SUMMARY OF FACTS

In ACG Acquisition XX LLC v Olympic Airlines SA [2012] EWHC 1070 (Comm), the Commercial Court had to consider the circumstances in which the defective condition of an aircraft delivered to an airline under an operating lease might entitle the airline to refuse to pay rent for it and counterclaim for substantial damages.

The issue arose out of a lease agreement dated 30 May 2008 in which ACG Acquisition XX LLC ("ACG") agreed to lease to Olympic Airlines SA ("Olympic") a Boeing 737-300 aircraft for a term of five years.

ACG undertook in the lease agreement that the aircraft would be delivered to Olympic in an airworthy condition and would comply with the detailed requirements specified in the lease agreement as to the condition of the aircraft at delivery.

The aircraft was delivered to Olympic by ACG on 19 August 2008 and Olympic signed a certificate of acceptance for it which contained specific confirmations from Olympic that the aircraft had been irrevocably and unconditionally accepted by it, and that the aircraft complied in all respects with conditions required at delivery under the terms of the lease agreement, subject to certain specified discrepancies which were listed in an annexure to the certificate of acceptance.

The aircraft was operated by Olympic for approximately two weeks at which time it was grounded when broken cables that controlled the spoilers on one wing were found. Olympic had previously noted the cables as being defective during the course of early pre-delivery inspections carried out in April 2008, however this was not listed as a discrepancy on the certificate of acceptance.

While trying to repair the broken cables, Olympic discovered further numerous defects in the aircraft which led to the Greek Aviation Authority withdrawing the aircraft's certificate of airworthiness. Through further investigations
it also became clear that the cost of repairing the aircraft and rendering it airworthy would have exceeded the value of the aircraft.

Olympic refused to pay any rent and maintenance reserves to ACG on the basis that ACG had failed to perform its obligations in relation to the delivery condition of the aircraft and had instead delivered an aircraft in a serious state of lack of airworthiness.

ACG issued proceedings for summary judgment in the Commercial Court in London claiming recovery of unpaid rent and maintenance reserves and damages. Olympic issued counter-proceedings contending that it was not under any obligation to pay rent or maintenance reserves because there had been a total failure of consideration as the aircraft had not been delivered in an airworthy condition, and that the "hell or high water" clause in the lease agreement which, in summary, provided that Olympic's obligation to pay rent was absolute and unconditional irrespective of any defect in the airworthiness of the aircraft, should be subordinated to the overriding obligation of ACG to deliver the aircraft in the correct delivery condition. Olympic also argued, alternatively, that it was entitled to counterclaim substantial damages from ACG which would exceed any rental liability owed to ACG.

ACG contended that the certificate of acceptance that Olympic had signed at delivery, when read in conjunction with the following clause in the lease agreement, precluded Olympic from making any claim in respect of the delivery condition of the aircraft:

"DELIVERY BY LESSEE TO LESSOR OF THE CERTIFICATE OF ACCEPTANCE WILL BE CONCLUSIVE PROOF AS BETWEEN LESSOR AND LESSEE THAT LESSEE HAS EXAMINED AND INVESTIGATED THE AIRCRAFT, THAT THE AIRCRAFT AND THE AIRCRAFT DOCUMENTS ARE SATISFACTORY TO LESSEE AND THAT LESSEE HAS IRREVOCABLY AND UNCONDITIONALLY ACCEPTED THE AIRCRAFT FOR LEASE HEREUNDER WITHOUT ANY RESERVATIONS WHATSOEVER (EXCEPT FOR ANY DISCREPANCIES WHICH MAY BE NOTED IN THE CERTIFICATE OF ACCEPTANCE)."

The Commercial Court in its decision delivered on 21 April 2010 dismissed ACG's application for summary judgment and held that Olympic had established an arguable case.

DECISION

In its decision of 30 April 2012, the Commercial Court rejected Olympic's claims and held Olympic liable for all of the unpaid rent and maintenance reserves under the lease agreement, plus damages to cover the remainder of the originally contemplated lease term.

The Commercial Court confirmed that although the aircraft had not been in an airworthy condition or condition for safe operation at the time of its delivery to Olympic and, accordingly, ACG was in breach of the lease agreement in this respect, Olympic was nevertheless bound by its signed representation in the certificate of acceptance that the aircraft satisfied the delivery condition stipulated in the lease agreement.

Applying the English law principal of estoppel, the Commercial Court found: (i) that Olympic was prevented from subsequently asserting that the aircraft did not comply with the delivery conditions of the lease agreement because its act of signing the certificate of acceptance resulted in ACG relying on the confirmations contained in the certificate of acceptance and in turn confirming to the previous operator of the aircraft (Air Asia) that the redelivery conditions under ACG's lease agreement with Air Asia had been met; and (ii) that rent and maintenance reserves became due under the lease agreement once Olympic accepted and leased the aircraft from ACG.

Ancillary matters, including costs and permission to appeal to the Court of Appeal are to be dealt with at a later date.

PRACTICAL IMPLICATIONS

The judgment will be welcomed by aircraft lessors and financiers as emphasising the importance of commercial certainty in lease agreements and that acceptance certificates have the clear effect that they desire. Nevertheless the case should serve as a warning to all lessors and lessees to ensure that lease agreements are drafted carefully and clearly in order to ensure that no points are being left open to interpretation.

The case will not only be of interest to aircraft lessors and lessees, but also to industry participants engaged in the trading of used aircraft which are continuing to be operated. It is well known that full inspection of aircraft on lease is often difficult
to accomplish depending on the scope of inspection rights permitted under a lease agreement and any quiet enjoyment protections that an operator may have.

Lessors and sellers of aircraft should continue to ensure that certificates of acceptance include a confirmation to the effect that the delivery conditions stipulated in the corresponding lease agreement or sale agreement have been met so as to avoid any later disputes. They may also wish to consider removing any undertakings or covenants in their lease and sale agreements to deliver an aircraft in a particular condition and instead simply reference specific delivery conditions as a condition precedent.

Aircraft lessees and purchasers may wish to consider insisting on greater pre-delivery testing and inspection rights under lease and sale agreements and that these are rigidly adhered to. By the same token, lessors and sellers may wish to insist that any certificate of acceptance contain a statement from the lessee or purchaser confirming that the pre-agreed testing and inspection procedures have been followed or, if any deviations were made, that such deviations were acceptable.

The decision re-emphasises the risks of signing a certificate of acceptance if a lessee or purchaser has any reservations relating to the condition of the aircraft which it is leasing or purchasing and of simply listing snagging items. Moving forward it will be interesting to see whether purchasers and lessees attempt to introduce any concept of conditionality into acceptance certificates in those cases where they wish to proceed with the purchase or leasing of an aircraft and they have not been able to complete robust pre-delivery inspections and whether provisions in lease and sale agreements relating to latent defects will be the subject of increased scrutiny.

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