

# ClientAlert

## Asset Finance

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### The English Court of Appeal confirms the effectiveness of Certificates of Acceptance in aircraft leasing transactions

The Court of Appeal's recent decision in *Olympic Airlines SA (in special liquidation) v ACG Acquisition XX LLC* [2013] EWCA Civ 369 gives welcome comfort to lessors that properly drafted Certificates of Acceptance will provide an effective defence to claims that a leased aircraft did not meet the contractually agreed specifications.

#### Background

In 2008 ACG, a major aircraft leasing company, leased a Boeing 737 to Olympic Airlines, the now-liquidated Greek flag carrier. As is usual industry practice, the aircraft was delivered to Olympic from the previous lessee following maintenance checks. Once the aircraft entered service it became clear that it had numerous defects and its airworthiness certificate was withdrawn. Olympic stopped making payments on the lease and ACG claimed against Olympic in the English courts. Olympic's response was to counter-claim against ACG.

The aircraft had been inspected by Olympic before delivery and it had executed a Certificate of Acceptance (a "**Certificate**") confirming that:

"the Lease Property complied in all respects with the condition required at delivery under Section 4.2 and Schedule 2 of the Agreement..."

Such Certificates are almost universal in aircraft leasing transactions and, as is also standard practice, the lease agreement provided that:

"delivery 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 accepted the aircraft for lease hereunder without any reservations whatsoever ..."

#### The proceedings

The purpose of these market-standard provisions is to ensure that the lessee takes an aircraft on an "as is where is" basis – it cannot later claim that the aircraft failed to meet the required contractual standard. There was widespread consternation, therefore, when Mr. Justice Hamblen suggested in 2010 that they might not be effective in cases of serious breach. Fortunately, the Courts have now re-affirmed the market view of these provisions.



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First, in the High Court, Mr. Justice Teare held that by signing the Certificate, Olympic had represented that the condition of the aircraft met the requirements of the lease. It would be inequitable to allow Olympic to go back on this representation and it was estopped from doing so. ACG was therefore entitled to recover damages from Olympic.

The Court of Appeal has now gone a step further. It upheld Mr. Justice Teare's decision but not on the same basis of an "estoppel by representation." Instead, it took a more commercial approach, based on the plain wording of the contract. As Lord Justice Tomlinson observed, the natural meaning of the provisions was clear – Olympic had contractually confirmed that the aircraft met the required standard (even if in reality it fell short of that standard); its signature of the Certificate amounted to conclusive proof. ACG's claim against Olympic therefore again succeeded.

The Court took this view even though the lease imposed a positive obligation upon ACG to ensure the aircraft met the required specifications (rather than simply making compliance with the specifications a condition precedent). The Court's view was that the Certificate amounted to conclusive proof, not just that the aircraft met the specification, but that ACG had met this obligation.

As Lord Justice Tomlinson emphasised, the commercial value of these provisions is that they allow parties to allocate risk between the lessor and the lessee; particularly significant in aircraft leases, where there is a real risk of defects not being picked up on inspection. The Court's willingness to uphold bargains designed to finally allocate such risks is unsurprising but welcome. The judgment also showed a clear understanding of the nuances of the aircraft leasing industry, acknowledging the limited involvement of lessors in the maintenance and delivery of aircraft.

## Conclusions

- The market view of Certificates is confirmed – accompanied by a properly drafted lease agreement, an executed Certificate serves as conclusive proof that the contractual specification for an aircraft has been met.
- Care should still be taken to ensure that the Certificate is brought to the lessee's attention and executed as a separate document.
- Despite this decision, lessors should avoid agreeing clauses which impose a positive obligation upon them to ensure that the specifications are met.
- This decision confirms the importance for lessees of conducting comprehensive inspections before signing a Certificate.