Neutral Citation Number: [2010] EWHC 1348 (Admin)

Case No: CO/12012/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 June 2010

Before :

Mr Justice Collins

Between :

Global Knafaim Leasing Limited & CGTSN Limited	Claimants
- and -	
The Civil Aviation Authority	First Defendant
BAA Limited	Second Defendant
- and -	
Eurocontrol	1st Interested Party
NATS (En Route) Plc	2nd Interested Party
Nats (Services) Limited	3rd Interested Party
Secretary of State for Transport	4th Interested Party
- and -	
Aviation Working Group	Intervener

Mr Rhodri Thompson, Q.C., Mr Tom Hickman & Mr Nicholas Gibson (instructed by **Norton Rose LLP**) for the **Claimants**
The Hon. Michael Beloff, Q.C. & Ms Victoria Windle (instructed by **the CAA**) for the **1st Defendant & the 2nd & 3rd Interested Parties**
Mr David Anderson, Q.C. & Mr Tim Ward (instructed by **Herbert Smith LLP)** for the **2nd Defendant**
Mr Rabinder Singh, Q.C. & Mr Sam Grodzinski (instructed by **Reed Smith LLP)** for the **1st Interested Party**
Mr Martin Chamberlain & Ms Margaret Gray (instructed by **The Treasury Solicitor)** for the **4th Interested party**

Hearing dates: 6-7, 10-13 May 2010

- -

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Insert Judge title and name here

1. The claimants are owners and lessors of aircraft. One of their aircraft was leased to a Canadian airline, Zoom Inc. The lease was originally to run from 31 March 2007 until 30 November 2009 but was extended to 31 May 2011. Unfortunately, Zoom got into financial difficulties and at the end of August 2008 was compelled to seek insolvency protection in Canada. It has since gone into liquidation and the assets available for its creditors are minimal. On 28 August 2008, the aircraft leased by the claimants to Zoom was detained at Glasgow Airport following Zoom's failure to pay airport charges due to BAA and what are known as route charges, that is to say charges which enable the first, second and third interested parties to carry out their functions to ensure safety in the air over Europe. In order to free their aircraft from detention, the claimants had to discharge not only the unpaid amounts attributable to their aircraft but also charges incurred by the other aircraft in Zoom's fleet in which they had no interest at all. Indeed, those other aircraft were leased to Zoom by other lessors who, as it happens, were in a more substantial way of business than the claimants. The extension of the charges beyond their aircraft, known as the fleet lien is, they contend, unfair and so unlawful. While permitted by domestic law, it is said to contravene Article 1 of the First Protocol (AIPI) to the European Convention on Human Rights (ECHR) and directly effective provisions of EU law. In addition, against BAA it is said to be unenforceable because it is anti-competitive.

2. As is apparent from the length of the hearing, the claim is complicated. I was presented with some nine files of authorities (about 140 in all) which, somewhat bizarrely, commenced with a case decided in 1688. As originally presented in the amended claim form, it challenged the lawfulness of the fleet lien power. In the claimants' skeleton arguments, this was narrowed to a challenge to the power insofar as it extended to the requirement that owners such as the claimants should discharge the debts incurred by aircraft in which they had no interest. It was contended that this power rendered the legislation incompatible with the ECHR. In the course of argument, this was further narrowed to the submission that the exercise of the power against owners such as the claimants was disproportionate when, because of the inability of the operator (in this case Zoom) to indemnify the owner, that owner had to pay sums which could be very substantial. In this case, they amount to nearly $US 2,000,000. It is said by all parties that this is a very important case since it concerns the funding of those bodies responsible for safety in the air over Europe and who provide facilities to enable aircraft to land, take off and be serviced at airports.

3. Not only is there an over-abundance of authorities but also of evidence, much of which for reasons which will become apparent I do not find it necessary to deal with in any detail. No expense has been spared in dealing with this claim and I have had the advantage of a 'live-note' record which has enabled me to review the submissions made. The skeleton arguments ran in total to over 300 pages. I shall, I trust, consider in this judgment the main points which seem to me to be material, but points which were shown to be peripheral in the course of argument or to have no real validity I shall not dwell on. A failure to refer to them in any detail does not mean they have not been taken into account.

4. I should identify the various parties and their roles in more detail. The first claimant (GKL) is an aircraft leasing company incorporated in Israel in 2002. Mr Sidney Slasky, who has made statements on its behalf in these proceedings is its president and chief executive officer. It generally does business through companies it sets up and wholly owns which own a single aircraft. In this case, the aircraft in question was owned and leased to Zoom by the second claimant, CGTSN. But it is common ground that GKL has borne the financial burden. Thus, although the lease was between CGTSN and Zoom, I shall refer to the claimants as in effect one entity for the purposes of this judgment. The claimants as at December 2008 owned some 19 aircraft of which 18 were leased to seven different airlines, usually in North America. Their turnover for 2007 was some $30.2 million.

5. The Civil Aviation Authority (CAA) is a public corporation established by Parliament in 1972 as the U.K.'s independent specialist aviation regulator and provider of air traffic services. Its costs are met by charges on those whom it regulates. The third interested party (NATS (Services) Limited (NSL)) provides traffic services in relation to taking off and landing at most of the U.K.'s major international airports, including Glasgow. NATS charges the individual airports which in turn recover their costs from the operators through landing fees. The second interested party NATS (En Route) Plc (NERL) levies a charge on aircraft operators for all aircraft arriving at Heathrow, Gatwick and Stansted and for aircraft operating within what is called the Shanwick Oceanic Control Area which lies approximately

within 45 to 61º North and 8 to 30º West. The services provided by NSL and NERL are essential to ensure the safe and expeditious movement of aircraft.

6. Eurocontrol is the title of the European Organisation for the Safety of Air Navigation. It came into being as a result of an international convention relating to co-operation for the safety of Air Navigation known as the Brussels Convention 1960. The original contracting parties were the U.K., Germany, Belgium, France, Luxembourg and the Netherlands and its provisions came into force on 1 March 1963. It has since been revised in 1981 and 1997 and now has 38 Member States, including most who are part of what has been called the Single European Sky. The EU itself is party to the Convention following a protocol signed on 8 October 2002. It is to be noted that each of Eurocontrol's member states is a member of the Council of Europe and thus subscribes to the ECHR.

7. Route charges imposed by Eurocontrol cover air traffic management over Europe. As must be obvious, it is vitally important that in a crowded airspace measures are in force to ensure that aircraft can fly in safety and without delays. The volume of traffic and the transitions between the various national air traffic control centres mean that the provision of a safe, efficient and economic service and management of Europe's airspace is very complex and so the costs of such management are high. While the collection of route charges is the responsibility of Eurocontrol, enforcement in the case of non-payment has to be taken through the procedures applicable in the relevant Member State which are made available to Eurocontrol. In the case of the U.K., enforcement is achieved through the CAA and includes the power to detain aircraft whose operators have not paid the route charges to Eurocontrol. Such detention will not take place unless the Member States and subsequently the Director General of Eurocontrol gives his approval.

8. I have referred to the complexity of the management of the airspace. This means that it is very expensive to run the system and in 2008 Eurocontrol billed no less than €6,575,505,775 through route charges. According to evidence from Mr Heerbaart, the Director of the Central Route Charges Office (CRCO) of Eurocontrol, which has the responsibility within Eurocontrol inter alia to collect and enforce against non-payment of route charges, prior to the ability to use the fleet detention powers available in the U.K., the recovery rate was 96%. By 2008, it had risen to 99.8%. As will be clear from the figures I have identified, even 1% amounts to a very substantial sum indeed of over €60 million. Thus high rates of recovery are essential to avoid substantial amounts falling on the users of the system and ultimately on the travelling public. And the finances of Eurocontrol must be maintained at the necessary level to ensure safety at all times.

9. BAA owns and operates a number of commercial airports in the U.K. These were at the material time Heathrow, Gatwick, Stansted, Southampton, Glasgow, Edinburgh and Aberdeen. Since then Gatwick has been sold. It provides infrastructure and facilities to operators whom, in its conditions of use, it defines as the persons for the time being having management of an aircraft. The services include the provision of runways, parking areas, infrastructure for ground handling and check-in and departure facilities including security. Currently NSL charges are made to and passed on to operators by BAA, but at the material time NATS charged operators directly at Glasgow. The airport charges comprised landing charges, charges on departing passengers, aircraft parking charges, charges relating to baggage handling facilities and check-in and what are labelled passenger mobility charges that is to say charges for assisting passengers to access aircraft. There are now in all some 36 airports designated in England and Wales and in 2004 in the whole of the U.K. there were some 50. Designation is what gives the power to detain. That power is used as a last resort but the threat to use it has regularly resulted in payment. It thus acts, it is said, as a very effective deterrent to non-payment. Account is taken of the effect on passengers, who will be stranded, on the prospects of payment being made without detention (this will include discussions with the operator on its financial situation) and on the availability of other assets in the U.K. (this is particularly material in the case of foreign based operators). While BAA is a commercial operator, it is also, as is accepted on its behalf, for the purposes of these proceedings, a public authority within the meaning of the Human Rights Act 1998 in relation to the decision to detain CGSTN. Thus it can be held responsible if its powers have been used in breach of the claimants' rights under AIPI.

10. Aviation Working Group (AWG) was permitted to intervene by submitting, without cost implications for itself, written representations. AWG was formed in 1994 at the request of the International Institute for the Unification of Private Law. Its objects are to contribute to the development and acceptance of policies, laws, regulations and rules which facilitate advanced aviation financing and leasing. It is co-chaired by Airbus and Boeing and its members comprise the major aviation manufacturers and some major financial institutions, including most of the world's largest leasing companies. In August 2004 AWG produced a position paper on Eurocontrol and Air Navigation Route Charges. This drew attention to the inconsistent means of collection of route charges in different Member States and asserted that 'in certain Countries, [collection] disregards basic property rights and imposes unknown and unquantifiable risks on parties having no connection with the operation of the aircraft that incurred the charges'. The fleet lien powers in the U.K. are attacked through much the same arguments as have been deployed by the claimants. It is said, putting it generally, that the exercise of the power in the U.K. 'leaves a financier or lessor of an aircraft with a significant risk which is difficult (if not impossible) to manage effectively'. It asserts a breach of AIPI and encourages discussion to try to harmonise enforcement powers and to see whether any sort of fleet lien really is necessary.

11. In the statement produced for the purpose of these proceedings, this is said:-

> "If the fleet lien is exercised, it has the potential to wipe out large amounts of equity in the case of property rights holders or principal in the case of mortgagees. By way of example, if the fleet lien is exercised over an aircraft leased to an insolvent operator, the owner can be left with a Eurocontrol bill (relating to debts accumulated by an entire fleet and in favour of navigation services to the 38 Eurocontrol Member States) equal to the full value of the detained aircraft."

