

CASENOTE - *Bowenbrae Pty Ltd & Nigel Arnot v Flying Fighter Maintenance and Restoration Pty Ltd* [2009] QDC 91

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by Glenn Biggs, Senior Associate

The decision of *Bowenbrae Pty Ltd & Nigel Arnot v Flying Fighter Maintenance and Restoration Pty Ltd* [2009] QDC 91 handed down on 17 April 2009 examined the operation of a possessory lien over an aircraft.

Facts

The plaintiffs made an application for summary judgement in the District Court of Queensland for the return of an aircraft from the possession of the defendant. The defendant claimed to be exercising a possessory lien over the aircraft for labour undertaken for which the defendant had not been paid.

The first and second plaintiffs jointly purchased the aircraft in 1999 with a view to restoring it. Prior to 5 January 2003, the aircraft was moved to the defendant's premises, presumably as the second plaintiff, Mr Arnot, was at times a director of the defendant and provided managerial services to the defendant company. Mr Arnot initially worked on the aircraft himself with the aid of volunteers and claimed that none of the defendant's staff assisted with the restoration. The defendant's records however revealed that the aircraft was allocated a job number and numerous invoices were rendered which, excluding two invoices for the supply and installation of headsets and a radio, were unpaid. Of contention were invoices:

- which appeared to be duplicated;
- where the amount of time worked on the aircraft was not specified; and
- invoices regarding hangarage of the aircraft during the time the defendant claimed to be exercising the lien.

The plaintiffs sought possession of the aircraft on the basis the defendant was not entitled to a lien, or in the

alternative, an interlocutory order that the aircraft be returned to the plaintiffs in return for a security order. The defendant counterclaimed seeking a declaration that it was entitled to a possessory lien over the aircraft until payment of all monies owing.

Decision

His Honour District Court Judge McGill dealt firstly with the invoices issued for hangarage during the period the defendant was claiming a lien over the aircraft. As Judge McGill held that a party purporting to exercise a lien over property cannot charge for storage, the defendant was therefore not entitled to retain possession of the aircraft pending payment of the charge for hangarage.

His Honour then turned to the plaintiffs' submission that the defendant was not entitled to a lien over the aircraft. The plaintiffs' submissions were twofold. Firstly, the plaintiffs submitted that in order to create a lien, the defendant must have received possession of the aircraft for the purposes for which the lien was claimed. Therefore, a lien could only be created if the aircraft was delivered for the purpose of the defendant undertaking repair and restoration works to the aircraft. It was submitted by the plaintiffs that the defendant received possession of the aircraft for free storage, rather than undertaking restoration works. Secondly, in the alternative, the plaintiffs submitted that if the defendant obtained possession of the aircraft for work to be undertaken, that such works comprised a specific task, being the supply and installation of the headsets and radio, for which the defendant had already received payment. It was argued that a lien would only arise for the specific task the defendant had been commissioned to complete, and that a lien should not arise for subsequent work done to the aircraft once it was already in the defendant's possession.

Judge McGill rejected the plaintiffs' submissions that the defendant did not have a lien over the aircraft. His Honour held that physical possession is the essence of a lien, not the reason why the defendant came to be in possession of the aircraft. This was confirmed by His Honour's finding that the defendant's lien would have been lost if the aircraft was returned to the plaintiffs' possession, even if it was returned in error. It was therefore held the defendant was able to claim a lien over the aircraft for the specific tasks commissioned by the plaintiff, and any subsequent works in restoring the

In brief

- The indicia to support an aircraft lien
- How much security is adequate?
- Australian flight attendant sentenced to 18 months jail

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aircraft, as the defendant did not lose possession of the aircraft between the completion of one task and the beginning of another. The application was therefore dismissed on this issue.

Judge McGill also raised a further point of interest in noting the co-ownership of the aircraft between the first and second plaintiffs. For a lien to be created, the instructions to undertake work must be given by the true owner of the aircraft. As it was the second plaintiff only in Mr Arnot who had directed the work to be undertaken, it was arguable the direction was not given by the true owners to enliven a lien. His Honour did however note that that the first plaintiff could have authorised the second plaintiff to give those instructions. Judge McGill did not make a decision on this basis however as firstly, it was not argued before him, and secondly, a trial of evidence would be required to determine if the first plaintiff had provided authority to Mr Arnot to give those instructions.

His Honour then turned to the argument in the alternative that an order should be made on an interlocutory basis whereby the aircraft was returned to the plaintiffs' possession in exchange for the plaintiffs providing security for the defendant's unpaid invoices. Both parties had agreed that such an order should be made however disputed the amount of security. Judge McGill, after examining previous case authorities and statutory provisions in other jurisdictions, held that the amount of security should be the total amount claimed by the person exercising the lien. Therefore, despite the Judge's misgivings on various invoices issued by the defendant - particularly those for hangarage - the total amount claimed by the defendant was held as appropriate security for the return of the aircraft.

Conclusion

The turnaround on aircraft repairs can be vitally important for an operator's cash flow, its capacity to meet customer demands and its ultimate business success. This is particularly the case in the current economic downturn where margins are tightened, aircraft are running fewer routes with higher seat uptake, and operators may be more leveraged.

The basis upon which to attract, and the consequent entitlements to a lien, can therefore be very important to ensure certainty when aircraft are being repaired or serviced. Likewise for aircraft engineers or service companies, this case serves to highlight the importance of retaining the legal indicia of a lien where disputes arise.

News just in...

Readers will recall that our April 2009 Aviation Newsletter discussed the case of Australian flight attendant and Dubai resident, Matthew Carney who was aboard Emirates flight EK-011 inbound to London when he allegedly planted wires and a note referring to a bomb and the Taliban.

We can now report that Mr Carney recently appeared in the Lewes Crown Court in Southern England where he pleaded guilty to one count of 'inducing a false belief that an object (was) liable to explode' but denied a second charge of 'endangering the safety of an aircraft'.

Despite offering through his lawyers, a wholehearted and sincere apology to all those individuals who were even the slightest bit inconvenienced by his actions, Carney was sentenced to 18 months jail for the bomb hoax. In handing down his sentence, Judge Richard Brown said that Carney had 'breached the trust of the plane's 164 passengers, its owner and his co-worker'.

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