Judgments

Wilmington Trust SP Services (Dublin) Ltd and others v Spicejet Ltd

[2021] **EWHC 1117 (Comm)**

Queen's Bench Division (Commercial Court)

Julia Dias QC (sitting as a deputy judge of the High Court)

30 April 2021

Judgment

Mr Akhil Shah QC (instructed by **Clifford Chance LLP**) for the **Claimants**

Mr Timothy Young QC (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing dates: 9 March and 12 April 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MISS JULIA DIAS QC

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 am on 30 April 2021 .

MISS JULIA DIAS QC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is an application by the Claimants for summary judgment under CPR Part 24. The claim is for amounts allegedly outstanding under three separate Aircraft Lease Agreements, together with contractual interest and costs. The Defendant, which is a well-known Indian budget airline, was the Lessee under all three agreements.

2. The Lease Agreements related to a Boeing 737-800 aircraft serial number MSN 41397 and two Boeing 737-MAX 8 aircraft serial numbers MSN 64507 and MSN 64509. They were concluded as follows:

i) *MSN 41397:* Aircraft Lease Agreement dated 7 August 2013 concluded between the Defendant as Lessee and the First Claimant as Lessor, acting not in its own name but as trustee for BOC Aviation (Ireland) Ltd ("BOC"). The Definitions section of the Lease Agreement defined BOC as the "Participant" under the Agreement and "Trust Agreement" as "*the trust agreement entered into between Wilmington (as trustee) and Participant (as trustor) establishing Lessor*".

ii) *MSN 64507:* Aircraft Lease Agreement dated 15 June 2018 concluded between the Defendant as Lessee and the Second Claimant as Lessor.

iii) *MSN 64509:* Aircraft Lease Agreement dated 15 June 2018 concluded between the Defendant as Lessee and the Third Claimant as Lessor. This lease was on materially identical terms to that for MSN 64507.

3. It is unnecessary to rehearse the background facts giving rise to this dispute in exhaustive detail. For present purposes, it is sufficient simply to record that the Defendant's use of MSN 41397 has been considerably curtailed as a result of the global pandemic and that the two MAX 8 aircraft have been grounded in India by the Indian Directorate General of Civil Aviation (the "DGCA") since early 2019 following the tragic fatal crashes of similar aircraft as a result of design defects. Similar bans were imposed by virtually all countries worldwide and although some countries have lifted their restrictions, the ban imposed by the Indian authorities remains in place for a period which is currently indefinite. It thus remains illegal for the Defendant to operate the aircraft at present, either internally or externally.

The terms of the Leases

4. All three Leases were "dry" leases concluded for a term of 10 years. A "dry" lease is a long-term lease where the aircraft is handed over to the lessee to exploit for its own purposes and where the lessee undertakes all risk and responsibility relation to the operation and maintenance of the aircraft while the lessor's obligations are effectively limited to warranting quiet enjoyment. In that respect, it bears some similarity to a bareboat charter.

5. The general scheme under all the Leases was to the following effect:

i) Basic Rent was payable monthly in advance in an amount which was varied from time to time by agreement.

ii) Supplementary Rent was payable in addition to Basic Rent. This was a varying amount made up of a number of different components. Some of these components comprised a flat monthly rate while others depended on actual usage and were charged in arrears based on a monthly report submitted by the lessee.

iii) The Leases provided for the provision of a Security Deposit either in cash or by letter of

credit. In very broad terms, upon a default in payment under the lease in question or, in certain circumstances, under a related lease, the Lessor could draw down on the Deposit and apply it as provided for in the Lease Agreement. The Lessee then became obliged to restore the Deposit on demand.

iv) The Leases contained provisions for contractual interest and default interest. The basic contractual rate in the case of MSN 41397 was Citibank N.A. base rate plus 4%, while the rate for MSN 64507 and MSN 64509 was US Prime Rateplus 2%.

6. As many of the arguments which arose in this case turn on the wording of the Lease Agreements, it is convenient to set out the main provisions on which the parties relied.

