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Victory for Lessor in ACG20 v Olympic

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The long-running litigation in *ACG Acquisition XX v Olympic Airlines*, which caused considerable uncertainty after an earlier judgment suggested a lessee might claim damages for alleged breach of delivery condition despite having accepted an aircraft, or circumvent the agreed terms by alleging a "total failure of consideration" where an aircraft had to be grounded shortly after delivery, ended today in outright victory for our client, ACG.

England's Court of Appeal has ruled that the lessee, Olympic, was bound by the terms of its Certificate of Acceptance, and by the "conclusive proof" clause in the Lease Agreement: thus upholding all the Lessor's claims for unpaid rent and damages, and defeating the Lessee's counterclaims. Importantly, the Court reached that judgment purely on the basis of the contractual terms themselves: without needing also to consider (as the trial judge had done) equitable questions of reliance, detriment, and unconscionability.

The Court's unanimous ruling, handed down this afternoon, dispels the cloud of uncertainty which had first been raised at an early hearing in the case by Mr Justice Hamblen. He had considered that Olympic had an arguable case that it could claim damages despite having accepted the aircraft, and despite the range of clauses in the Lease Agreement designed to protect the Lessor in such circumstances. That finding was reached without an examination of the evidence, and having to take at face value a series of overstated allegations made by Olympic. Although at trial Mr Justice Teare rejected Olympic's case, he did not entirely dispel the uncertainty surrounding the effectiveness of the contractual terms, finding in ACG's favour but on the basis of equitable estoppel rather than the interpretation of the contractual documents alone.

The Court of Appeal, by contrast, approached the matter from a thoroughly practical, commercial perspective, firmly grounded in the reality of the aviation industry, and the aircraft leasing market in particular. They made comments such as the following:

- *it is commonplace for parties in this market to contract upon a basis … whereby a lessee elects whether or not to accept an aircraft … and with it the risk of non-compliance with the required delivery condition;*
- *it should not be thought that the achievement of such an objective is unlikely to have been the parties' intention" (as Olympic had alleged);*
- *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. That commercial parties should in such a situation strive to achieve finality in relation to the allocation of risk and responsibility is commonplace;*
- *in the absence of some contractual mechanism whereby compliance with the contractually required delivery condition can be conclusively determined, parties to leases such as this could face years of uncertainty as to the allocation of responsibility for defects of which neither of them were aware on delivery; and*

- *certainty and speed are the essential requirements for the orderly conduct of business affairs.*

On that basis, the Court accepted that the "conclusive proof" clause, together with the Certificate of Acceptance, "provide[d] a contractually agreed mechanism whereby it can be determined whether the condition of the aircraft on delivery is to be treated as compliant … the lessor is conclusively agreed to have satisfied both its positive obligation to deliver the aircraft … and the condition precedent". The Court dismissed Olympic's case as "*a most unlikely and uncommercial construction*".

The Court also confirmed that the Hamblen judgment – the initial cause of consternation in the industry – "*decided nothing more than that Olympic had at least a real prospect of success*" and that "*insofar as the judge in the course of reaching that conclusion expressed [different] views concerning the proper construction of the contractual provisions … [we] respectfully disagree*". For good measure, the Court reiterated that caution should be taken in drawing parallels between shipping and aircraft leasing: a reassuring point given the trial judge's willingness to read across from one context to the other.

Particularly helpful is the Court's additional finding that, even had there not been a "conclusive proof" clause, the Lessor would still have won, purely on the basis that (1) the Certificate of Acceptance contained a statement that the Aircraft was in the delivery condition, and (2) as is commonly the case, the Lessee's representations and warranties included a provision that the Operative Documents (which included the Certificate of Acceptance) were binding. Such a warranty is common, and can provide protection even in leases which do not contain a "conclusive proof" clause.

The industry can take considerable comfort from the Court of Appeal's judgment. In addition to upholding the plain meaning of core contractual terms, the Court in this case has sent a powerful message by recognising the commercial norms and rationales which underlie those terms. This clear decision by three senior judges should give future judges in the lower courts considerably greater confidence in awarding summary judgment to lessors seeking to enforce the terms of their Leases, thus sparing them lengthy and costly proceedings.

The Simmons & Simmons team representing ACG Acquisition XX LLC comprised partner Nick Benwell, managing associate Stephen Moses, and associates Sharley Willetts and Caroline Close-Smith, together with asset finance partner Mark Moody.

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