

**BLUE SKY ONE LTD & ORS V BLUE AIRWAYS LLC  
PK AIRFINANCE US INC V BLUE SKY TWO LTD & ORS**

**Judgment of the Hon. Mr Justice Beatson Commercial Court London 21 December 2009  
[2009] EWHC 3314 (Comm)**

### Importance of the case

This case is of interest to aviation and commercial litigation lawyers. The dispute arose out of a series of transactions that made Boeing 747-400 aircraft available to an Iranian airline under a structure which was aimed at avoiding breach of United States sanctions against Iran.

The issues which the Court considered included:

- sham in the context of commercial contracts;
- whether oral agreements varied or supplemented written agreements;
- whether there were trusts of the aircraft for the benefit of the Iranian airline;
- the validity of back-dated bills of sale; and remedies under s.3 of the Torts (Interference with Goods) Act 1977 for conversion of aircraft, in particular whether the Court would order delivery up of commercial chattels.

### Factual background

The claimants in the first action and the first third party (together Balli) claimed delivery up of three Boeing 747-400 aircraft and damages for breach of contract, conversion and unlawful interference with property from the second defendant in the first action (Mahan), a private Iranian airline, and the third defendant in the first action (FZE), a UAE company controlled by Mahan.

The parties had entered into a series of transactions by which FZE lent money to Balli so that it could purchase three US manufactured aircraft through special purpose companies. Balli leased the aircraft to the first defendant an Armenian airline (BAW), which then chartered them to Mahan. Balli were to make loan repayments solely from the lease rentals payable by BAW.

Balli granted Mahan an option allowing Mahan to buy the shares in the claimant companies but only if and when US sanctions, which prevented the sale or lease of American aircraft to Iranian individuals or companies, allowed.

The option was on terms that the aircraft were not to be sold, leased, pledged during the currency of the option without Mahan's consent.

At Mahan's request, Balli provided bills of sale for each aircraft that were to be held on trust by a third party trustee (T) but they were only to be executed in accordance with a further written agreement when US sanctions permitted.

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When the leases expired instead of returning the aircraft to Balli the aircraft were handed over to Mahan/FZE. Mahan also forged the bills of sale that were wrongly handed over to them by T and used the forged bills of sale to de-register the aircraft from the Armenian Register. Mahan eventually re-registered the aircraft in Iran and operated them in breach of US sanctions.

When Balli sued for the return of their aircraft BAW and Mahan /FZE alleged that the leases were all sham and that Balli had orally agreed to hold them on trust for Mahan/FZE and/or that because they had advanced the purchase money the aircraft were held on resulting trust for Mahan/FZE. Balli denied any express or resulting trust and relied on a series of carefully structured agreements by which they were to be legal and beneficial owners and that none of the conditions for exercise of the option had been satisfied and that no title could be transferred by the use of forged bills of sale. Balli sued for delivery up of the aircraft.

### **Judgment**

The Court gave judgment in favour of the claimants on their claims and held as follows:

- None of the agreements in question were sham and the fact that parties departed from some of their terms did not render them sham.
- Mahan/FZE had not proved the existence of any oral agreement supplementing the written agreements – such alleged oral agreements would have breached US sanctions which Balli never intended to breach.
- The fact that a legal owner was restricted in his ability to use property as he wished did not give rise to a trust, particularly where the restrictions were found in contract.
- The prohibition on selling, leasing, pledging or mortgaging the aircraft without Mahan 's consent did not make Balli Mahan 's trustee or give Mahan an equitable proprietary interest in either the aircraft or the shares of the claimants. The option gave Mahan a contractual entitlement in due course if the conditions for its exercise were satisfied, which they were not.
- Further, there was no purchase money resulting trust as a result of the loan from FZE.
- The option agreement stated that Balli was the legal and beneficial owner of the shares in the claimant companies, and that Mahan's interest was protected by the contractual right under the option agreement. If the agreement had been that Balli was to hold the aircraft or the shares on trust for Mahan it would not have needed an option.
- The bills of sale had not been executed in accordance with their provisions, and title to the aircraft had not been transferred to Mahan /FZE by using forged bills of sale.

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- The appropriation and continued use of the aircraft by Mahan had been wrongful. It was deliberate conduct inconsistent with the rights of the claimant companies which owned the aircraft and it excluded Balli from possessing and using them.
- In some circumstances a contract concerning a ship or aircraft would be specifically enforceable, but that was not an invariable position. In deciding on the remedy for wrongful interference the primary principle was that delivery up under s.3(2)(a) of the Act would not be ordered if damages were adequate (*Kuwait Airways Corp v Iraqi Airways Co (No6)* (2002) UKHL 19, (2002) 2 AC 883). The first question to consider was whether the goods were ordinary articles of commerce (*Tanks & Vessels Industries Ltd v Devon Cider Co Ltd* (2009) EWHC 1360 (Ch)). Ordinary articles of commerce, even complex machinery, ships and aircraft, might be ordered to be delivered up even if they were not physically unique, but they would be considered "commercially unique" if buying or otherwise obtaining substitutes would be difficult or would be so delayed that the claimant's business would be seriously interrupted. Accordingly delivery up would be ordered under s.3(2)(b) with Mahan having the option to pay damages instead. The assessment of damages was to be decided in a further trial.

***Philip Shepherd QC and Bajul Shah acted for the claimants  
XXIV Old Buildings, Lincoln's Inn, February 2010***

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