Despite this, it is a non-registrable debt. And, it is said, such a fleet lien is outside the range of commercial risks that a property rights holder can be sensibly asked to take and manage. Having regard to its membership, it is perhaps not surprising that AWG should be antipathetic to the fleet lien power insofar as it may affect lessors or other financial suppliers who have not only been involved in operating the aircraft which has been detained but have had no interest in the rest of the fleet in respect of which unpaid charges have been incurred. However, I do not think that AWG's representations add anything of significance to the matters relied on in the submissions made by Mr Thompson on behalf of the claimants.

12. The statutory powers under which the fleet lien powers arise are different for BAA and CAA. In BAA's case, they are conferred by Section 88 of the Civil Aviation Act 1982. Section 88 provides, so far as material, under the heading "Detention and sale of aircraft for unpaid airport charges":-

> "(1) Where default is made in the payment of airport charges incurred in respect of any aircraft at an aerodrome to which the section applies, the aerodrome authority may, subject to the provisions of this section –
>
> (a) detain, pending payment, either –
>
> (i) the aircraft in respect of which the charges were incurred (whether or not they were incurred by the person who is the operator of the aircraft at the time when the detention begins);
>
> or
>
> (ii) any other aircraft of which the person in default is the operator at the time when the detention begins; and
>
> (b) if the charges are not paid within 56 days of the date when the detention begins, sell the aircraft in order to satisfy the charges."

This is not particularly well drafted since the use of the words "either" and "other" suggests that the power is disjunctive. However, it has always been construed as conjunctive, giving power to detain more than one aircraft in respect of unpaid charges and the legislative history supports that construction. Section 88(2) forbids further detention if the operator or any other person claiming an interest in the aircraft disputes that the charges were due or were due in respect of the aircraft detained under s.88(1)(a)(i) and provides sufficient security for the charges alleged to be due. Further, no sale can take place without leave of the court and the court must be satisfied that a sum is due, there has been default in payment and the aircraft is liable to be sold (s.88(3)). S.88(10) applies the section to any aerodrome owned or managed by a government department or local authority or to one designated for the purposes of s.88 by the Secretary of State.

13. Section 88(9) is of some importance in the claimants' arguments. It reads:-

> "The power conferred by this section to detain an aircraft in respect of which charges have been incurred may be exercised on the occasion on which the charges have been incurred or on any subsequent occasion when the aircraft is on the aerodrome on which those charges were incurred or on any other aerodrome owned or managed by the aerodrome authority concerned."

This provision underlines the point that the power of detention and sale is a power that acts in rem and so the lien attaches to the aircraft until all charges that have been incurred in respect of it have been paid. Thus if an operator becomes insolvent the aircraft keeps attached to it the obligation to pay the charges and so cannot be leased on the basis that it is, as it is put, clean since it could be detained if it uses any aerodrome owned or managed by the aerodrome authority in respect of which the charges were incurred. In the case of BAA, that would be a serious impediment to use of major U.K. aerodromes.

14. It is to be noted that by s.88(6), on a sale the payment of any tax or duty, the expense of the airport authority, the airport charges and payments due to the CAA must be met out of the proceeds of sale in priority to any money that can go to the owner. It is s.88(1)(a)(ii) that gives the fleet lien power. As is apparent from the wording of s.88(2)(a), the legislation recognises that the power to detain can be exercised under s.88(1)(a)(i) or s.88(1)(a)(ii) or both. If the detention is limited to s.88(1)(a)(i), the amounts payable are equally limited to those incurred by that aircraft at any airport owned or managed by the aerodrome authority in question. It would no doubt be unusual for the full powers not to be used, at least where there were outstanding charges from other aircraft operated by the fleet. But it is important to bear in mind that the power to detain under s.88(1)(a)(ii) only applies where the person in default is the operator at the time when the detention begins. Thus if a lease has been terminated, the lessee will have ceased to be the operator and so the power to detain will be limited to that ensuing under s.88(1)(a)(i). This will mean that the lessor will have to pay only all outstanding airport charges incurred by that aircraft. That Mr Thompson accepts he would not challenge.

15. The powers given in respect of non-payment of route charges are contained in the Transport Act 2000 and regulations made thereunder. Section 73 of the 2000 Act enables CAA to identify the charges which are payable. Section 83 is side-noted "Detention and sale". So far as material, it provides:-

> "(1) The Secretary of State may make regulations containing-
>
> > (a) provision which, in the case of default by an operator in paying a charge payable by virtue of section 73, authorises the detention (pending payment) of any aircraft falling within subsection (2); …
> >
> > (c) provision which authorises the sale of any detained aircraft if the default is not remedied within a specified period.
>
> (2) These aircraft fall within this subsection-

(a) the aircraft in respect of which the charge was incurred (whether or not the person who is the operator of the aircraft when detention begins is the defaulter);

(b) any aircraft of which the defaulter is the operator when detention begins.

(3) Regulations under subsection (1) may - ….

(h) make provision corresponding to any provision made by or under section 88 of the Civil Aviation Act 1982 …

(i) generally make such provision as the Secretary of State thinks is necessary or expedient to secure detention or sale."

S.88(3)(a) to (g) enables restrictions to be imposed on the relevant powers but, as will be clear, (h) and (i) confer a wider power. Two sets of regulations have been made. Each gives the CAA the necessary powers to detain and sell, but one excludes and the other relates only to charges payable to Eurocontrol. Otherwise, the powers are identical and I shall refer only to those relating to Eurocontrol, namely the Civil Aviation (Chargeable Air Services)(Detention and Sale of Aircraft for Eurocontrol) regulations 2001 (SI 2001 No 494). Regulation 3 enables CAA, with the consent of Eurocontrol, to act on Eurocontrol's behalf. Regulation 4 provides:-

"Where such consent has been given, the CAA or an authorised person may on behalf of Eurocontrol, subject to the provisions of this and the following regulations, take such steps as are necessary to detain, pending payment, either-

(a) the aircraft in respect of which the charges were incurred (whether or not they were incurred by the person who is the operator of the aircraft at the time when the detention begins); or

(b) any other aircraft of which the person in default is the operator at the time when the detention begins; and if the charges are not paid within 56 days of the date when the detention begins, the CAA may, subject to the following regulations, sell the aircraft on behalf of Eurocontrol in order to satisfy the charges."

This follows the language of s.88(1) of the 1982 Act. It would have been better to have used the language of s.83(1) of the 2000 Act, but the meaning is the same. The following regulations contain the same provisions as are in s.88 of the 1982 Act so that the regimes under the regulations and under s.88 are identical.

16. The fleet lien power is obviously required and is entirely justified in relation to aircraft owned and operated by the same person. This will apply to the majority of aircraft. Equally, it will not operate unfairly nor, as Mr Thompson accepted, would its use be unlawful if the owner who was not the operator could recover any sums he had to pay from the operator. Thus it is the exercise of the power in circumstances where the owner who is not the operator cannot recover any payment exacted from him from the defaulting operator because of that operator's inability to pay which is said to be unlawful. Mr Thompson has relied on the legislative history of the statutory provisions and on various international conventions which the U.K. has signed but not ratified to seek to show that the power has not been properly considered domestically and has not been approved internationally.

17. Mr Thompson's contention was that the domestic legislation had no support from any common law powers and, so far as what I shall label innocent owners are concerned, was truly draconian and oppressive. He has relied heavily on a publication by Graham McBain and Hugh Garety, two solicitors who have great experience in and knowledge of aircraft law, which considers aircraft fleet liens and the ECHR. The power is heavily criticised and it is said that it originated in the Civil Aviation (Eurocontrol) Act 1962 following advice by

the then Treasury Devil and was inserted in the Act without proper consideration. It has been re-enacted again, it is contended, without ever having received proper consideration in Parliament. Mr Thompson has referred me to Hansard in order to show that it had not been referred to in debates on the various Acts. Even assuming that to be correct (and it may well not be), I am satisfied that he has asked me to follow a forbidden route. The absence of debates on a provision proves nothing. It is only if an MP or a peer wants to raise a particular issue that debate will be likely to occur and it is impossible to assume that there was no discussion outside the chambers or consideration of the provisions to be enacted.

18. In *Wilson v First County Trust (No 2) Ltd* [2004] 1 A.C. 816, upon which Mr Thompson sought to rely, Lord Nicholls of Birkenhead said this in paragraphs 62 to 67 of his speech:-

> "62. The legislation must not only have a legitimate policy objective. It must also satisfy a "proportionality" test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a "value judgment" by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force. I interpose that in the present case no suggestion was made that there has been any relevant change of circumstances since the Consumer Credit Act 1974 was enacted.
>
> 63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the "proportionality" of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the "mischief") at which the legislation is aimed. This may throw light on the rationale underlying the legislation.
>
> 64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be "questioning" proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.
>
> 65. To that limited extent there may be occasion for the courts, when conducting the statutory "compatibility" exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act. The constitutionally unexceptional nature of this consequence receives some confirmation from the view expressed in the unanimous report of the Parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-1, HC 214-1), p.28, paragraph 86, that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability.

> 66. I expect that occasions when resort to Hansard is necessary as part of the statutory "compatibility" exercise will seldom arise. The present case is not such an occasion. Should such an occasion arise the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions.
>
> 67. Beyond this use of Hansard as a source of background information, the content of Parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of Parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute. I agree with Laws LJ's observations on this in *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 775, paragraphs 113-114."

Mr Thompson is not seeking to refer to Hansard to identify the mischief or to anything positive stated by a minister or any other member of either House in debates. Thus in my view Lord Nicholl's observations in paragraphs 66 and 67 must prevail. I have to decide whether the legislation is proportionate based upon what must be presumed to have been the will of Parliament that the power extends to a fleet lien.

19. Arguments have been presented based on the international conventions and EU instruments. Mr Rabinder Singh, Q.C. in his skeleton argument submitted that these showed approval and indeed endorsement of the fleet lien power. Mr Thompson submits the contrary. He points out that the U.K. is the only Member State of Eurocontrol which has such a power. Ireland used to have such a power following the U.K. legislation but has decided not to apply it. The international conventions commence with the Rome Convention on Precautionary Arrest of 1933. Passenger and indeed commercial air traffic was in its infancy then. The Convention dealt with precautionary arrest, namely arrest 'in pursuit of a private interest, by the agency of judicial or public administrative authorities, for the benefit either of a creditor, or of the owner or other person entitled to a right in rem over the aircraft' (Article 2(1)). This applies in the absence of an enforceable judgment. Article 3 exempted inter alia 'aircraft actually in service on a regular line of public transport'. Nothing is said one way or the other about the extent of this power. The Chicago Convention of 1944 looked to the post-war need to deal with civil aviation on the basis that every state had complete and exclusive sovereignty over the airspace above its territory. It contains nothing of relevance so far as a fleet lien is concerned.

