

THE AIR TRANSPORT LICENSING AUTHORITY

BETWEEN

OASIS HONG KONG AIRLINES LIMITED *Applicant*

-v-

CATHAY PACIFIC AIRWAYS LIMITED *Opponent*

DECISION

The issue

1. The issue before this Authority is whether the Applicant [“Oasis”] has the locus to make an application before us for licence under the Air Transport (Licensing of Air Services) Regulations [“the Licensing Regulations”] in the absence of any grant of an Air Operator’s Certificate [“AOC”] in its favour under regulation 6 of the Air Navigation (Hong Kong) Order 1995.

2. Oasis first launched its application pursuant to the Licensing Regulations on 26th April, 2005. The application was amended on 9th May, 2005. The application as amended is for operation of scheduled airline services between Hong Kong/London Gatwick and vice versa; between Hong Kong/Cologne Bonn, Berlin Schoenefeld and Milan Malpensa and vice versa and between Hong Kong/Oakland, Chicago and vice versa using B747-400 aircrafts. Both the initial and the amended applications were in Form 1 as provided by Regulation 6 and the Schedule to the Licensing Regulations. The applications were submitted to us through the Director-General of Civil Aviation [“The Director-General”]. Form 1 contains the following “Conditions” :

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Conditions

Note : Before the application overleaf is submitted by the Director-

General of Civil Aviation to the Licensing Authority for consideration, the applicant must first satisfy the Director-General of Civil Aviation as regards :

1. Operation procedures to be observed - including Route Capacity Schedules, Operations Manual, Route Book for aircrew, Preparation for flight, such documents as Flight Plans, Log-books, (Aircraft, Engine and Journey), Loadsheet; Radio apparatus to operate on the required frequencies for the proposed Route;

2. Maintenance Manual and Schedule. Information is also required as to where major overhauls are to be done, the checks on aircraft and engines; and the availability of adequate spare parts.

3. Traffic handling

4. The adequacy and competence of the staff to be employed”.

3. By letter dated 2nd June, 2005, the Director-General sent to this Authority Oasis’ applications. The application was endorsed by the Director-General in these terms :

“I certify that I have verified to the best of my knowledge and ability the particulars given overleaf and in the Annexures; that I have examined the applicant’s proposed practices in respect of Conditions 1, 2, 3 and 4 above, and I am of the opinion that they are satisfactory on condition that at the time of flight the aircraft to be used are of the types covered by the Air Operator’s Certificate of the applicant as required by the Air Navigation (Hong Kong) Order 1995 or any leased Hong Kong registered aircraft approved by the Civil Aviation Department”.

4. The Opponent [“Cathay”] accepts that the Licensing Regulations make no reference to the grant of an AOC as a prerequisite to the consideration by this Authority of a licence application. Cathay however submits that :

- (a) this Authority has consistently adopted a policy of requiring an applicant for a licence to operate air services to hold an AOC. Such a policy has been expressly recognised both by Government officials speaking on air transport policy and in the 17th April, 2003 decision of this Authority in *Cathay Pacific Airways Limited v. Hong Kong Dragon Airlines Limited* [“the Dragon Air Decision”]. This Authority has not notified Cathay of any change in that policy.
- (b) this Authority should, as a matter of policy, prescribe that no licence application will be considered unless the applicant holds an AOC.
- (c) this Authority should, as a matter of discretion, impose by way of condition in the grant of any licence the obtaining by Oasis of the requisite AOC.

Pronouncements by Government officials

5. The first pronouncement relied upon by Cathay is the statement made on 20th November, 1985 by Sir John Bremridge, then Financial Secretary, on Air Transport Policy. Sir John Bremridge sought to explain in his statement Government’s policy on scheduled and non-scheduled operations by Hong Kong airlines. In relation to scheduled services, Sir John Bremridge said this :

“To operate such services on any given route, an airline already holding an air operator’s certificate must, as a first step, obtain the requisite licence. It is ATLA, an independent body established under the Air Transport (Licensing of Air Services) Regulations, which determines licence applications. Its terms of reference for doing so are laid down in law in some detail, but generally speaking it must have regard to the co-ordination and development of air services with the object of ensuring the most effective service to the public while avoiding uneconomical overlapping. An ATLA decision on a licence application is final.