MSN 41397 "1.1 Definitions

…

"***Affiliate***" *means, in relation to any person, any other person which, directly or indirectly, controls or is controlled by or is under common control with such person and for the purposes of this definition,* "***control***" *when used with respect to any specified person means the power to direct the management and policies of such person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise*…

…

"***Companion Aircraft***" *means any aircraft leased or to be leased by Participant (or by any Affiliate of Participant) (or by any trust of which Participant or any Affiliate of Participant is the beneficiary) to Lessee … from time to time.*

"***Companion Lease Agreement***" *means any lease agreement entered into by Lessee… in relation to any Companion Aircraft.*

…

"***Delivery Location***" *means Seattle, Washington.*

…

"***Indemnitee***" *means (a) each of Lessor, Owner, Participant, Wilmington … and (b) their respective successors, permitted assigns and permitted transferees*…

…

"***Owner***" *means Lessor or such other person as Lessor may notify to*

Lessee in writing from time to time as being the owner of the Aircraft.

"***Participant***" *means BOC Aviation (Ireland) Limited.*

…

"***Relevant Event***" *means any Termination Event or any event which, with the giving of notice or lapse of time or the satisfaction of any other condition … would constitute a Termination Event.*

…

"***Security Deposit***" *means the security deposit provided or to be provided, as the context may require, to Lessor pursuant to Clause 4.1 in the amount of [US$4,200,000].1*

…

"***Termination Event***" *means any of the events or circumstances described in Clause 23.*

…

"***Trust Agreement***" *means the trust agreement entered into between Wilmington (as trustee) and Participant (as trustor) establishing Lessor.*

…

1.3 Interpretation

…

(h) reference to "*Lessor*", "*Owner*", "*Participant*" *… shall include the successors, assigns and transferees of such person…*

…

4.3 Deposit Property of Lessor

The Deposit shall be the absolute and unconditional property of Lessor, may be freely co-mingled by Lessor with its other funds and dealt with by Lessor and in accordance with the terms of this Agreement… If a Termination Event shall occur and be continuing, in addition to any other rights Lessor may have under

applicable law as a secured party or otherwise, Lessor may set-off against, use, apply or retain all or any part of the Deposit in full or partial payment of amounts due and payable by Lessee under any Operative Document or any Companion Lease Document to compensate lessor for any expense it may incur as a result of, or to compensate Lessor for any loss suffered as a consequence of, the occurrence of any Termination Event or Companion Lease Termination Event, or to apply toward Expenses arising as a result of the occurrence of any Termination Event or Companion Lease Termination Event. If Lessor uses or applies all or any part of the Deposit, such use or application shall not be deemed a cure by Lessee, or waiver by Lessor or any other person, of any Termination Event and Lessee shall, within three Business Days after Lessor's demand, pay to Lessor in cash such amount as may be necessary to restore the Deposit to its original amount.

4.4 Letter of Credit Option

As an alternative to the provision of the cash Security Deposit pursuant to Clause 4.1, Lessee may… elect to provide to Lessor a letter of credit complying with the requirements specified in Clause 4.42…

…

4.6 Lessor's rights under Letter of Credit

Lessor may make demand under a Security Letter of Credit at any time following the occurrence of a Relevant Event which is continuing, and the aggregate amount paid to Lessor pursuant to that demand shall constitute the Security Deposit and shall be held or applied by Lessor in accordance with Clause 4.3…

…

4.8 New Letter of Credit

If Lessor draws funds under a Security Letter of Credit and Lessee subsequently cures all subsisting Termination Events and all Relevant Obligations then falling due for performance have been performed or discharged in full, Lessee may deliver a new letter of credit to Lessor complying with the requirements of Clause 4.5.

…

5.2 Delivery

Lessor shall deliver the Aircraft to Lessee immediately upon delivery of the Aircraft to Lessor by the Airframe Manufacturer, and Lessee shall accept the Aircraft under this Agreement when so delivered at the Delivery Location, whereupon the Lease Term shall commence…

7.2 Agreement to Pay Basic Rent

Lessee shall pay to Lessor Basic Rent monthly in advance … on the Delivery Date and on the first

day of each subsequent calendar month during the Lease Term…

…

7.5 Obligations to Pay Rent Unconditional

Lessee's obligation to pay Rent and make all other payments in accordance with this Agreement shall be absolute, unconditional and non-refundable and irrespective of any contingency whatsoever including (but not limited to):