20. Mr Thompson places importance on the Geneva Convention on the International Recognition of Rights in Aircraft of 1948. This like all the conventions referred to was

signed but has not been ratified by the U.K. So far as material, Article 1 of the Convention provides:-

> "(1) The contracting States undertake to recognise:
>
> (a) rights of property in aircraft …
>
> (c) rights to possession of aircraft under leases of six months or more;
>
> (d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for the payment of an indebtedness …
>
> (2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of the Contracting State; but Contracting States shall not admit or recognise any right as taking priority over the rights mentioned in paragraph (1) of this Article."

Mr Thompson submits that Article 1(2) forbids fleet lien at least where an owner's rights are overridden. I do not think that Article 1(2) has the wide effect which is suggested by Mr Thompson. Most states have laws which enable property to be seized if, for example, taxes are unpaid. It would be remarkable if such measures were prohibited by Article 1(2). It is, I think, aimed at private rights which might normally be enforceable by overriding rights specified in Article 1(1). I do not think it was intended to or can extend to rights in the public interest which can ensure payment of amounts due. Indeed, the Rome Convention recognised the existence of such rights and there is nothing in the Geneva Convention to suggest that they no longer could be used.

21. The most recent international convention is the Cape Town Convention on International Interests in Mobile Equipment of 2001. It concerns trains, spaceships and aircraft. As its preamble records, it is concerned with the advantages of asset-based financing and leasing for the purpose of facilitating the acquisition and use of the mobile equipment in question which will be of high value and particular economic significance. If registered, an international interest (which includes an interest vested in a lessor (Article 2.2(c)) has priority over any unregistered or subsequently registered interest and is to be effective in any subsequent insolvency. Article 39(1) provides:-

> "A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare, generally or specifically:
>
> (a) those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and
>
> (b) that nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object."

This clearly enables a Contracting State to apply domestic measures which otherwise might be inconsistent with the rights recognised in the Convention in seeking to recover outstanding amounts owing in respect of services provided by such as Eurocontrol and airports. Thus the Convention must be taken to have recognised that such powers could be retained and there is nothing to suggest that there should be any particular limitation on their ambit. While it may be that the International Conventions do not as such endorse

the existence of the fleet lien power, they do not support Mr Thompson's submission that they disapprove them.

22. In 1984 Eurocontrol adopted a proposal by the U.K. government that collection of route charges could be expedited by making use of powers under U.K. legislation providing for detention of aircraft. The preamble to the decision of Eurocontrol refers to the consideration that 'Member States wish to strengthen the means of collecting from users more promptly the route charges established pursuant to Article 1 of the Multilateral Agreement'. Mr Thompson makes the point that the concern is to collect from users so it does not extend to approval of collection from owners instead of users. The principle is, of course, that users pay, but measures which achieve the payment of the charge are not prohibited. There is no reason to believe that Eurocontrol was unaware of the extent of the U.K. powers and it could have made clear that its approval of the use of such powers did not extend to any measure which made other than users liable to pay.

23. In 1997 the Eurocontrol Convention was revised and in 2002 a Protocol was presented to Parliament. While it may not yet be in force, it is of persuasive value in indicating the attitude of Eurocontrol's members to the U.K. powers. Articles 5 and 6 of Annex IV are of relevance. Article 5.4 provides that, if the law of a contracting party so provides, the operator and the owner shall be jointly and severally liable to pay the charges. Article 6.1 provides:-

> "Where the amount due has not been paid, measures may be taken to enforce recovery, including detention and sale of aircraft, if the law of the Contracting Party where the aircraft has landed so permits."

Article 9 confirms the ability of a Contracting Party to detain and sell. This is consistent with a recognition that an owner may be liable in addition to a user. No doubt it does not in terms extend to the imposition on an owner of unpaid charges relating to other aircraft than his. But equally it does not in terms prevent any domestic means of recovery of unpaid charges even if they extend beyond the user.

24. The existence of a power to obtain unpaid amounts from owners of aircraft is nowhere prohibited by any of the international or European instruments. While the fleet lien power as applied in the U.K. is nowhere expressly approved it is nowhere disapproved. For whatever reason, other states have not followed the U.K. legislation. Mr Thompson submits that that is because they recognise that it is unfair and oppressive and so might work an injustice. That submission would carry greater weight if other states as members of Eurocontrol had not approved the use of the U.K. powers, which include the fleet lien power, to recover unpaid amounts. Mr Thompson says that there is a lack of transparency in Eurocontrol's decision making processes. Whether or not that is accepted, there is no evidence before me to suggest, nor should I assume, that proper procedures were not adopted. In particular, I note that a majority of members approved the use of the U.K. powers to their full extent.

25. It follows that in my judgment there is nothing in international or European conventions or instruments which disapproves let alone renders unlawful the fleet lien power granted by U.K. legislation. The question is whether the exercise of that power in the circumstances of this case was unlawful because it breaches AIPI or European law and/or, as against BAA, it was anti-competitive. Accordingly, the legislation is not incompatible with the ECHR since the exercise of the power is not mandatory but, as one would expect, discretionary. Thus if to exercise it in a given set of circumstances would be disproportionate and so constitute a breach of AIPI or of any European law, such exercise would not be permissible. There were arguments that the exercise of the power against an owner whenever the operator was unable to pay so that the owner could never recover was to be regarded as an attack on the power rather than limited to the exercise of it on given facts. Whether the facts cover many or merely exceptional circumstances does not alter the true position which is that the power, which can be exercised without being even arguably unlawful, is said to be unusable in particular circumstances.

26. I should now set out the material facts which led to the detention of the aircraft and the payments by the claimants to secure its release. Zoom was what is described as a leisure airline carrying in the main holiday makers going to various destinations including the U.K.

It had since its inception in 2002 shown steady growth when the claimants decided to lease its aircraft to Zoom. At the time of the lease it had added about one aircraft a year to its fleet. I shall refer to some relevant terms of the lease in due course, but the rental payments were $US 235,000 per month and the claimants held a security of $US 500,000 together with a letter of credit for $US 250,000. These amounts were within the limits which the market allowed. The four other aircraft in Zoom's fleet were leased to them by Aercap and ILFC, two of the bigger aircraft leasing companies, ILFC being the world's largest. The evidence from the claimants is that Zoom was, until the summer of 2008, a good payer. Eurocontrol had the same experience until 2007 but BAA found them to be what was stated to be a relatively slow payer. Warnings of possible detention by BAA led to payments in December 2007 and January 2008 which significantly reduced the debt.

27. So far as Eurocontrol was concerned, apart from a hiccup in 2005 which was resolved without the use of a threat of detention, Zoom paid satisfactorily until the autumn of 2007. This led to an e-mail to Zoom on 6 December 2007 informing them that unless the outstanding amount of €270,418.20 was paid by 11 December 2007 a request to the CAA to detain would be made. A similar e-mail was sent on 24 January 2008 in respect of an outstanding amount of €115,208.90. As a result of the deterioration in payment the enlarged Committee was requested to and did approve that Zoom be placed on the list of those airlines in respect of whom a detention request could be made. By 14 August 2008 Zoom was in substantial arrears having failed to pay charges due for May and June 2008 and on 18 August a further invoice for July arrears in the amount of €303,955.67 was issued, payment being due by 17 September 2008. In response to a letter of 21 August threatening detention unless there was an immediate payment, Zoom's vice president stated that the outstanding charges would be settled by 26 August. In consequence, Eurocontrol decided not to request detention. Nothing was paid and a further e-mail threatening detention was sent on 27 August. Approval was sought and obtained for a detention and CAA was informed. It was thought that BAA had acted to detain the aircraft at Glasgow in the morning of 28 August. But the CAA detained that morning.

28. BAA views detention as a measure of last resort. But the power is understandably regarded as a powerful incentive to airlines to pay what is due. BAA will consider whether there is a prospect of payment without detention, whether the non-payment has arisen from a temporary cash flow problem, the potential impact on passengers who may be stranded and the availability of any assets within the jurisdiction. Zoom was a regular user of Glasgow airport. By 2006 some 76,000 passengers were being carried at Glasgow and over 100,000 at Gatwick. A security deposit of £10,000 at Glasgow and £25,000 at Gatwick had been obtained in accordance with the normal conditions of use. By November 2007 the outstanding debt had risen to £277,466.68 and Zoom was warned of the possibility of detention in the absence of payment. By early January 2008, this debt was substantially reduced. Between January and June 2008, the debt was never cleared but did not increase substantially and so detention was not considered to be needed. By the beginning of July Zoom was only paying about one half of the charges it was incurring and the total had reached £375,217.27. Despite promises to clear the outstanding amount by the end of July, only £103,000 was then paid. On 27 August 2008 the relevant manager, Mr Renton, was informed. He decided that the escalation of the arrears justified detention and at 10.00am an e-mail was sent to Zoom demanding immediate payment of £531,117.37 which was made up by £382,644.48 for Gatwick and £148,472.89 for Glasgow. Discussions were held with Zoom's manager at Glasgow who informed BAA that Zoom was looking to obtain further investment which would enable it to pay its outstanding bills and continue to trade. In all the circumstances having regard to this and the impact on passengers if detention took place it was decided not to detain. In the result, a Zoom aircraft was allowed to leave the airport. On the morning of 28 August the claimants' aircraft flew in. It was due to leave that evening. BAA ascertained that the CAA had decided to detain and in the course of the morning BAA discovered that Zoom Inc. (a U.K. based subsidiary of Zoom Inc) had gone into administration and Zoom itself had filed for creditors' protection in Canada. Since it was clear that the charges would not be paid and the aircraft had already been detained by CAA, BAA formally exercised its powers under s.88 of the 1982 Act at approximately 6.30 pm that evening.

29. The claimants were unaware of the history of the outstanding charges to Eurocontrol and to BAA and indeed to NSL and NERL. It is not necessary to go into the details of their charges which are substantially less than those outstanding to BAA and to Eurocontrol.

Nor were the claimants informed of the decisions to detain. The first they knew of any problems was on 28 August 2008 when the Canadian lawyer who had acted for them in connection with the lease sent a copy of an article in the Calgary Herald newspaper which stated that a Zoom aircraft had been grounded at Calgary because the lessor had terminated the lease. In fact, Aercap had terminated the lease when the aircraft was in the air flying from Paris to Calgary. Mr Slasky made inquiries and discovered that Zoom had ceased all operations on 28 August and gone into bankruptcy proceedings in Canada. It was not until 29 August that the claimants discovered that their plane was detained at Glasgow.

30. Until July 2008, Zoom had been good payers of the rent due under the lease, no doubt because it appreciated that a failure to pay on time was an event of default within the meaning of the lease (Article 25.2(b)) which would justify immediate terminating of the lease (Article 25.3). However, the July rent was not paid and on 5 August, following enquiries by the claimants, the president of Zoom, Mr. Dolinski, informed Mr Slasky that Zoom were 'on the verge of announcing a significant new funding for the company' (30M Euro+). A good faith payment would be made ($US150,000 was paid) but the outstanding amounts would not be cleared until September because the new funding was to come in tranches. The claimants' fears were allayed by this and they decided not to terminate the lease. As Mr Slasky says, it is always a difficult commercial decision when a lessee is in financial difficulties since termination by one lessor could push the lessee into insolvency which might not otherwise occur. It is in fact clear from the information which has since been obtained that Zoom owed very considerable sums to many entities in Canada and that the assets available for its creditors were minimal.