The next step is for the airline (assuming it meets the designation criteria) to be designated under the relevant air services agreement to exercise rights on the route for which it has been licensed or, if the

rights do not exist, for a decision to be taken as to whether those rights should be sought. Designation and the decision on whether to seek additional rights are matters for HMG acting on the advice of the Hong Kong Government. Where the rights exist, it is only in the most exceptional circumstances that a government can decline to accept designation of an airline”.

In this statement, Sir John Bremridge was describing the additional steps that must be observed by “an airline already holding an air operator’s certificate” before he could commence his operation. There is no indication in this statement that this Authority had adopted a policy of refusing to entertain any application for licence in the absence of an AOC.

6. The second pronouncement relied upon by Cathay is the statement made on 18th February, 1987 by Sir Piers Jacobs, then Financial Secretary to Legislative Council in relation to the steps that must be taken before a Hong Kong airline can be designated to fly any particular route. Sir Piers Jacobs said this :

“...there is not, and never has been, any intention on the part of the Government to restrict the number of Hong Kong's airlines...We have no statutory powers so to do. Provided an airline first obtains an air operator's certificate, which, in effect, is its mark of technical competence, and provided it has the necessary qualified personnel, it may then seek to start commercial operations...

“If a Hong Kong airline with an air operator's certificate wishes to operate scheduled services on any given route, it must first apply to the Air Transport Licensing Authority (ATLA) for a licence. ATLA's terms of reference for determining an application are laid down in some detail in the Air Transport (Licensing of Air Services) Regulations. In broad terms, ATLA must have regard to the co-ordination and development of air services with the object of ensuring the most effective service to the public while avoiding uneconomical overlapping of services.

The mere fact that a licence has been granted by ATLA does not, however, mean that an airline can immediately and automatically start flying on the route covered by that licence. Insofar as scheduled services are concerned, the next question to consider is designation, which is a matter for the Government”.

Sir Piers Jacobs was likewise describing the different steps involved before an airline can commence flying on scheduled services. There is likewise no suggestion in his statement that this Authority had imposed by way of a preliminary requirement the holding of an AOC before an application for licence can be launched.

7. The most recent statement by Government official relied upon by Cathay is the answer furnished by Mr. Leo Kwan, Acting Secretary for Economic Services to the Legislative Council on 29th May, 1996. Mr. Leo Kwan explained that :

“An AOC may be granted if the Government is satisfied that the company is competent to secure the safe operation of aircraft for the flights intended. It is essentially a mark of technical competence to operate a public transport service.

By itself, an AOC will not enable a company to operate air services to and from Hong Kong. To operate a scheduled service, a company would further require :

1. *a licence for a specific route granted by the Air Transport Licensing Authority (ATLA), an independent body established under the Air Transport (Licensing of Air Services) Regulations; and*
2. *designation by the Government as a Hong Kong airline which can operate on the route under the relevant air service agreement.*

...an AOC has no direct bearing on the Government’s ‘one airline one route’ policy which concerns designation of airline for a specific route under the relevant air services agreement. An AOC and an ATLA licence are prerequisites to designation, but designation of an airline by the Government is not automatic”.

The Secretary for Economic Services expressly recognised in this statement that an AOC and an ATLA licence are “prerequisites” to designation. There is however no support in this statement that an AOC is a prerequisite to an ATLA licence.

The Dragon Air Decision

8. Cathay relies on the following passages in the Dragon Air Decision.

(a) § 110 which reads :

“A crucial distinction, and one which appears not to have been grasped in this case, is that an ATLA licence, like its necessary precursor the Air Operator’s Certificate (‘AOC), functions as a necessary prerequisite to governmental designation, but that such designation by government does not automatically follow, which was one of the points specifically made in his oral response by the then Secretary for Economic Services in the Legislative Council proceedings of 29 May 1996. An ATLA licence, like an AOC, is a necessary ‘building block’ without which an application to fly upon a particular route immediately will founder, if a licence application be rejected, the matter goes no further. That which an ATLA licence is not required to reflect, however, is Government policy”.

(b) § 137 which reads :

“The grant of licences for international routes is governed by air services agreements entered into between governments, and within the international context Dragonair accepts that the position of ATLA today remains unchanged within that hierarchy of decisions which require to be made before an airline actually begins to operate upon any such international route. Such decision-making involves that which traditionally has been understood as a ‘four-step’ process : first, the technical evaluation involving the grant of an air operator’s certificate; second, considerations by ATLA of the statutory requirements underpinning the grant of a licence to fly that route;

third, governmental designation of the relevant airline pursuant to the relevant bilateral air services agreement such as is in place; and fourth, obtaining an operating permit and provision of landing 'slots' within the airport at the place of destination".