(a) *any unavailability of the Aircraft for any reason…; or*

(b) *the ineligibility of the Aircraft for any particular use or trade, or for registration or documentation under the laws of any relevant jurisdiction; or*

(c) *the Total Loss … of, or any damage to, the Aircraft, Airframe or any Engine; …*

8.3 Late Payment

If Lessee fails to pay to Lessor any sum (excluding any sum payable pursuant to this

Clause 8.3) on its due date for payment under this Agreement or any other Operative

Document, lessee shall pay to Lessor on demand interest on such sum from the due

date up to the date of actual payment (as well after as before any relevant judgement) at the Default Rate. 8.4 ***Calculation of Interest***

All interest and other payments of an annual nature by each party under this Agreement … shall accrue from day to day and be calculated on the basis of actual days elapsed and a 360 day year.

…

15. SUPPLEMENTAL RENT

15.1 Payment of Supplemental Rent

*(a) Lessee shall pay to Lessor on the fifteenth day of each calendar month during the Lease Term, commencing on the first fifteenth day of the calendar month following the calendar month in which Delivery occurs and of the Lease Termination Date… supplemental rent in respect of the Aircraft calculated in accordance with the provisions of Clause 15.2 ("****Supplemental Rent****").*

…

19. LOSS AND DAMAGE

19.1 Risk of Loss and Damage

Throughout the Lease Term Lessee shall bear the full risk of any loss, destruction, hijacking, theft, condemnation, confiscation, seizure or requisition of or damage to the Aircraft and of any other occurrence which shall deprive Lessee of the Aircraft for the time being of the use, possession or enjoyment thereof.

…

23. TERMINATION EVENTS

Each of the following events or circumstances shall constitute a Termination Event:

…

(u) a Companion Lease Termination Event occurs…

30. THIRD PARTY RIGHTS

*The parties do not intend that any term of this Agreement shall be enforceable solely by virtue of the Contracts (Rights of Third Parties) Act 1999 (the "**Act**") by any person who is not a party to this Agreement **provided** that each Indemnitee may enforce its rights under this Agreement in accordance with the terms of the Act…"*

MSN 64507/MSN 64509

"***1. DEFINITIONS.***

Affiliate means, in respect of any person, any person directly or indirectly controlling, controlled by, or under common control with such first person; and a person shall be deemed to control another person if such first person possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of such other person, whether through the ownership of voting securities, contract or otherwise…

Aviation Authority shall mean the Directorate General of Civil Aviation in India or any Governmental Entity which under the laws of the State of Registration has control over civil aviation or the registration, airworthiness or operation of aircraft in the State of Registration.

…

Delivery Location shall mean the location specified in Exhibit C hereto for the delivery of the Aircraft by Lessor to Lessee.

…

Lease Payments shall mean any and all amounts, liabilities and obligations (other than Basic Rent) which Lessee assumes or agrees to pay hereunder Lessor, including without limitation; (i) the Supplemental Rent; … (iv) … interest at the Interest Rate (all computations of interest under this Lease to be made on the basis of a 365 day year for the actual number of days elapsed) calculated on any part of any instalment of Basic Rent not paid on the due date thereof for the period the same remains unpaid, and on any other amounts not paid when due hereunder until the same is paid; and (v) the Deposit.

…

State of Registration shall mean India or any other jurisdiction in which the Aircraft is registered in accordance with this Agreement.

…

2. Lease and Conditions.

…

(b) Lessor shall deliver the Aircraft hereunder to Lessee upon the receipt by Lessor of the following items on or before the commencement Date…:

…

(viii) *certified copy of the approval of the Ministry of Civil Aviation for the import of the Aircraft;*

(ix) *a No Objection Certificate with respect to the Aircraft issued by the Aviation Authority together with annexure;*

(x) *evidence of the issue of the Aircraft's temporary registration certificate for the purposes of the ferry flight to India;*

…

(xxii) a copy of the application for the Certificate of Registration of the Aircraft

(Form CA-28) with the Aviation Authority noting that the Aircraft is being registered pursuant to a Lease…;

…

(d) Within fifteen (15) Business Days of the Commencement Date, Lessee will provide to Lessor the following documents….:

…

(iii) A copy certified by Lessee of the bill of entry for home consumption issued by the customs authority upon import of the Aircraft into India;

…

3. DELIVERY AND ACCEPTANCE; EFFECTIVE DATE; TERM.

(a) *Delivery and Acceptance. … The Aircraft to be leased hereunder shall be delivered to Lessee "AS IS, WHERE IS" and "SUBJECT TO EACH AND EVERY DISCLAIMER OF WARRANTY AND REPRESENTATION AS SET FORTH IN*

SECTIONS 5(a) AND 5(b) HEREOF. Lessee's acceptance of the aircraft shall be regarded for all purposes as absolute, unconditional and irrevocable…

(b) ***Effective Date and Term of Leasing; Risk of Loss; Failure to Deliver.***

(i) Lessor will lease the Aircraft to Lessee and Lessee will take delivery of the Aircraft on lease in accordance with this Lease for the duration of the Term.

…

(iii) Risk of Loss. During the Term… the Aircraft, the Engines and every Part will be in every respect at the sole risk of Lessee, who will bear all risk of loss, theft, damage or destruction to the Aircraft, any Engine or any Part from any cause whatsoever.

…

4. RENT.

(a) Rent. Lessee covenants and agrees to pay to Lessor… the following as Rent:

(i) *Basic Rent payable in consecutive monthly instalments in advance and due on each Basic Rent Payment Date; and*

(ii) *any and all Lease Payments as the same becomes due.*

…

(c) Prohibition Against Setoff, Counterclaim, Etc. This Lease is a net lease. Lessee's obligation to pay all Rent hereunder shall be absolute and unconditional and shall not be affected or reduced by any circumstances, including, without limitation: (i) any setoff, counterclaim, recoupment, defence or other right which Lessee may have against Lessor, the Manufacturer or any other manufacturer, any seller of or Person providing services with respect to the Aircraft or any other Person, for any reason whatsoever; (ii) any defect in the title, airworthiness or eligibility for registration under Applicable Law, or any condition, design, operation, merchantability or fitness for use of, or any damage to or loss or destruction of, the Aircraft, or any interruption or cessation in the use or possession thereof by lessee for any reason whatsoever, whether arising out of or related ot an act or omission of Lessee, or any other Person; … (vi) any failure of the Aircraft to comply with the specifications agreed with the Manufacturer, (vii) any other circumstance or happening of any nature whatsoever, whether or not similar to any of the foregoing;…

…

5. REPRESENTATIONS AND WARRANTIES.

(a) IN RELIANCE ON LESSEE'S REPRESENTATIONS, WARRANTIES AND COVENANTS CONTAINED IN THIS LEASE, LESSOR HAS NOT AND SHALL NOT BE DEEMED TO HAVE MADE (WHETHER BY VIRTUE OF HAVING LEASED THE AIRCRAFT UNDER THIS LEASE, OR HAVING ACQUIRED THE AIRCRAFT, OR HAVING DONE OR FAILED TO DO ANY ACT, OR HAVING ACQUIRED OR FAILED TO ACQUIRE ANY STATUS UNDER OR IN RELATION TO THIS LEASE OR OTHERWISE) AND LESSOR HEREBY SPECIFICALLY DISCLAIMS ANY REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED (EXCEPT AS HERIN BELOW PROVIDED IN THIS SECTION 5(a)), AS TO ARIWORTHINESS, CONDITION, DESIGN, OPERATION, MERCHANTABILITY, FREEDOM FROM CLAIMS OF INFRINGEMENT OR THE LIKE, OR FITNESS FOR USE FOR A PARTICULAR PURPOSE OF THE AIRCRAFT, OR AS TO THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE AIRCRAFT, THE ABSENCE THEREFROM OF LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE, OR AS TO ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED (INCLUDING ANY IMPLIED WARRANTY ARISING FROM A COURSE OF PERFORMANCE OR DEALING OR USAGE OF TRADE), WITH RESPECT TO THE AIRCRAFT; AND LESSEE HEREBY WAIVES, RELEASES, RENOUNCES AND DISCLAIMS EXPECTATION OF OR RELIANCE UPON ANY SUCH WARRANTY OR WARRANTIES. LESSOR SHALL HAVE NO RESPONSIBILITY OR LIABILITY WHATSOEVER TO