31. It is not necessary to go into the detail of the actions taken by the claimants' solicitors to sort out matters. The July charges for Eurocontrol, which were very substantial, became payable on 17 September. The claimants believed that they were liable under U.K. law to pay the May and June outstanding charges on all Zoom's fleet and so, before the extra amounts became payable, they decided to achieve the release of their aircraft by paying in total a sum exceeding $US 2,000,000. Of this, no more than 20% at most was owing on the GKL aircraft. Subsequently, negotiations were carried out with all lessors in relation to the July and August amounts since the aircraft remain liable to detention for outstanding amounts which attach to the aircraft by virtue of s.88(1)(a)(i) of the 1982 Act and Article 4(a) of the Eurocontrol Regulations. Those negotiations resulted in a payment of 75% of the charges due on three out of the four other lessors' aircraft.

32. Mr Slasky says that the claimants were unaware of the history of poor payment to Eurocontrol, NATS, NERL and BAA and asserts that even if such information could have been obtained it would probably not have made any difference. He suggests that the ability to obtain such information from the various bodies to whom the charges were payable was not fully appreciated at the time. However, Article 10.5 of the lease, which is headed Flight Charges, requires prompt payment of all such charges by the lessee and an indemnity for the lessor. 10.5.2 reads as follows:-

> "If requested by LESSOR, LESSEE will provide LESSOR with a list of the airports to which LESSEE regularly operates the Aircraft or its other aircraft. LESSEE hereby authorizes Nav Canada, Eurocontrol and every aviation authority or airport or creditor claiming rights on the Aircraft to confirm the status of LESSEE's payments made and amounts owing to such creditor for the Aircraft and its other aircraft, as and when requested by LESSOR. LESSEE hereby appoints LESSOR its attorney for the purpose of directing and authorizing Nav Canada, Eurocontrol or any other aviation authority or airport or creditor who may have any rights in the Aircraft to confirm the status of LESSEE's payments made and amounts owing to such creditor in writing to LESSOR or to GKL, and agrees to provide a written authorization or authorizations to such effect in the form of Exhibit "O", or such other form as is reasonably requested by LESSOR, as and when requested by LESSOR."

Thus the claimants could have ensured that they received the information from all the various entities but for reasons which are not spelt out failed to make use of that power. The evidence from Eurocontrol, CAA and BAA is that if such a power of attorney were

shown to be in place information of payment or, more importantly, non-payment would have been given. By Article 22.2(e) Zoom agreed to supply the claimants with copies of its accounts and all 'other reasonable information as Lessor or Lessor's Lender may reasonably request concerning the location, condition, use and operation of the Aircraft or the financial condition of Lessee'. If they had used their powers under 10.5.2, the claimants would have been able to request more detailed financial information from Zoom. It is, I think, the more extraordinary that their 10.5.2 powers had not been used since by Article 25.2(q) an event of default arises where the lessor is notified by Eurocontrol or any applicable airport authority that there are unpaid charges. The claimants could not receive that information unless the 10.5.2 powers were exercised.

33. A considerable amount of evidence was put before me from those who were speaking on behalf of the various parties and from experts about what steps could have been taken to protect each party's interests. The defendants and interested parties have drawn attention to a number of possible measures such as mutual insurance, greater levels of security or prohibitions on flying to the U.K. and have suggested that the claimants did not exercise proper risk management. Mr Slasky has sought to answer these criticisms and has produced evidence which he says shows that they are generally impractical. I cannot decide on those matters nor is it necessary as will I hope became apparent for me to do so. I simply note that there are disputes over what could reasonably be done by lessors such as the claimants to provide added protection. Equally it is alleged by the claimants that Eurocontrol and BAA in particular had as good an ability to judge the financial soundness of Zoom or of any operator of aircraft using U.K. airports as did the claimants. BAA could have required much higher security than the somewhat derisory sums they in fact required. Again, I note but make no findings on those allegations.

34. However, that said, there is no doubt that the claimants could have obtained far more information about Zoom's financial state and would have been in a much better position to judge whether the failure to pay rent on time did indeed result from temporary financial difficulties or signalled the likely insolvency of the airline. It would if the lease had contained the necessary power have been possible to liaise with the other lessor since it was in the interest of all of them that, if the financial difficulty was temporary and so could be overcome, leases should not be terminated. All lessors would know that they would, if they wanted their aircraft to use in the U.K., have to discharge all debts attaching to those aircraft. In the case of a temporary financial difficulty it would no doubt be in the interests of a lessor to discharge all debts owing on the aircraft in question to avoid detention. Equally, they could discharge fleet lien charges if the aircraft was detained in the expectation of reimbursement from the lessee. But if it appeared that the financial difficulty might be permanent they could terminate the lease and so avoid payment of charges beyond those attaching to their aircraft. Whether or not the obtaining of further information would have made any difference I cannot know. But it is clear that the claimants deprived themselves of the opportunity of obtaining information which could have been of vital importance and to that extent are open to criticism. It is to be noted that they now exercise their powers under an equivalent Article to 10.5.2 in their leases.

35. CAA's evidence is that since 2000 there have only been two cases (this and one other) where an owner has paid charges incurred in respect of an aircraft in which that owner had no interest in order to secure the release of his aircraft. The threat of detention resulted in collection of over £62M between 2000 and 2008 and actual detention a further £28M of which some £3.3M was paid by owners rather than operators. Of some 35 detentions over that period, only this one has seen the operator go into insolvency immediately after the detention and before release could be achieved. This demonstrates the power is rarely used where owners are likely to be liable to pay for other than their aircraft on behalf of operators at least where there is no prospect of owners recovering amounts so paid. This is of some importance, it is submitted, in showing that the discretion is exercised very much as a last resort.

36. Insolvency of the operators is important since, in the case of an insolvency in the U.K. or a foreign insolvency registered here, the leave of the court is needed for the exercise of detention powers. This results from the decision of the Court of Appeal in *Bristol Airport Plc v Powdrill* [1990] 1 Ch 744. The airport had detained an aircraft leased to an insolvent operator and the court was concerned with the interaction between in that case the powers of an administrator appointed under the Insolvency Act and the right of an airport

to detain under s.88 of the 1982 Act. Woolf LJ expressed concern that the policy of Part II of the Insolvency Act 1986 should not interfere unduly with the statutory rights of detention under s.88. At p.768 Woolf LJ recites the powers under s.88 (which of course include the fleet lien power) without comment. But the point was that it would prejudice other creditors and be likely to frustrate the efforts of the administrator if the powers under s.88 were exercised. That is the reason for the need to seek leave of the court. If there is an insolvency and no possibility of maintaining the business (as in this case) the exercise of the fleet lien power against a lessor could not prejudice other creditors. The contrary is the case. Thus, although it seems leave of the court has never been sought in such a case, there is no reason to think that leave would be refused. And, as the *Powdrill* case makes clear, a swift ex parte order can be obtained from the court or detention followed by an immediate application to the court would be permissible. It is only if the operator is also the owner that rights of other creditors would be likely to be adversely affected.

37. The defendants rely on the importance in the public interest of ensuring to the greatest possible extent that the charges are paid. Airports have an obligation to permit any airline to use its facilities which are provided in the interests of the travelling public and are also conducive to ensuring safety, on equal terms and conditions. The route charges go to maintain the very expensive system in place to ensure safety in the European sky. If charges are not paid, ultimately the travelling public will suffer through the need to pass on the amounts unpaid. The claimants suggest that in BAA's case, it will merely affect their commercial profit. That is not so since they are able, through a system of charge capping applied by the CAA on a quinquennial basis, to pass on bad debts. Indeed, BAA albeit a private commercial airport owner accepts that it is to be regarded as a public body within the meaning of the Human Rights Act 1998 and so can be liable to a victim in respect of any breach of an Article within the Schedule to the Act. This includes AIPI.

38. The defendants' approach is supported by a decision of the Supreme Court of Canada in a case known as *Re Canada 3000 Inc* [2006] 1 SCR 865. The powers given to detain for non-payment of airport and route charges are similar to those in force in the U.K. It is subject to the need to apply to the court which has wide power to apportion liability to pay. Binnie J giving the judgment of the court said this in paragraph 1:-

> "When an airline collapses leaving unpaid bills for airport charges and air navigation services, the question becomes who takes the financial loss (or, as it is sometimes said, "the haircut"), the people who ultimately own the aircraft or the people were obliged to (and did) provide the airport and navigation services?"

This is the question which arises directly in this case. The attack is not on the detention as such. Many airports outside the U.K. have powers which, albeit not labelled in that way, amount to detention. It is on the exaction of payment of the outstanding charges which were not incurred by the detained aircraft but by other aircraft in which the claimants have no interest. The claimants complain that they are having to pay sums which ought to fall on their commercial rivals.

39. In paragraph 3 of the judgment, Binnie J observed:-

> "When financial collapse occurs (and these have been frequent in Canada and elsewhere in the past decade), there is little meat on the corporate bones for unsecured creditors. Doing business with such airline operators carries significant financial risks, yet the appellant Canadian airports operating under government supervision are obliged by statute to allow financially troubled airlines to make use of their services (and sometimes the airport will not know if an airline is in financial trouble or not). Airport costs are largely recovered through landing fees. If these and other fees go unpaid, the airport is out of pocket for the cost of the services it was obliged by law to provide."

40. In paragraph 4, he pointed out that "NAV Canada" (the equivalent body to Eurocontrol) was also obliged to offer its services to any aircraft flying through Canadian airspace. Its business was even riskier since often aircraft flew though Canadian airspace but did not

land in Canada. While the statutory requirements are not so clearly spelt out in the U.K., the position is in reality no different since the only protection available to airports is the imposition of security requirements since they cannot refuse to allow aircraft to land. Eurocontrol equally cannot forbid aircraft to fly through airspace it is responsible for managing.

41. In paragraph 37, Binnie J made the point that the legal titleholders leased the aircraft intending them to be used in the very activities for which the services were provided. As he put it, '[b]y and large, the legal titleholders are sophisticated corporations. They are knowledgeable about the ways of the industry in which they have chosen to participate'. If they are not knowledgeable, they have only themselves to blame and should take all necessary steps including the obtaining of advice from experts to ensure that they do know what they are doing.

