of

"developing defects" which may be "for all intents and purposes unknowable at a given stage in the maintenance cycle", he made the general point in his leading judgment that "the parties know that neither can be absolutely certain of an aircraft's condition at the point at which the lessee is called upon to accept delivery and the on-going risk." The Court also noted that the specific lease contained extensive pre-acceptance terms allowing the lessee to inspect the aircraft and aircraft documents, to note discrepancies and to require rectification of any defects.

Construction of Lease and Certificate of Acceptance; meaning of "satisfactory"

Based on the above, on a true construction of the contract, the Certificate of Acceptance read with the conclusive proof provision in the lease itself confirmed compliance with the required delivery condition, as well as marking commencement of the lease term and the lessee's obligation to pay rent accordingly. The Court held that the "natural meaning" of the relevant terms was clear; the aircraft being "satisfactory" to the lessee under the conclusive proof clause meant that the aircraft complied with the required delivery condition. It did not matter that the Certificate of Acceptance did not exactly reflect the conclusive proof clause. Moreover, the conclusive proof clause had to be read with the rest of the contract of which it was part, specifically the Certificate of Acceptance to which it gave effect. The fact that such clause did not expressly refer to the specific delivery conditions schedule nor to an obligation on the lessor to deliver the aircraft in such condition did not prevent a "clear implication" that the aircraft had been examined and

inspected, found to be in the required delivery condition and had been accepted by the lessee accordingly.

It is worth noting that the subject lease included a positive obligation on the lessor to deliver the aircraft according to the delivery conditions schedule, as well as a more common objective condition precedent to delivery that the aircraft must comply with such schedule. Happily for ACG, the Court held that the combined effect of the conclusive proof clause and the Certificate of Acceptance was to provide, as a matter of contractual agreement, that the lessor had satisfied its relevant obligation and that such condition precedent had been met. Notwithstanding this, we would advise lessors and lenders to avoid assuming any such positive obligation and to focus on documenting the delivery condition of the aircraft as an objective condition precedent.

Conclusion

The Court of Appeal therefore found in favour of ACG on the contractual estoppel argument, rather than on the estoppel by representation case, holding that the High Court had reached "the right conclusion but for the wrong reason". This decision should be welcomed by operating lessors and lenders engaged in aircraft leasing. The allocation of risk in respect of the condition of the aircraft is a principal concern for both the lessor and the lessee and, as is usually the case in commercial contracts, parties value certainty above all. The contractual mechanism of placing the risk of the condition of the aircraft on the lessee at delivery by requiring execution of the Certificate of Acceptance at such time, coupled with a conclusive proof provision in the lease itself, is an

established device in aircraft lease agreements. Additionally, parties should ensure that the documentary terms are supported by clear inspection and delivery procedures.

1 [A Greek Tragedy: ACG v Olympic Airlines - English Court finds in favour of Operating Lessor; Airline bound by Certificate of Acceptance](#) – April 2012

2 [2013] EWCA Civ 369

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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