

## CAPE TOWN CONVENTION LEGAL ACTIVITY ANALYSIS<sup>1</sup>

Produced by the Legal Advisory Panel to the Aviation Working Group

Reference: Ireland, case 4 [2017]		
Date of Judgment:	15 May 2017	
Case:	Aviation Capital Group LLC –v- Aviareto Limited (unreported)	
Relevant CTC/Protocol (IR Rules & Procedures)	Article 25(4); Article 44	IR Rules and Procedures  None
Relevant CTC Jurisdictions	Ireland, USA	
CTC Facts, Conclusions and Analysis		
<p><b>I. <u>Facts:</u></b></p> <p>1. The Applicant, a US company, was the beneficial owner of a Boeing 737-8Q8 aircraft and two CFM56-7B26 aircraft engines (the <b>Aircraft</b>) which it had acquired in 2005 subject to a lease to XL Airways UK Limited (<b>XL</b>). In November 2007, XL had subleased the Aircraft to TEM Enterprises (<b>TEM</b>) and had, with the consent of TEM as “debtor” within the meaning of the CTC, registered the international interests created by the sublease on the International Registry in respect of the airframe and each of the engines of the Aircraft. When the sublease expired in November 2008, no steps were taken by XL as the right to discharge holder to discharge the international interests. In June 2014, XL was dissolved in a creditors voluntary winding up and had ceased to exist. In 2017, the Applicant was party to an agreement to sell the Aircraft. The Purchaser required the international interests in respect of the sublease to be discharged.</p> <p>2. Not being the "debtor" within the meaning of the CTC, the Applicant had no express entitlement under the provisions of the CTC to make an Article 25(4) demand on XL to remove the registrations or, in circumstances where XL had ceased to exist, to bring an application to the Irish High Court (the <b>Court</b>)</p>		

<sup>1</sup> Unless otherwise indicated, Articles references in Arabic numerals are to those the Convention on International Interests in Mobile Equipment (**Convention**), and in Roman numerals are to those on the Protocol on Matters Specific to Aircraft Objects (**Protocol**). The Convention, as modified by the Protocol, is referred to as **CTC**.

under the provisions of Article 44(2) seeking an order directing the Registrar to discharge the registrations, although the Applicant did make a demand on XL to discharge the registrations.

3. There was no order of any court having jurisdiction under CTC in relation to the discharge of the registration, so the Court's jurisdiction under Article 44(3) could not be relied upon.
4. The Applicant nonetheless brought an application requesting that the Court take a broad interpretation of Article 44(1) to accept jurisdiction to assist the Applicant by making Orders pursuant to Article 44(1) directing the Respondent to remove the registrations of the international interests in respect of the airframe and two engines.
5. The Applicant argued that the registration of the international interests in respect of the sublease were incorrect and misleading as they should have been discharged by XL (as the right to discharge holder) when the sublease expired but XL had failed to discharge them.

The Applicant further argued that the continued presence of the international interests on the International Registry had caused, and was continuing to cause, active prejudice to the Applicant and, in particular, may prevent the sale of the Aircraft if the international interests were not removed in advance of the closing date for the sale.

The Applicant argued that, in circumstances where (i) the incorrect and misleading registration was causing active prejudice to the Applicant and threatened to cause the loss of the sale of the Aircraft; (ii) the continued presence of the incorrect and misleading registration of the international interests in relation to the Aircraft was preventing the Applicant from dealing with the Aircraft; and (iii) the Applicant would suffer serious prejudice unless the situation was remedied quickly, there was an appropriate case for the Court to exercise its jurisdiction pursuant to Article 44(1) and/or its inherent jurisdiction to rectify the registration of the international interests.

The Applicant's arguments were made in affidavits submitted with the application for the Orders. The Judge had read the application papers in advance. The Applicant was asked to make only limited oral submissions to the Court.

6. The facts were not disputed.
7. The Applicant sought the co-operation and consent of the Respondent in making its application.
8. The Respondent did not make any objection to the application for the Orders directing it to discharge the registrations.

## **II. Conclusions:**

9. The Court, having satisfied itself that the registrations of the international interests could not otherwise be discharged save by the Respondent, made the Orders directing the Respondent to discharge the registrations pursuant to Article 44(1) in circumstances where there was no objection to the making of such an Order by the Respondent.

10. No formal written judgment was handed down by the Court.

11. No order was made with regard to costs.

### **III. Analysis:**

#### **[Timing of Case]**

12. The case was resolved within 5 working days.

This decision, and the speed with which it was made, demonstrates that the Court appreciates the commercial realities of the aviation industry and is prepared to be flexible in giving effect to the objective of the CTC to facilitate efficient aircraft financing and leasing.

#### **[Court's jurisdiction]**

13. The Court interpreted its jurisdiction under Article 44(1) broadly to allow it to make an Order notwithstanding that neither the debtor nor the creditor in respect of the international interests were a party to the application and Article 25 did not apply.

14. The Court did not make any express statement with regard to the scope of its jurisdiction. Its acceptance of its jurisdiction under Article 44(1) was implicit in the making of the Orders to discharge the registrations.

15. The case differs from each of Ireland case 1 [2012], Ireland case 2 [2013] and Ireland case 3 [2015]. In those cases, the registrations of international interests were not valid registrations. This case was the first case where the Court was asked to assume jurisdiction to make an Order under Article 44(1) in circumstances where:

(i) the registration of the international interests were valid registrations of validly created international interests and as such were not incorrect and/or ought not to have been made but which, following expiration of the underlying sublease, had become incorrect and misleading to third parties obtaining a priority search certificate in relation to the Aircraft; and

(ii) there was no order of a court of competent jurisdiction to procure the discharge of the registration with which a party had not complied.

While the Judge did not expressly state the basis of his interpretation of Article 44(1), it was clear that the Judge accepted the arguments put forward by the Applicant and, on that basis, was prepared to take a broad interpretation of Article 44(1) to accept jurisdiction to make the Orders directing the Respondent to discharge the registrations. The fact that the Applicant had engaged positively with the Respondent in advance of bringing the application, and that the Respondent had not objected to the Orders, is believed to have been persuasive in this regard.

16. The case established a precedent for the Court to take jurisdiction to make an Order under Article 44(1) in circumstances where (1) there is no dispute on facts as to the expiration of a registered international interest (2) the party with the right to effect discharge of the obsolete registration under the CTC (in this case, being XL) either cannot or will not exercise those rights and (3) the continued presence of the obsolete filings negatively impact the ability of the owner to deal with the Aircraft and/or has a negative impact on value.

17. The acceptance of jurisdiction under Article 44(1) in circumstances where Article 25 had no application to some extent closes off a gap in Article 25. Article 25 does not create an obligation to discharge an international interest created by a lease once the lease expires. Article 25(1) is limited to security interests, registered non-consensual rights or interests and title reservation agreements; Article 25(2) is limited to prospective interests; and Article 25(3) is limited to national interests. Accordingly, in order to effect discharge of a registration of an international interest created by a lease, it appears that only Article 25(4) can be relied on. Article 25(4) refers broadly to a "registration" which "ought not to have been made or is incorrect". Registration of a valid lease creating an international interest does not constitute a registration which "ought not to have been made" and, at the time of registration, is not "incorrect". The Court implicitly accepted the argument that the registered international interests created by the sublease to TEM became "incorrect" when the sublease expired. Article 25(4) gives a debtor standing to make a demand for discharge of a registration of an expired lease. However, a debtor under an expired lease (in this case, TEM) has no incentive to make such a demand. The Court made the Order notwithstanding that TEM had not made a demand.
18. The precedent was followed in Ireland case 5 [2017].