42. It is worth citing what Binnie J said in paragraphs 71, 72 and 74 of his judgment:-

> "71. It is difficult to endorse the indignation of the legal titleholders with respect to detention of their aircraft until payment is made for debts due to the service providers. They are sophisticated corporate players well versed in the industry in which they have chosen to invest. The detention remedies do not affect their ultimate title. Investors who have done their due diligence will recognise that detention remedies have deep roots in the transport business. In *The Emilie Millon,* [1905] 2 K.B. 817 (*"Mersey Docks"*), for example, the English Court of Appeal examined a statute that stipulated that the Mersey Docks and Harbour Board could cause a ship to be detained until all harbour and tonnage payments had been made despite the fact that the ownership of the ship did not correspond to the debtor who had incurred the charges. The ruling in that case reflects the traditional scope of this type of remedy (at p.821):
>
> > "… The Mersey Docks and Harbour Board have a right by statute to detain the vessel until the dock tonnage rates and harbour rates are paid. That is an express statutory right, and the board have nothing to do with any sale of the vessel to a purchaser. That is a matter which only concerns those who are interested in the vessel. It does not concern the board. <u>The board are entitled to detain the vessel, whoever is the owner, until the rates are paid.</u> The order appealed against deprives them of that right, and without their consent purports to give them an option to try and make some claim to a lien upon or right against the fund in priority to other claimants. The board have no such lien or right. If this vessel had been allowed to leave the dock, the board would have been left to make a futile claim against the fund in court…"
>
> This type of provision is not uncommon in the airline business, see, e.g. decisions under a differently worded U.K. Act such as *Channel Airways Ltd v Manchester Corp*, [1974] 1 Lloyd's Rep. 456 (QB), at p.461, in which it was held that the *Manchester Corporation Act* "mean[t] what it sa[id]", and that the city could detain aircraft in respect of which charges had been incurred until those charges had been paid. The legal titleholders face this problem on the other side of the Atlantic. It is a risk they manage there. No reason was given as to why they cannot manage here.
>
> 72. The legal titleholders are in a better position to protect themselves against this type of loss than are the airport authorities and NAV Canada. The legal titleholders can select which airlines they are prepared to deal with and negotiate appropriate security arrangements as part of their lease transactions with the airlines. In the case of the aircraft at issue in these appeals, many if not all of the leases provided for substantial security deposits. For example, the total amount posted by Canada 3000 to the ILFC as security deposits for airport fees and charges was approximately $15,305,500. It is unnecessary to catalogue all of the

> possible security arrangements, but these deposits demonstrate a legal titleholder's ability to negotiate protection at a time when the airline is solvent to cover the amounts in overdue charges that the airline may eventually be required to pay to the statutory service providers.
>
> "…"
>
> 74. On the other hand, the conclusion of Juriansz J., dissenting in part, was correct that "the wording of the Detention Provisions makes apparent that aircraft may be seized and detained without regard to the property interests of persons who are neither the registered owners nor the operators of the aircraft under the legislation. As long as the aircraft is owned or operated by a person liable to pay the outstanding charges, it may be the subject of an application to seize and detain it. The fact that there may be other persons, who are not liable to pay the outstanding charges but have property interests in the aircraft, is of no consequence" (para. 239)".

Finally, in paragraph 92 he made it clear that in deciding on any fair and reasonable arrangement a judge must ensure that the authority is paid in full. Paragraph 92 reads:-

> "Much of the potential unfairness which the titleholders envisage in the operation of the detention remedy can be addressed by the motions judge. Section 56(3)(c) of CANSCA states that NAV Canada must release the aircraft "if … an order of a court directs the Corporation to do so". Similarly, s.9(3) of the *Airports Act* states that an airport authority need not release the aircraft until the charges are paid, "except where otherwise directed by an order of a court". Parliament has left the door open for the motions judge to work out an arrangement that is fair and reasonable to all concerned, provided that the object and purpose of the remedy (to ensure the unpaid user fees are paid) is fulfilled. It would be open to a judge on a detention remedy hearing to determine an allocation amongst the titleholders that reflected such factors as the number of seized aircraft, the amount of charges in relation to a particular aircraft or the short duration of an aircraft's life spent in the doomed fleet. The judge need not make each aircraft hostage for the full amount of the unpaid charges, provided the result is that the authority is paid in full. In this way, what may otherwise be portrayed as a draconian remedy can be reduced to a fair and proportionate judicial response to the airline collapse."

43. *Canada 3000* was primarily concerned with liability to pay in respect of the lessor's own aircraft but it does not exclude the possibility of payment on a fleet lien basis. Further and more importantly it emphasises the need to ensure full payment of outstanding charges so that the correct approach is that unpaid amounts should fall not on the service provider but on the commercial lessor. I see no reason why the same approach should not be adapted to our legislation provided that it is in the given circumstances proportionate and not unfair to the claimants. They contend that it is in the circumstances thoroughly unfair. It was chance that led to their aircraft being the one that was detained and they find themselves having to pay a very large sum of money which was not owed by their aircraft in order to obtain its release and they have no prospect of recovering the sums they had to pay from anyone else. I am bound to say that I have some sympathy with their complaint. The action taken against them was certainly harsh, particularly as it was their bad luck that their aircraft was detained. But, harsh though it was, I can only grant relief if persuaded that it was unlawful.

44. In *Diamond Lease (UK) Ltd v CAA* (1991) 1 S&B Av R VI 17 the fleet lien powers in issue in the present case were considered in the context of an insolvency. No question was raised as to the lawfulness of the power. However, that is perhaps not surprising since the case predates the Human Rights Act and so carries little weight for my purposes.

45. The first and I think main contention of the claimants is that the exercise of the powers in the circumstances of this case breaches AIPI. As I have said, the challenge was originally to the legislation but now as a result of refinements in oral argument it is to the requirement to

pay the outstanding charges on aircraft in which the claimants have no interest in order to obtain a discharge of their aircraft. AIPI provides:-

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

46. As is the custom of the ECtHR, in cases involving alleged breaches of particular Articles of the Convention, general principles have been established and are usually repeated in each case. It has also been made clear that the court will concern itself, without losing sight of the general context of the case, only so far as possible, with what it describes as the concrete case: see *James v UK* (1986) 8 EHRR 123 at p.139. A considerable number of cases, both domestic and in the ECtHR, were before me. I do not propose to refer to them all since what matters is the principles which are applicable and how in some instances the court applied those principles to the concrete case. Two are of particular relevance.

47. The first is *Air Canada v UK* (1995) 20 EHRR 150. Customs officers found a consignment of cannabis resin on board an aircraft owned and operated by the applicant and, in accordance with section 141(1)(a) of the Customs & Excise Management Act 1979, the aircraft became liable to forfeiture and was seized by the officers. It was only released on payment by the applicant of £50,000. The cannabis resin had a black market value of some £800,000. The courts' decision that there had been no breach of AIPI was reached by a majority of 5 to 4. In paragraphs 29 to 34 on page 172 the court stated:-

> "29. The Court recalls that Article 1 guarantees in substance the right of property and comprises three distinct rules. The first, which is expressed in the first sentence of the first paragraph and is of general nature, lays down the principle of peaceful enjoyment of property. The second, in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
>
> 30. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.
>
> 31. The applicant considered that it had been deprived of its aircraft albeit for a temporary period and, subsequently, as a permanent measure, of the £50,000 that it was required to pay as a condition for the return of its property. There had thus been a deprivation of possessions.
>
> 32. For the government, with whom the Commission agreed, this was not a case involving a deprivation of property since no transfer of ownership of the applicant's aircraft had taken place. The seizure and demand for payment were to be seen as part of the system for the control of the use of an aircraft which had been employed for the import of prohibited drugs.
>
> 33. The Court is of the same view. It observes, in the first place, that the seizure of the aircraft amounted to a temporary restriction on its use and did not involve a transfer of ownership, and, in the second place, that the decision of the Court of Appeal to condemn the property as forfeited did not have the effect of depriving Air Canada of ownership since the sum required for the release of the aircraft had been paid.

> 34. In addition, it is clear from the scheme of the legislation that the release of the aircraft subject to the payment of a sum of money was, in effect, a measure taken in furtherance of a policy of seeking to prevent carriers from bringing inter alia prohibited drugs into the United Kingdom. As such, it amounted to a control of the use of property. It is therefore the second paragraph of Article 1 which is applicable in the present case."

The fleet lien does not transfer ownership and so detention does not amount to deprivation within the first paragraph of AIPI. This accords with an old authority in relation to a port's power to detain when dock charges are unpaid. In *The Emilie Millon* [1905] 2 KB 817 it was recognised that the right was to detain pending payment. It is true that the right in this case extends to a right to sell subject to a court order if in due course the amounts are unpaid but that, as *Air Canada* itself makes clear, does not render the exercise of the power to detain (or, in that case, to seize as liable to forfeiture) a deprivation within paragraph 1 of AIPI.

48. Mr Thompson sought to argue that there was a deprivation of the money which had to be paid to secure the release of the aircraft. This argument has not been raised, (save possibly inasmuch as Judge Walsh in his dissenting opinion in *Air Canada* (page 179 paragraph 2) observed:-

> "Thus the court is of the opinion that the UK action in depriving Air Canada of the sum of £50,000 was justifiable under the Convention as a measure conforming to the 'General interest in combating international trafficking'. On the particular facts of the case the Court is in reality holding that 'in the general interest an innocent person's goods or property may be forfeited to the State without compensation … I fear that such a proposition may lead persons to compare it with the view that it may be 'expedient that one innocent man should die for the people'."

49. I do not think the argument, if valid, would make any difference in this case, but I am satisfied that it is not a correct approach. The payment in question is in my view to be regarded as another contribution within the meaning of the second paragraph of AIPI' since it is required in the public interest. It is a control of the property in the public interest. It is to be noted that in *AGOSI v UK* (1986) 9 EHRR 1 the court was concerned with the forfeiture of Krügerrands which the applicants had sold to an individual who then attempted to smuggle them into the U.K. AGOSI were not paid since the purchaser's cheque was dishonoured and were an innocent party. The court decided that the forfeiture did not amount to a deprivation but to a control on use. In paragraph 51 on page 13 the court said this:-

> "The forfeiture of the coins did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins such as Krügerrands. It is therefore the second paragraph of Article 1 which is applicable in the present case."

50. Accordingly, to return to *Air Canada*, the approach which should be adopted where the second paragraph is in issue is set out in paragraph 36 on p.173. This is a paragraph which is repeated in other cases. It reads:-

> "According to the Courts' well-established case law, the second paragraph of Article 1 must be construed in the light of the principle laid down in the Article's first sentence. Consequently, an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued."

51. While the court observed that there had been no finding of fault or negligence against Air Canada, it made the following observations in paragraph 38 which reflected the government's submissions:-

> "For the Government, there were strong public interest reasons justifying the actions of the Commissioners in the present case. There had been previous occasions when inadequate Air Canada procedures had led to the carriage of dangerous drugs. Despite promises to improve their procedures they had failed to do so. The events leading to the seizure of the aircraft had involved very serious lapses in security. Moreover, it was noteworthy that following the events at issue there had been no further security problems with Air Canada. The Commissioners had thus acted within the margin of appreciation conferred on them by the second paragraph of Article 1 of Protocol No 1 in order to encourage the adoption of higher security standards by the applicant company."

