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BRIEFING

IS AN INSOLVENT AIR CARRIER ENTITLED TO ALLOCATION OF LANDING SLOTS?

JANUARY 2018

- COURT OF APPEAL HOLDS THAT MONARCH AIRLINES IS ENTITLED TO ALLOCATION OF TAKE-OFF AND LANDING SLOTS
- AIR TRANSPORT UNDERTAKING WILL BE "AIR CARRIER" FOR PURPOSES OF SLOTS REGULATION UNTIL ITS OPERATING LICENSE IS REVOKED

"MONARCH AIRLINES WAS PLACED INTO ADMINISTRATION BY AN ORDER OF THE COURT ON 2 OCTOBER 2017, TRIGGERING BRITAIN'S BIGGEST PEACETIME REPATRIATION OF THOUSANDS OF PASSENGERS FROM ACROSS EUROPE BY THE CIVIL AVIATION AUTHORITY."

The Court of Appeal has decided (overturning a recent High Court decision) that the insolvent Monarch Airlines ("Monarch") is in fact still an "air carrier" for the purpose of Article 2(f) of Council Regulation (EEC) No. 95/93 (the "Slots Regulation") and it should, therefore, be entitled to be allocated take-off and landing slots at UK airports for the summer season 2018 (the "Summer 2018 slots")[1].

Background to the High Court Decision

The claimant, Monarch Airlines, was placed into administration by an order of the court on 2 October 2017, triggering Britain's biggest peacetime repatriation of thousands of passengers from across Europe by the Civil Aviation Authority ("CAA"). At the same time, the CAA commenced the process to revoke or suspend Monarch's operating licence as part of the protocol which is followed in the event of an airline's inability to meet the necessary EU criteria in order to provide air services. The CAA also provisionally suspended Monarch's air operator's certificate.

Pursuant to a timetable laid down by the International Air Transport Association ("IATA"), the defendant slot co-ordinator, Airport Co-ordination Ltd ("ACL") was due to allocate Monarch slots for take-offs and landings at Luton and Gatwick airports (gained through historical precedence) for the Summer 2018 season by 26 October 2017. Although Monarch no longer intended to use the slots for actual operations, it contended that it should be allocated the slots it had requested in order to exchange them with other airlines for other, less valuable slots and receive a payment reflecting

[1] *R on the application of Monarch Airlines Ltd (In administration) v Airport Co-ordination Ltd* [2017] EWCA Civ 1892

the difference in worth. Monarch's administrators, KPMG, believed that this process of exchange would allow them to effect the proper realisation of Monarch's assets and achieve the most positive result for creditors.

"ACL CONSIDERED THAT IT WAS UNDER NO DUTY TO ALLOCATE SLOTS TO A DEFUNCT AIRLINE, AND THAT ITS DECISION TO DEFER THE ALLOCATION OF SLOTS TO MONARCH WAS A LEGITIMATE RESPONSE TO THE SITUATION."

ACL considered that it was under no duty to allocate slots to a defunct airline, and that its decision to defer the allocation of slots to Monarch was a legitimate response to the situation given that it was not clear whether Monarch, as an insolvent entity, would resume services. ACL also submitted that it did not have an obligation to allocate slots to facilitate any agreement that Monarch might have with other airlines to exchange its valuable slots for those which are less commercially desirable. It therefore decided to defer the decision to allocate slots to Monarch until after the outcome of the CAA's regulatory process.

Proceedings were then commenced by the administrators of Monarch for judicial review of ACL's decision.

Manchester Airports Group Plc ("MAG") acted as an intervener pursuant to CPR 54.17. It submitted evidence and made written and oral submissions which opposed ACL's decision to defer the allocation of slots to Monarch, yet were neutral as to whether or not the Summer 2018 slots should be allocated to Monarch or placed in the slot pool.

The key issues for the High Court concerned whether ACL, as a slot co-ordinator:

i. had a duty to allocate the Summer 2018 slots to Monarch; and
ii. was entitled to defer the decision to allocate the slots until after the conclusion of the CAA's proposal to revoke Monarch's operating licence.

The Court found that under Article 2(f) of the Slots Regulation, slots are to be allocated to an "air carrier". It decided that the definition of an "air carrier" under this article means: an 'air transport undertaking' which holds a valid operating licence.

Due to its lack of aircraft and the fact that it only had three pilots at most, Monarch could not prove that it was a valid, operating air transport undertaking for the purpose of Article 2(f) of the Slots Regulation. In addition, the threat of revocation of its operating licence by the CAA cast serious doubt over Monarch's ability to demonstrate that it held a valid operating licence.

Furthermore, the administrators of Monarch had conceded in their dealings with the CAA that there was only a remote possibility of Monarch emerging as a going concern or resuming the operation of air services. As a result, the Court reached the conclusion that it was exceedingly unlikely that Monarch would be able to provide air transport services again and, therefore, it could no longer be considered to be an "air carrier" within the definition of Article 2 of the Regulation. As for the administration, its purpose was to achieve a better result for the respective creditors of the companies within the Monarch Group and to realise property in order to make a distribution to one or more of the secured creditors. It was never suggested that the administration of the airline would result in it being rescued as a going concern.