9. The 2 passages cited above lend support to the contentions of Cathay. The issue in that decision was however unrelated to the question whether an AOC was a "necessary precursor" to an ATLA licence. The views expressed in that decision are therefore strictly *obiter*.

The grant of an AOC and the previous practice of this Authority

10. The administrative procedure for the issue of an AOC is summarised in CAD 360 published by the Civil Aviation Department ["CAD"]. CAD 360 is divided into 2 parts. Part One covers the Operation of Aircraft and Part Two covers Arrangements for Maintenance Support. Both parts contain a wealth of details regarding what conditions have to be met before an AOC is issued or varied. § 2.1 of CAD 360 makes it clear that the issue of an AOC "shall be dependent upon the operator demonstrating an adequate organisation, method of control and supervision of flight operations, training programme as well as ground handling and maintenance arrangements consistent with the nature and extent of the operation specified". The issue of the AOC by the Director General signifies only that the holder is considered "competent to secure the safe operation" of the operator's aircraft.
11. We drew the parties' attention to 2 previous cases before this Authority. The first was an application in 1985 when this Authority processed 14 applications for 24 points by Caledonian Far East Airways Limited ["Caledonian"] whilst Caledonian was applying to CAD for an AOC. The applications were opposed but no objection was taken that Caledonian did not hold an AOC. The other application was the one made by Hong Kong Express Airways ["HKEA"] in October 2004. HKEA did not possess the relevant AOC at the date of its application. No point was taken by the opponent to that application. Caledonian's application was not pursued. HKEA's application was eventually granted by this Authority in the absence of a relevant AOC. The 2 applications (particularly HKEA's application) strongly suggest that it has not been the practice of this Authority to require the grant of an AOC as a pre-condition for any application of licence.

The Licensing Regulations

12. The mandate of this Authority is closely defined by Regulation 11 of the Licensing Regulations. In exercising our discretion to grant, or to refuse, a licence, we are enjoined to have regard to “the co-ordination and development of air services generally with the object of ensuring the most effective service to the public while avoiding uneconomical overlapping and generally to the interests of the public”. We are directed to have regard to 8 specific matters including “the extent to which it is probable that the applicant will be able to provide a satisfactory service in respect of safety, continuity, regularity of operation, frequency, punctuality, reasonableness of charges, and general efficiency”.

13. The use of the word “probable” suggests that the exercise involves weighing the evidence before this Authority and concluding on a balance of probabilities whether an applicant will be able to provide a satisfactory service. Regulation 11 does not dictate any head of evidence that we must have regard to. It does not lay down any pre-condition in relation to the availability of an AOC. What is prescribed by Form 1 is the endorsement by the Director-General. The Director-General may indicate unconditional satisfaction; conditional satisfaction or dissatisfaction. Given his expertise in this area, this Authority would (in the absence of any compelling evidence to the contrary) respect the views that he expressed in his endorsement. There would be little difficulty in the case of unconditional satisfaction or dissatisfaction. In the case of conditional satisfaction by the Director-General, we would have to consider the nature of the condition in the light of the surrounding circumstances and decide whether a licence should be granted having regard to the co-ordination and development of air services generally with the object of ensuring the most effective service to the public while avoiding uneconomical overlapping and generally to the interests of the public. We see no justification why we should fetter our discretion under Regulation 11 by imposing an inflexible requirement of an AOC.

14. Cathay’s opposition is based on the sole ground that an AOC is a pre-condition to an application before this Authority. On our construction of the Regulations as reinforced by the past practice of this Authority, we reject this contention. Cathay expressly indicated that should we decide this point against them, they would not be contending that on the facts of

this case no licence should be granted in favour of Oasis.

15. In relation to the sole issue before us, we hold in favour of Oasis. We grant the licence craved for by Oasis.

(signed)

Ronny F.H. Wong S.C.

(Chairman)

(signed)

Mr. Albert Cheung

(signed)

Mrs. Fanny Lai

(signed)

Prof. Japhet Law

(signed)

Mr. Ma Ho Fai

Mr. Johnny S.L. Mok instructed by Messrs. Lily Fenn & Partners for the Applicant
Mr. John Hickin of Messrs. Johnson, Stokes & Master for the Opponent