The court in paragraph 41 noted that the seizure was an exceptional measure resorted to in order to bring about an improvement in Air Canada's security procedures. Air Canada had been warned of the possible exercise of power in the light of previous illegal importation of drugs. This enabled the court to observe (Paragraph 42):-

> "Against this background there can be no doubt that the measures taken conformed to the general interest in combating international drug trafficking."

The court considered that access to judicial review constituted an adequate remedy and so there was compliance with the second paragraph of AIPI. In 1995 the scope of judicial review was narrower than it now is and, when dealing with alleged breaches of Articles of the ECHR, the court's approach is the same as that adopted by the ECtHR.

52. The second important case in the ECtHR is *Gasus Dosier v Netherlands* [1995] 20 EHRR 403, in fact decided shortly before *Air Canada*. The applicant company had sold a concrete mixer to a Dutch company on condition that title would not pass until the full price had been paid. The mixer was installed but, before the full price was paid, it was seized to cover the purchaser's tax debts. The ECtHR decided that there was no breach of AIPI. The powers of seizure were derived from an Act of 1845 and on their face enabled tax authorities to seize all the debtor's assets and sell them to meet the debt. This power extended to seizure and sale of all moveable property found on the tax debtor's premises irrespective of whether or not the property belonged to the tax debtor. In paragraph 59 the court said this:-

> "… Against this background, the most natural approach, in the Court's opinion, is to examine Gasus's complaints under the head of "securing the payment of taxes", which comes under the rule in the second paragraph of Article 1. That paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes. The importance which the drafters of the Convention attached to this aspect of the second paragraph of Article 1 may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the States' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation.
>
> The fact that current tax legislation makes it possible for the tax authorities, on certain conditions, to recover tax debts against a third party's assets does not warrant any different conclusion as to the applicable rule. Neither does it suffice in itself to describe section 16(3) of the 1845 Act as granting powers of arbitrary confiscation.
>
> Conferring upon a particular creditor the power to recover against goods which, although in fact in the debtor's possession, are legally owned by third parties is, in several legal systems, an accepted method of

> strengthening that creditor's position in enforcement proceedings. Under Netherlands law as it stood at the material time, landlords had a comparable power with respect to unpaid rent, as they did also under French and Belgian law; the Government have also cited several provisions in the tax laws of other Member States that give similar powers to the tax authorities in special cases. Consequently, the fact that the Netherlands legislature has seen fit to strengthen the tax authorities' position in enforcement proceedings against tax debtors does not justify the conclusion that the 1845 Act, or section 16(3) of it, is not aimed at "securing the payment of taxes", or that using the power conferred by that section constitutes a "confiscation", whether "arbitrary" or not, rather than a method of recovering a tax debt."

53. The court observed in paragraph 60 as follows:-

> "In passing such laws the legislature must be allowed a wide margin of appreciation, especially with regard to the question whether – and, if so, to what extent – the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are in to enforce commercial debts. The court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation."

As the court said, the enforcement of tax debts is clearly in the public interest. While the charges in question in the present case are not tax debts, it is clearly in the public interest that they should be enforced and I see no reason to differentiate between them and tax debts: the same principle applies.

54. The government had issued guidelines which limited the wide powers to seizure of furnishings owned by third parties where third party ownership was 'intended solely to frustrate recovery against the tax debtor or to afford the third party a preferential right of recovery over the goods concerned'. The legislation was said to be justified because among other things, unlike private creditors, the tax authorities could not choose their debtors, and could not enter into any agreements which might protect them in case of insolvency. I should set out in full paragraphs 66 to 71 of the court's judgment:-

> "66. The Court notes at the outset that the grant to the tax authorities of a power to recover tax debts against goods owned by certain third parties – such as a seller of goods who retains his title – does not in itself prompt the conclusion that a fair balance between the general interest and the protection of the individual's fundamental rights has not been achieved. The power of recovery against goods which are in fact in a debtor's possession although nominally owned by a third party is a not uncommon device to strengthen a creditor's position in enforcement proceedings; it cannot be held incompatible per se with the requirements of Article 1 of Protocol No 1. Consequently, a legislature may in principle resort to that device to ensure, in the general interest, that taxation yields as much as possible and that tax debts are recovered as expeditiously as possible. Nonetheless, it cannot be overlooked that, quite apart from the dangers of abuse, the character of legislation by which the State creates such powers for itself is not the same as that of legislation granting similar powers to narrowly defined categories of private creditors. Consequently, further examination of the issue of proportionality is necessary in this case.
>
> 67. I
> n this connection, the Court also notes that in assessing the proportionality of the powers under section 16(3) and their use in the present case it is immaterial that 'Gasus was a limited company with legal personality under German law and had their registered office in Germany. Gasus had sold and delivered their concrete-mixer to a purchaser based in the Netherlands and installed it on his premises. Gasus could therefore not have expected otherwise than that the effectiveness of their retention of title in the face of seizure depended on Netherlands law. It

consequently makes no difference whether a seller who retains title and who finds himself a victim of use by the tax authorities of their power under section 16(3) has his domicile or registered office in the Netherlands or elsewhere. In either case the essential question must be whether as a consequence of the tax authorities' actions against the goods to which title has been retained the vendor has had to bear "an individual and excessive burden".

68. Whatever the nature of retention of title compared with "true" or "ordinary" property rights – a question on which the Court discerns no common ground among the Contracting States – it is apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price. A State may therefore legitimately, within its margin of appreciation, differentiate between retention of title and other forms of ownership.

It matters little whether such differentiation takes the form of substantive limitations of the right of ownership or is expressed in terms of procedural law; as the Court pointed out in its *FAYED V UNITED KINGDOM* judgment, such a distinction may be no more than a question of legislative technique.

69. It cannot be ignored that in general the cases in which the tax authorities will make use of their high-ranking priority rights and their powers under section 16(3) of the 1845 Act are precisely those where the tax debtor is unable to satisfy all his creditors. This necessarily implies that in these cases commercial creditors will not be fully paid if they receive any payment at all.

The Court therefore does not agree with the Government that the fact that the applicant company's claim against Atlas was rendered worthless is not a consequence of the action taken by the tax authorities.

70. It is nonetheless true, as observed by the Commission, that the applicant company was engaged in a commercial venture which, by its very nature, involved an element of risk. The facts of the case show that Gasus were in fact sufficiently aware of their risk to take steps to limit it.

Having allowed Atlas to pay the purchase price of the concrete-mixer in instalments, and being aware of the danger that Atlas might default on its payments, Gasus reserved their title to the concrete-mixer until the full price had been paid. This, under Netherlands law, provided them with a considerable degree of security, as their claims to the concrete-mixer thus took priority over those of all other creditors except the tax authorities, who were entitled under section 16(3) of the 1845 Act to seize it and take the proceeds for the State.

Like the Commission, the Court considers that Gasus could have eliminated their risk altogether by declining to extend credit to Atlas: they could have stipulated payment of the entire purchase price in advance or else refused to sell the concrete-mixer in the first place. It also accepts that the applicant company might have obtained additional security, e.g. in the form of insurance or a banker's guarantee, which pass the risk on to another party.

It is therefore unnecessary for the Court to establish whether the applicant company could have ascertained the existence and extent of Atlas's tax debts, this point being in dispute. Nor is it material that the applicant company bore no responsibility for the tax debt.

> In the present context it is not without relevance that the owners of goods subject to seizure under section 16(3) of the 1845 Act had knowingly allowed them to serve as "furnishings" of the tax debtor's premises. They might therefore well be held responsible to some extent for enabling the tax debtor to present a semblance of creditworthiness.
>
> 71. Furthermore, whether or not the tax authorities are under any legal or other obligation to be more flexible in respect of tax debtors in temporary financial difficulties, they do not have the same means at their disposal as commercial creditors for protecting themselves against the consequences of their debtors' financial problems. Nor have they any other means of protecting themselves against their debtor's attempts to solve such problems by vesting the title to his "furnishings" in another party as a device of borrowing against a security."

55. *Gasus Dosier* lost their concrete-mixer because of the misfortune that it had been installed just before the tax authorities exercised their powers against the purchaser. Gasus Dosier did not know that the purchasers had failed to pay their taxes. However, in deciding on proportionality the court did consider that the difference between retention of title and true ownership was capable of being a material consideration.

56. Mr Thompson seeks to distinguish these authorities on the ground that in the *Air Canada* case the court was influenced by the prior failures of security and warnings given to the applicants and in the *Gasus Dosier* case retention of title as opposed to true ownership was regarded as important. But those distinctions do not in my view suggest that the court would necessarily have reached a different conclusion without them. Air Canada was not, as the court noted, found to have been other than an innocent party and the Dutch law was not regarded as one which fell outside a proper application of the margin of appreciation. In the present case, there were steps which the claimants could have taken to provide themselves with more information about Zoom's financial position. In addition, they could, if they were persuaded that it was not desirable to terminate the lease since that would have been likely to trigger the insolvency which it was hoped could be avoided, have forbidden Zoom to fly their aircraft to the U.K. until its financial situation improved or have required (if that was feasible) further security. It is also noteworthy that in the *AGOSI* case the Government conceded that as a practical matter where a person was free of any fault which could relate in any way to the purpose of the legislation forfeiture could not on any sensible construction of the legislation further its object. One element of the circumstances was the degree of fault or care of the applicant. The court recognised that relevant considerations "included the alleged innocence and diligence of the owner of the forfeited coins" (Paragraph 56). So here, the conduct of the claimants and their failure to make use of their powers to obtain material information or to take steps to avoid the application of the aspects of the fleet lien of which they complain to them is relevant. *AGOSI* is a strong case in favour of the defendants' submissions.

57. Reference has been made to a number of domestic authorities which have considered AIPI. In *Lindsay v Customs & Excise Commissioners* [2002] 1 WLR 1766 the Court of Appeal was concerned with the forfeiture of a vehicle in which the appellant had been carrying a considerable quantity of cigarettes and tobacco in excess of the allowable personal reliefs. He said he had bought some of them for members of his family with money provided by them. He had spent £2,107 to purchase them; his car was worth at least £10,500. The court decided that the failure to differentiate between a truly commercial smuggler and the driver importing goods for social distribution to family or friends in circumstances where there was no attempt to make a profit made the policy disproportionate. However, as Lord Phillips MR observed in paragraph 64 on p.1786:-

> "Of course, even in such [sc. non-commercial smuggling] a case the scale of importation, or other circumstances, may be such as to justify forfeiture of the car. But where the importation is not for the purpose of making a profit, I consider that the principle of proportionality requires that each case should be considered on its particular facts, which will include the scale of importation, whether it is a 'first offence', whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by the forfeiture."

Judge LJ observed (Paragraph 72 on p.1788):-

> "Given the extent of the damage caused to the public interest, it is, in my judgment, acceptable and proportionate that, subject to exceptional individual considerations, whatever they are worth, the vehicles of those who smuggle for profit, even for a small profit, should be seized as a matter of policy."

