On 17 April 2013 the English Court of Appeal gave judgment in favour of Aviation Capital Group ("ACG") as respondent in an appeal filed by Olympic Airlines ("Olympic") against the English Commercial Court judgment (ACG Acquisition XX LLC v. Olympic Airlines S.A. (in special liquidation) [2012] EWHC 1070 (Comm)), that we reported on in April 2012.

This is a case which has attracted considerable attention in the multibillion dollar commercial aircraft leasing industry and has been closely followed by financiers, lessor and airlines alike. The unanimous Court of Appeal judgment has been welcomed by many participants in the industry as reinforcing confidence that contractual mechanisms for risk allocation in English law governed lease documentation by way of "hell or high water", "as is where is" or "conclusive proof" provisions will be interpreted and enforced by the English courts on a sensible, pragmatic and commercial basis and in line with how lessors and financiers had always intended them to operate.

By way of brief re-cap, the case concerned the delivery and acceptance (following pre-delivery inspections carried out by Olympic and the Greek aviation authority) of a 17 year old Boeing 737-800 aircraft on a five year lease from ACG to Olympic in August 2008. Following acceptance on lease by Olympic, the aircraft was grounded after two weeks in service when, amongst other defects, broken cables that controlled the spoilers on one wing were discovered and the airworthiness certificate for the aircraft was withdrawn.

At first instance the Commercial Court upheld ACG’s claim for unpaid rent and damages from Olympic on the basis that ACG was unaware of any defects in the aircraft when it delivered the aircraft to Olympic and that Olympic was bound by its signed representation in the certificate of acceptance stating that the aircraft satisfied the delivery condition stipulated in the lease agreement. It is important to note that the trial judge found in favour of ACG not on the basis of ACG’s argument of contractual estoppel, but rather on the basis of ACG’s alternative argument of estoppel by representation. In layman terms, the Commercial Court judgment result was reached on the basis that Olympic was prevented from subsequently contending that the aircraft was not in the correct delivery condition by virtue of the fact that Olympic had made a clear representation to ACG in the acceptance certificate that the aircraft was in the correct delivery condition, and that in making this representation Olympic intended that ACG rely on it and confirm to the previous lessee of the aircraft, Air Asia, that the aircraft was in the correct condition for redelivery to ACG.

The fact that ACG had relied to its detriment on Olympic's representation and accepted redelivery of the aircraft from Air Asia without requiring additional rectification of defects (not already identified and rectified by Air Asia during Olympic's inspection process) formed the trial judge's decision that Olympic's execution of the certificate of acceptance gave rise to estoppel by representation.
Olympic subsequently appealed the decision, contending that the trial judge was wrong to find that the provisions in the lease agreement and the statements in the certificate of acceptance which were insufficient to constitute contractual estoppel instead constituted estoppel by representation. ACG responded by again arguing their case on the basis of contractual estoppel.

The Court of Appeal upheld the decision of the trial judge that Olympic was bound by its acceptance of the aircraft. However, it went a significant step further and sided with ACG's contention of contractual estoppel, emphasising that the trial judge had arrived at the correct conclusion but for the wrong reason. The Court of Appeal found that the contractual clauses of the lease agreement were effective to transfer to Olympic the risk and responsibility of non-compliance with the required delivery condition. This meant that when Olympic signed the certificate of acceptance acknowledging that the aircraft was in the required condition and agreeing to take the aircraft on lease, it was bound by this acceptance and could not subsequently allege that the aircraft was not satisfactory to it.

The Court of Appeal judgement demonstrates that the English courts have a very clear grasp of the complex issues involved in aircraft operating leasing. In particular it was recognised that short of complete disassembly of an aircraft (which is impractical), neither party to an aircraft lease agreement can be absolutely certain of an aircraft's condition at the point at which a lessee is called upon to accept delivery. This aligns with the commonly held view of industry participants and has circumvented the creation of an uncertain position for lessors and lessees which might have necessitated vast amounts of time and great expense being spent on in-depth aircraft inspections in order to try to absolutely determine an aircraft's condition at delivery.

Another important aspect of the decision is the Court of Appeal's recognition that aircraft lessors are not typically operators of aircraft and that a lessor's role in an aircraft operating leasing transaction is to raise finance on the strength of which aircraft can be acquired and leased to airlines. It was also acknowledged that lessees, by the ongoing nature of their business as operators of aircraft, will typically arrange for and be responsible for the on-going maintenance of the aircraft and will have sufficient nexus with maintenance providers to ensure that an aircraft is in the required delivery condition and if it is not, to ensure that any technical issues with the aircraft are adequately addressed in an annex of “snagging” items to the certificate of acceptance or by way of a separate agreement detailing how the aircraft deviates from the required delivery condition.

The Court of Appeal judgment will also be welcomed by lessors and financiers as fully alleviating any concerns brought about by the very first decision in this case in the initial summary judgment of 2010 in which the judge found that Olympic had an arguable case that a lessee could bring a claim against a lessor for breach of an undertaking to deliver an aircraft in a particular condition in circumstances where the lessee had accepted the aircraft as being in the correct delivery condition. Industry participants will well remember the consternation caused when industry-standard "hell or high water", "as is where is" and "conclusive proof" provisions all came under scrutiny and were at risk of being deemed ineffective. Accordingly, the judgement should also be welcomed by airlines as setting clear parameters for risk allocation which will in turn facilitate efficient and cost effective financing and leasing of aircraft.

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