The High Court held, therefore, that ACL was under no obligation to allocate slots to Monarch. It was emphasised that the focus of the allocation of slots under the Slots Regulation should be on functioning airlines, capable of providing air transport services, not defunct airlines.

Deferral of the decision to allocate slots

As to whether ACL possessed the power to defer the decision to allocate slots, both Monarch and MAG rejected the position that ACL could defer the allocation of slots, arguing that there was nothing in the Slots Regulation to permit this flexibility to postpone the allocation until after the outcome of process to revoke Monarch's licence. ACL argued that this course of action was in fact inherent in the Slots Regulation and was not unlawful. It submitted that in any event, given the grave financial circumstances of Monarch and the dwindling prospects of it operating once more as a going concern, if it was required to make a decision as to the allocation of the Summer 2018 slots, it would place them in the slot pool rather than allocating them to Monarch.

In light of these arguments, the Court ruled that ACL could no longer justify its decision to defer allocation of the Summer 2018 slots until the outcome of the CAA's regulatory process. Monarch had ceased to operate as an air transport undertaking on 2 October 2017 and there was no prospect of it ever resuming business operations. Therefore, the Court ruled that ACL had all the information it needed to make its decision on the allocation of slots before the IATA Slot Conference scheduled for 7-10 November 2017. Although ACL was allowed a certain degree of flexibility as to the timing for slot allocation, such flexibility that would entail a delay until the outcome of the CAA's proposal was not permitted.

Consequently, it was held that the Summer 2018 slots were to be placed in the slot pool. ACL had no duty to issue slots to a defunct airline that was not an "air carrier" and could no longer reserve its decision on their allocation until a later date.

Monarch appealed to the Court of Appeal.

Court of Appeal Decision

Much of the Court of Appeal decision centred on the definition of "air carrier". Although the Court accepted that there was little prospect of Monarch resuming air transport services and was, in effect, a "failed air transport undertaking", contrary to the earlier decision of the High Court, LJ Newey found that this did not stop the airline being an "air transport undertaking", thus satisfying the first element of the definition of "air carrier". Moreover, the Court held that the role of an airport co-ordinator should not overlap with that of a licensing authority, and therefore the potential revocation of the operating licence should not have relevance to the definition of "air carrier". As such, it was held that Monarch was still an "air carrier" unless and until its operating licence was revoked by the CAA. Therefore, it was entitled to be allocated slots.

"IT WAS HELD THAT MONARCH WAS STILL AN "AIR CARRIER" UNLESS AND UNTIL ITS OPERATING LICENCE WAS REVOKED BY THE CAA. THEREFORE, IT WAS ENTITLED TO BE ALLOCATED SLOTS."

The Court made the decision to grant Monarch the relief it originally sought in its claim form. Given that the slots were considered to be valuable assets to be used to achieve a better result for its creditors, the Court considered it important not to deny Monarch this relief. To this end, a declaration was given that ACL may not lawfully delay their allocation and a mandatory order was issued which required ACL to immediately allocate the slots in question to Monarch.

"THIS CASE IS THE FIRST OF ITS KIND TO DETERMINE WHETHER OR NOT A DEFUNCT AIRLINE IS ENTITLED TO BE ALLOCATED SLOTS."

Comment

This case is the first of its kind to determine whether or not a defunct airline is entitled to be allocated slots. Provided that an air transport undertaking is still held to be an "air carrier", it is likely that it will not be denied the allocation of slots – even if it does not necessarily intend to use them but instead wishes to exchange them for valuable consideration. This will be so even if the undertaking is considered a 'failed' air transport undertaking. Indeed, the Court of Appeal's decision to grant Monarch the relief it sought upholds the anti-deprivation principle that an insolvent entity should not have assets removed from it.

This case reflects a strict approach to evaluating the role of the slot co-ordinator by emphasising that it should not act as an investigator and it should not let its obligations overlap with those of a licensing authority. The financial circumstances of an undertaking are a matter relevant to decisions as to the revocation of an operating licence and should not be a concern for the airport slot co-ordinator. As such, the threat of revocation of the operating licence should not affect the ability of an airline to be considered an "air carrier" for the purposes of the Slots Regulation. It is only when a licensing authority has made the decision to revoke the licence that an entity will have difficulty in maintaining that it is an "air carrier" and thus entitled to be allocated slots.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with one of the authors below or your regular contact at Watson Farley & Williams.

ANDREW HUTCHEON
Partner
London

+44 20 7814 8049
ahutcheon@wfw.com

REX ROSALES
Partner
London

+44 20 7863 8975
rrosales@wfw.com

STEPHEN PARKER
Partner
London

+44 20 7863 8908
sparker@wfw.com

JEREMY ROBINSON
Partner
London

+44 20 3036 9800
jrobinson@wfw.com

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