58. It is there recognised that hardship can be a material consideration when there is a deprivation of property (for that is what the court found to be the position). But all will depend on the circumstances of a particular case and hardship by itself will not be determinative.

59. In *Greenalls Management Ltd v Customs & Excise Commissioners* [2005] 1 WLR 1754 the appellants, who operated a tax warehouse, released some 250,000 bottles of vodka under an excise duty suspension arrangement in the belief that the vodka was to be despatched to kindred warehouses in Spain and Belgium. It was fraudulently diverted and the appellants were required to pay the duty which had been evaded amounting to some £2M. In the House of Lords, Lord Hoffmann, who gave the leading speech, said in paragraph 17 on p.1758H:-

> "[The judge] said that there was nothing unreasonable about making the warehousekeeper liable for the duty even though he did not himself intend to depart from the suspense arrangements. It is practical because the commissioners do not have to investigate the extent, if any, to which the warehousekeeper was to blame in parting with the goods. If someone else was responsible, the warehousekeeper is not without remedy. By virtue of the joint and several liability created by [the regulations], he has a right of recourse against those primarily responsible for the diversion. Of course he may in practice find it difficult to pursue them. But the commissioners are in the same position. The warehousekeeper can reduce the commercial risk by requiring a bond or guarantee. Whether he does so or is content to run the risk of having to pay the duty without effective recourse is a matter for him. No-one is obliged to run an excise warehouse. It is a privilege which carries obligations."

60. The approach of the Court of Appeal reflected in observations by Schiemann LJ that the regulation 'was not intended to impose liability on a warehousekeeper in circumstances where he is utterly blameless and no longer has any connection with the goods' was rejected. Lord Walker stated in paragraph 38 on p.1762:-

> "[Greenalls] does business on a large scale and has access to expert advice as to its potential liabilities, and the extent to which they could be covered by insurance, secured guarantees, or similar arrangements. There is no unfairness or injustice in the notion that it may become liable for large sums of excise duty in circumstances where it is not at fault."

61. AIPI was not raised in *Greenalls*, although if there is any merit in Mr Thompson's argument that the requirement to pay money is within AIPI it could have been. There is nothing to suggest that, if it had been regarded as within AIPI, the decision would have been any different. It could be said to be unfair that an innocent party should find himself liable to pay £2M and it was certainly harsh, but not unlawful.

62. *International Transport Roth v Secretary of State for the Home Department* [2003] Q.B. 728 concerned an attack on the penalty scheme imposed pursuant to s.32 of the Immigration and Asylum Act 1999 whereby carriers were made liable to pay a fixed penalty of £2000 for every clandestine entrant found concealed in a vehicle. I note that at first instance Sullivan J records that it was tentatively submitted that enforcing a penalty amounted to deprivation of possessions within the meaning of AIPI. However, that submission does not seem to have been pursued before the Court of Appeal. Certainly, no reference is made to it. The breach of AIPI was said to turn on the detention provisions, which amounted to a control of property for the purposes of AIPI. Much of the argument

was directed to whether the scheme was to be regarded as civil or criminal for the purposes of Article 6 of the ECHR. By a majority (Laws LJ dissenting) the court decided it was criminal. I confess that I find Laws LJ's dissent entirely persuasive, but the issue is not relevant to what I have to decide. The majority found that the scheme was disproportionate and so breached AIPI. Simon Brown LJ stated (Paragraph 53 on p.754):-

> "If, therefore, contrary to my belief, the scale and inflexibility of the penalty, taken in conjunction with the other features of this scheme, are not such as to deprive the carriers of a fair trial under Article 6, then I would hold them instead to impose an excessive burden on the carriers such as to violate Article 1. Even acknowledging, as I do, the great importance of the social goal which the scheme seeks to promote, there are nevertheless limits to how far the state is entitled to go in imposing obligations of vigilance on drivers (and vicarious liability on employers and hirers) to achieve it and in penalising any breach. Obviously, were the penalty higher still and the discouragement of carelessness correspondingly greater, the scheme would be yet more effective and the policy objective fulfilled to an even higher degree. There comes a point, however, when what is achieved is achieved only at the cost of basic fairness. The price in Convention terms becomes just too high. That in my judgment is the position here."

63. In *Roth*, the attack was on the scheme and in particular on its inflexibility. If it had built into it a discretion which could mean that the penalty might be avoided if all due vigilance and care had been exercised and nothing had been left undone in that regard by either the driver or the carrier it might well – indeed, in my view should – not have contravened AIPI. I am sure that such an approach would have been in accord with the jurisprudence of the ECtHR.

64. Mr Thompson has attacked the exercise of the power in this case as being arbitrary and excessive. He suggests that it is not the best way of ensuring payment and that there are other means which could have been used. As the circumstances of this case show, he submits that it is manifestly unfair. In *Gasus* the court observed that a wide margin of appreciation must be allowed to a state and the court would respect the legislature's assessment in such matters 'unless it is devoid of reasonable foundation' (Paragraph 60).

65. In *R (Federation of Tour Operators) v HM Treasury* [2008] S.T.C. 2524, the court was concerned with the doubling of air passenger duty. The airlines could pass this on to tour operators but, when the new rates were implemented, the operators could not themselves pass it on to their customers. This was overlooked at the time of implementation, but there was a refusal when it was drawn to the relevant officials' attention to postpone the implementation largely, it seems, because to do so would have resulted in a loss of revenue of at least £50M and perhaps as much as £800M. The Judge (Stanley Burnton J) had said:-

> "In my judgment, there is no difference between the approach of the court to a measure to secure the payment of taxes in the sense of that considered in *Gasus* and the approach to a substantive tax measure, i.e. a decision to impose a particular tax or to increase it. In order to challenge successfully such a measure, it must be shown that the legislature's assessment is 'devoid of reasonable foundation'.
>
> Furthermore, the jurisprudence of the ECtHR does not justify this court in declaring a tax measure incompatible because its objects could have been more efficiently or alternatively by a different measure. The cases of *James* and *Gasus* show that the fact that a particular class of persons is subject to a measure that engages AIPI is a factor to be taken into account, but does not of itself lead to a conclusion of incompatibility."

These observations were approved by the Court of Appeal. While, as I have said earlier, the powers in the instant case are not a tax measure, I see no reason why the same principles should not apply. In particular, the grant of such powers by the legislature can only be impugned if devoid of reasonable foundation.

66. Mr Thompson placed some reliance on observations of Lord Hope in *R v Director of Public Prosecutions ex p. Kebilene* [1999] 4 All E.R. 801 at 843-4. He submitted that the doctrine of margin of appreciation was not available to national courts when considering convention issues arising within their own countries. But there is an area of judgment to which the court will defer on democratic grounds in a decision made by the elected body or a person exercising a discretion conferred upon him. In this case it must be recognised that, consistent with the ECtHR jurisprudence, the legislature does have a margin of appreciation in deciding what is the appropriate means of ensuring that payments which should be made in the public interest are in fact made. The principle that an aircraft owner rather than an airport authority or a body such as Eurocontrol should, where the operator does not or cannot pay, prima facie be liable seems to me to be unassailable. Whether or not the fleet lien is the best way of achieving such payment is immaterial: provided that it is not 'devoid of reasonable foundation' the court should not strike it down. I have no doubt that, however harshly it may operate in a given case, the principle is an entirely reasonable solution to the problem. It follows that, quite apart from my inability on the material before me to decide whether the claimants or the defendants and their various experts are correct in supporting or rejecting the possibility of protective measures being taken, such issues are not relevant.

67. Once it is accepted that the power is lawfully there, the exercise of it will equally be lawful unless in a given set of circumstances its exercise would be unfair and disproportionate. The defendants submit that the inability of the operator to pay is precisely the situation in which the fleet lien power leading to payment by a lessor is needed. Thus such circumstances as arose in this case cannot be regarded as exceptional or to take this case out of those in which use of the power is permissible. In my view exceptional circumstances are needed. One can well think of possibilities. Examples could include the misleading of the lessor by a possessor of the power or an indication given to a lessor that the power was not to be exercised against his aircraft or there was a deliberate targeting for no good reason of a particular lessor's aircraft. These will depend on the individual facts of a given case. This case, hard though it is on the claimants, has nothing to take it out of the circumstances in which the power can properly be exercised.

68. I am conscious that I may not have referred to every matter raised by the parties or dealt with some of the detail covered by the lengthy skeleton arguments, witness statements and oral submissions. I have of course considered them and I hope that my reasons suffice to show why I have formed the view that there is no breach of AIPI.

69. The claimants relied in addition on EU law. Regulation EC No 550/2004 dealt with the provision of air navigation services in the Single European Sky, such services being "connected with the exercise of the powers of a public authority, which are not of an economic nature justifying the application of the Treaty rules of competition". Commission Regulation (EC) No 1794/2006 lays down a common charging scheme for air navigation services. Paragraph (3) of the preamble states:-

> "The development of a common charging scheme for air navigation services provided during all phases of flight is of the utmost importance for the implementation of the single European sky. The system should contribute to the achievement of greater transparency with respect to the determination, imposition and enforcement of charges to airspace users. The system should also encourage the safe, efficient and effective provision of air navigation services to the users of air navigation services that finance the system and stimulate integrated service provision."

This underlines the importance of ensuring that air navigation services should in the public interest be properly financed.

70. Article 2 defines 'user' to mean "the operator at the time when the flight was performed or, if the identity of the operator is not known, the owner of the aircraft, unless he proves that another person was the operator at the time". Article 14 deals with collection of charges. It provides:-

> "1. Member States may collect charges through a single charge per flight.

> 2. Users of air navigation services shall promptly and fully pay all air navigation charges.
>
> 3. Member States shall ensure that effective enforcement measures are applied. These measures may include the denial of services, detention of aircraft or other enforcement measures in accordance with applicable law."

71. Mr Thompson submits that Article 14 is inconsistent with a fleet lien usable against lessors since it refers to the obligation on users to pay the charges and so, he submits, any enforcement measures must be applied not against owners but against users. That the principle to be applied in 'user pays' is clear from Regulation 550/2004. Paragraph (22) of the preamble reads:-

> "Air navigation service providers offer certain facilities and services directly related to the operation of aircraft, the costs of which they should be able to recover according to the 'user pays' principle, which is to say that airspace users should pay for the costs they generate at, or as close as possible to, the point of use."

72. The principle clearly is, as Mr Thompson submits, based on 'user pays'. But there is nothing which deals directly with the situation when the user does not or cannot pay. Article 14.3 of 1794/2006 does not limit the means whereby the charges can be collected and it is implicit in the Regulation that the charges must if possible be collected in the public interest. Thus there is no reason in my view to limit the scope of Article 14.3 to users alone. It would be strange if it did since it is accepted that outstanding charges on his own aircraft can properly be made payable by the lessor.

