



PLAYING THE SLOTS: COURT OF APPEAL HOLDS THAT DEFUNCT AIRLINE MONARCH IS STILL ENTITLED TO VALUABLE TAKEOFF AND LANDING SLOTS

Last month we reported¹ that the Divisional Court of the High Court had found that Monarch Airlines, in administration, was no longer entitled to have airport take-off and landing slots allocated to it because it had ceased to be an “air carrier” for the purposes of the EU Slots Regulation.

The High Court had also looked more broadly at the purposes of the EU Slots Regulation (EEC No. 95/93), finding that “It is concerned with the allocation of the use of airport infrastructure for take-off and landing. The purpose is to facilitate the operation of air transport services.” Because “Monarch had ceased to be a functioning airline” the High

¹ <http://www.hfw.com/Monarch-Airlines-English-Court-rejects-slot-allocation-claim-November-2017>

Court held that allocating slots to it would run contrary to the purposes of the Slots Regulation.

We commented that, in our view, allocating slots to a non-functioning airline for the purpose of sale would take matters beyond what the regulatory framework permitted. However the Court of Appeal has now overturned the decision of the High Court. The slots have been allocated and sold, realising a rumoured £60 million for Monarch's creditors. What was the rationale behind this somewhat surprising reversal of fortune?

No guidance in the Regulation

The Court of Appeal decision is based primarily on an analysis of the language of the Slots Regulation, and in particular the meaning of "air carrier" and "air transport undertaking." The body responsible for the allocation of slots at, among other UK airports, Luton and Gatwick is Airport Coordination Limited (ACL). ACL argued that Monarch in administration had ceased to be "an air transport undertaking" and was therefore no longer an "air carrier". ACL conceded that a **temporary** cessation by an airline of operations would not mean that it had ceased to be an air transport undertaking. Relying on this, the Court of Appeal found that "If the reference in the definition of "air carrier" to "air transport" does not necessarily require the undertaking in question to be actively engaged in air transport services at the relevant time, it is hard to know quite how it should be understood on ACL's case and also find a basis for such an interpretation in the wording of the Slots Regulation."

While the High Court had considered that an undertaking that "has ceased to operate air transport services and has no realistic prospect of resuming them" is not an "air carrier", the Court of Appeal found "it is not clear where it [the High Court] would draw the line between such an undertaking and one that is no more than temporarily unable to operate air transport services." It found "What matters most, perhaps, is that the wording of the Slots Regulation provides no guidance on where any line should be drawn. Had it been intended that there should be such a line, the Slots Regulation could be expected to have said something about it, but it does not;"

ACL has a limited function

The Court of Appeal decision is also grounded on the Court's view of the scope of ACL's function, contrasted with that of the UK Licensing Authority, the Civil Aviation Authority (CAA). Under the EU Licensing Regulation (EC No. 1008/2008) the "licensing authority" is competent to grant, suspend and revoke a Community air carrier's operating licence. This does indirectly influence the slot allocation process because, under the Slots Regulation, holding a valid operating licence is a pre-requisite to being allocated slots. Monarch went into administration on 1 October and the CAA notified the airline the following day that it was proposing to revoke or suspend its operating licence. However a licence cannot be revoked definitively without giving the holder the chance to contest the decision at a hearing. ACL had to allocate the slots on 26 October but the licence revocation hearing was set for two weeks later, on 8 November. The CAA did subsequently decide to revoke the licence but, crucially, on D-day for the slot allocation Monarch still held a valid licence.

The Court of Appeal relied on the judgment of *Maurice Kay J in R v Airport Co-ordination Ltd. Ex p. The States of Guernsey Transport Board* [1999] EU LR 745 who found that:

"[ACL] has a very limited remit, consistent with the need for speed and flexibility which are essential in this context. The Regulation simply does not establish the co-ordinator as the kind of investigatory or regulatory body to which [counsel for the Board] refers..." and described the imposition on ACL of a duty to investigate each slot exchange transaction as "both unworkable and undesirable".

Endorsing those findings the Court of Appeal reasoned:

"There is a compelling case for saying that matters relating to an undertaking's financial circumstances and ability to continue in business are best left to, and intended to be left to, the licensing process. Approaching matters in that way achieves certainty, avoids the need for a coordinator to undertake a potentially difficult assessment of an undertaking's position and prospects, and avoids the

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danger of a coordinator's work cutting across that of the licensing authority."

Commentary

ACL confirmed that they would not appeal the Court of Appeal decision and duly allocated the Gatwick and Luton slots to Monarch. They were almost immediately snapped up by British Airways and Hungarian low-cost carrier Wizz Air. However ACL has expressed concern that "The fact that a defunct airline is able to obtain and trade slots sets a worrying precedent for the future" adding that "The wider implications of the judgment will need to be considered by those responsible for the laws and guidelines which underpin ACL's jurisdiction - the International Air Transport Association, the European Commission and the Department for Transport, among others."

There is no doubt that this decision severely impacts ACL's authority when a carrier collapses. Legislators must take steps to address the bigger issue of whether or not it should be possible for slots to be allocated to grounded airlines whose only use for them is to convert them into cash. In the meantime, it seems that future disputes over the allocation of slots in such circumstances are likely to involve scrutiny of the decisions of the CAA rather than ACL.

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