73. It is however clear from decisions of the European Court that community regulations must not be applied in a way which breaches fundamental rights. A good example of that principle is to be found in *Wachauf v Federal Republic of Germany* [1989] ECR 2609. In paragraphs 17 to 19 the principle is spelt out thus:-

> "17. The Court has consistently held, in particular in its judgment of 13 December 1979 in Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the Court has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those States may not find acceptance in the Community. International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law.
>
> 18. The fundamental rights recognised by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.
>
> 19. Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must,

> as far as possible, apply those rules in accordance with those requirements."

74. As must be apparent, this adds nothing to the argument based on AIPI. If the action taken violates AIPI, it will be likely to violate the principles set out in the paragraphs I have cited, albeit the threshold is set at a high level in Paragraph 18. Equally, if there is no violation of AIPI, there will be no violation of EU law.

75. The reason why Mr Thompson sought to rely on EU law was in case the defendants were able to maintain a defence to the claim based on s.6 of the Human Rights Act 1998. This provides, so far as material:-

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if –
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect or enforce those provisions."

76. The purpose of s.6(2)(b) is to preserve the sovereignty of Parliament: see *R (Hooper) v Work & Pensions Secretary* [2005] 1 WLR 1681 at 1696G per Lord Hoffmann citing observations of Lord Nicholls in *Aston Cantlow v Wallbank* [2004] 1 A.C. 546 at paragraph 19. A good example of the application of s.6(2)(b) is to be found in *Togher v Revenue & Customs* [2008] QB 476. This concerned enforcement of a confiscation order. The relevant statutory provisions meant that enforcement could still be effected after the service of a term of imprisonment to default. Thus if the discretion to enforce by other means after such service was exercised it would inevitably breach Article 7 of the ECHR. Accordingly s.6(2)(b) applied to enable that discretion to be exercised lawfully.

77. If the discretion cannot be exercised without breaching a person's human rights, it is clear that s.6(2)(b) takes the act outside s.6(1). In the context of this case, that would mean that the claimants could not recover the amounts they had to pay. I accept that it goes a little further inasmuch as s.6(2)(b) should protect the public authority if failure to exercise the discretion in a manner which breached human rights would frustrate the will of Parliament. This could apply if, albeit there may be some circumstances in which the power could be exercised without breaching human rights, these were so restricted as to render the use of the power unreasonably confined. In this case, I am satisfied that the discretion can be given effect in a way which is compatible with the claimants' human rights. I do not in the circumstances have to decide whether, if I were wrong and the claimants' argument that to exercise the power would breach their AIPI rights, s.6(2)(b) would apply. Certainly the use of the power would be confined, but not rendered nugatory. I think it is certainly arguable that Parliament's intention was that the power should be used where the operator could or would not pay and so to find that its use where the operator could not pay would be incompatible with AIPI rights would come within s.6(2)(b). However, s.6(2)(b) is not material in the circumstances of this case and so the EU argument adds nothing to the AIPI argument.

78. I turn to the submissions that BAA's actions were contrary to EU competition law. Article 102 of the TFEU (formerly Article 82 of the Treaty) provides:-

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member states. Such abuse may, in particular, consist in:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, …
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

It is therefore necessary if a breach is to be found to establish that the undertaking in question has a dominant position in a market which forms a significant part of the internal market (formerly the common market), that there is conduct amounting to an abuse of that dominant position and that that abuse can have an effect on trade between Member States.

79. As is no doubt generally well known, BAA has been the subject of an inquiry by the Competition Commission. This concluded that BAA's common ownership of airports in South East England and lowland Scotland gave rise to adverse effects on competition. It also reached the same conclusion in relation to aspects of its ownership of Aberdeen. The Competition Appeal Tribunal has overturned those conclusions but there is, I gather, an appeal to the Court of Appeal. One issue is what is the relevant market? Does it extend beyond a single airport, in this case Glasgow? It is not for me to determine that issue which depends on detailed evidence which is not before me. However, Mr Anderson has accepted for the purposes of these proceedings that BAA holds a dominant position at Glasgow airport – that that is so is obvious – and that Glasgow airport is capable of being regarded as being a significant part of the internal market. That makes it unnecessary in any event to consider the issue of the extent of the market dominance.

80. I have decided that the exercise of the fleet lien power was proportionate and did not breach the claimants' AIPI rights. That being so, since the power has been granted to BAA by statute, it would be extraordinary if it fell foul of competition law. That seems to me to be a complete answer to the claimants' submissions since the exercise of the power in such circumstances could not amount to an abuse.

81. EU competition law is, to say the least, complex. While the categories of abuse are not closed, generally the action in question will be exclusionary or exploitative. In the former category will come cases where a rival is not allowed to offer services in a market dominated by the undertaking in question. In what I shall call the *Port of Genoa* case [1991] ECR I-5889 users of the port were required to accept the services of dockers provided by the port. There were strikes, provision of unnecessary services which had to be paid for and a failure to take advantage of up to date technology which added to cost and created delays. This was a breach. Landing fees at an airport which discriminated in favour of the national airline were unlawful: see *Re Zaventem Airport landing fees: British Midland v Belgium (Brussels airport)* [1996] 4 CMLR 84. In *Sea Containers Ltd v Stena Sealink Ports* 1995 4 CMLR 84 the refusal to allow another ferry company to have access on a reasonable and non-discriminatory basis was unlawful.

82. There may, if an abuse and an adverse impact on competition is found, be a justification. Such an objective justification can exist if the conduct in issue is proportionate to any legitimate commercial interest or public policy objective which may be identified. That is the position here. In *Hoffmann-La Roche v Commission* [1979] ECR 461, the court observed:-

> "The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of

> the degree of competition still existing in the market or the growth of that competition. ”

No evidence produced before me establishes that the exercise of the fleet lien power has even potentially influenced the structure of the market, weakened the degree of competition or hindered the maintenance or growth of competition in the market, whatever market is the relevant one. Further, this exercise is one which would not normally be appropriately undertaken by the Administrative Court on judicial review – seethe observations of the Court of Appeal in *R(Association of Pharmaceutical Importers) v Secretary of State for Health* [2002] Eu L.R. 197 at paragraph 35.

83. In their amended grounds for judicial review at paragraph 135.3, the claimants assert that the use of the power means that lessors will be reluctant to allow their aircraft to use U.K. and BAA airports and so trade is affected. In paragraph 135.4 it is said that U.K. airports also have a competitive advantage over other European airports because they can guarantee full recovery of charges. The two assertions are contradictory. The reality is that there is no evidence upon which an effect on trade can be identified. Mr Chamberlain adds the point that the fleet lien power extends to all designated airports and some are clearly too small to constitute a significant part of the internal market. He gives as examples Biggin Hill and Lydd. In such cases, no breach of Article 102 could be established although the risk to and effect on the lessor of an aircraft would be identical. This further suggests that BAA is correct to submit that any alleged unfairness has nothing to do with the dominance of BAA.

84. I am satisfied for the reasons advanced by Mr Anderson and Mr Chamberlain which I have summarised that Mr Thompson’s submissions must be rejected. I have not considered it necessary to go into further detail since, as I have said, the proportionate use of the power means it does not amount to an abuse and there is no evidence from which I could properly find a weakening of competition.

85. That leaves one discrete issue which I can deal with very shortly. Two of the aircraft for whose debts the claimants had to pay were registered in the U.K. Mr Slasky says that he has spoken to Mr Dolinski, the now ex-president of Zoom Inc., who, as he puts it, confirmed to him that during the summer months Zoom Inc. would lease the aircraft from Zoom Ltd. on what is known as a wet lease basis. A wet lease normally means that the lessors would provide crew and insurance and would continue to be responsible for maintenance of the aircraft. Thus Zoom Ltd. would, if that were the position and the lease so provided, remain the operator since they rather than Zoom Inc. would have the management of the aircraft at the material time: see Article 155(3) of the Air Navigation Order 2005, (now repealed and replaced by the Air Navigation Order 2009/3015, Article 257) there being no separate definition of ‘operator’ in the Civil Aviation Act or the Transport Act or any of the regulations.

86. The normal practice is to bill on the basis of the call sign of an aircraft. In the protocol presented to Parliament in 2002 consolidating the Eurocontrol International Convention of 13 December 1960, which the U.K. ratified and deposited its instrument of ratification on 25 February 2003. Annex IV Article 5.2 provides:-

> “Where an ICAO designator or any other registered designator is used in identification of the flight, Eurocontrol may deem the operator to be the aircraft operating agency to whom the ICAO designator was allocated or was in the process of allocation at the time of the flight or identified in the filed flight plan or identified by use of that ICAO or other recognised designator in communication with air traffic control or by any other means.”

Zoom Inc. had been billed for these aircraft and there had not been any suggestion that they were not the operator. Indeed, payment of the amounts claimed had always been made by Zoom Inc.

87. Mr Thompson sought to rely on observations of HH Judge Diamond Q.C. in *Civil Aviation Authority v Internationale Nederlanden Aviation Lease BV* (1997) 1 Lloyds Rep 96 which, he submitted, showed that the call sign was not a satisfactory basis for identifying the

operator. The judge made the point that the regulations which he had to construe did not explicitly provide that the person liable to pay the route charges was the person who had requested the relevant services or the person whose call-sign was used on the flight plan. But he recognised that the call-sign did tend to indicate that the person so designated was the operator and that it at least amounted to a representation that that was the case. Judge Diamond had evidence before him of the actual arrangements and so was able to decide who was the true operator. I do not think the observations assist Mr Thompson since they recognise that Eurocontrol (and the same applies to BAA) are entitled to assume unless evidence to the contrary is produced that the person designated by the call-sign is the operator. This assumption is strengthened when that person has never asserted that he was not liable to pay.

88. Mr Thompson perforce accepted he could not argue that the evidence he was able to put before me was sufficient to establish that Zoom Inc. were not the operator if the burden lay upon him. Eurocontrol and BAA were, as I have said, entitled to rely on the call-sign and past practice. If the claimants challenged this, an evidential burden clearly rested on them. That burden they have not been able to discharge.

89. I should add that Mr Thompson submitted that the question who was the operator should be determined by the court as a matter of precedent fact, applying *Khawaja v Secretary of State for the Home Department* [1984] A.C. 74 and the recent Supreme Court decision in *R(A) v Croydon LBC* [2009] 1 WLR 2557. I very much doubt whether Mr Thompson is right, but I do not have to decide the issue since, as I have said, he accepts that he cannot show that the billing of Zoom Inc. was wrong.

90. I do not doubt that the claimants justifiably feel that they have been treated harshly and I can well understand and have sympathy with their belief that what has happened is unfair. However, the owning and leasing of aircraft can bring in substantial profits but it has its risks. The existence of the fleet lien was well known to the claimants and the possibility of detention followed by payment for aircraft other then their own was equally known. Termination of the lease could have avoided that. Whether or not to terminate was a commercial decision for which the lessor did not have as much information about the lessee's financial situation as possible.

91. For the reasons I have given, I dismiss this claim.