LESSEE OR ANY OTHER PERSON, WHETHER ARISING IN CONTRACT OR TORT, OUT OF ANY NEGLIGENCE OR STRICT LIABILITY OF LESSOR OR OTHERWISE, FOR: (i) ANY LIABILITY, LOSS OR DAMAGE CAUSED OR ALLEGED TO BE CAUSED

DIRECTLY OR INDIRECTLY BY THE AIRCRAFT OR ANY ENGINE OR BY ANY INADEQUACY THEREOF OR DEFICIENCY OR

DEFECT THEREIN OR BY ANY OTHER CIRCUMSTANCES IN CONNECTION

THEREWITH; (ii) THE USE, OPERATION OR PERFORMANCE OF THE AIRCRAFT OR ANY ENGINE OR ANY RISKS RELATING THERETO; (iii) ANY INTERRUPTION OF SERVICE, LOSS OF BUSINESS OR ANTICIPATED PROFITS OR CONSEQUENTIAL DAMAGES; OR (iv) THE DELIVERY, OPERATION, SERVICING, MAINTENANCE, REPAIR, IMPROVEMENT OR REPLACEMENT OF THE AIRCRAFT, EXCEPT IN EACH CASE TO THE EXTENT CAUSED BY THE GROSS NEGLIGENCE OR WILFUL

MISCONDUCT OF LESSOR. [Capitalisation in the original.]

…

(b) *Manufacturers' Warranties. Lessor hereby assigns to Lessee such rights as*

Lessor may have, or will have on the Delivery Date, under any warranty, express

or implied, with respect to the Aircraft and the Engines made by the Manufacturer, the Engine Manufacturer, or any other Person (including any Approved Maintenance Provider), to the extent that the same exist or may be assigned or otherwise made available to Lessee;…

(c) *Lessee's Representations and Warranties. Lessee hereby represents and warrants on the date hereof and on the Commencement Date as follows:*

(i) Lessee is a company duly incorporated and validly existing under the laws of India, and has the full power and authority to carry on its business as presently conducted and to perform its obligations under this Lease and the other Lessee Agreements;

…

(vii) *Lessee holds: … a valid air transport licence for the type of operations conducted by lessee in accordance with Applicable Law and the requirements of the Aviation Authority*…

(viii) *Lessee has complied with and satisfied all of the requirements of the Aviation Authority, so as to enable it to fulfil its obligations hereunder, and to otherwise lawfully operate, possess, use and maintain the Aircraft;*

…

6. POSSESSION AND USE.

(a) Possession.

…

(ii) Subleases. Lessee shall not sublease the Aircraft except pursuant to sublease to a solvent, commercial air carrier or air operator…

…

(d) Maintenance. Lessee, at its own cost and expense, shall:

…

(ii) keep the Aircraft in such operating condition as is necessary to enable all certificates, licenses, permits and authorizations required for the use and operation of the aircraft, Engines and Parts, including the airworthiness certification of the Aircraft to be maintained at all times … under applicable Aviation Authority and FAA regulations and any other Applicable law, including, but not limited to any equipment modifications or installations required by the Aviation Authority and the FAA;

…

(g) Supplemental Rent.

(i) Lessee shall pay in arrears, no later than the fifteenth (15th) calendar day following the last day of each calendar month during the Term, to Lessor, the Supplemental Rent on such dates and in such amounts with respect to the Airframe, each Engine, the Life Limited Parts, the Landing Gear and APU as specified in Exhibit C hereto (the "Supplemental Rent")…

17. EVENTS OF DEFAULT.

Any one or more of the following occurrences or events shall constitute an Event of Default:

(a) Lessee shall fail to make any payment of Basic Rent to Lessor when due under this Lease and such payment shall be overdue for a period of three (3) Business Days or Lessee shall fail to make any other payment when due hereunder and such payment shall be overdue for a period of five (5) Business Days;

…

(k) an event of default shall occur and be continuing under any other Operative Agreement or under any Related Lease;

21. MISCELLANEOUS.

…

(a) Governing Law; Jurisdiction.

(i) *This Lease and any non-contractual obligations arising out of or in connection with it shall in all respects be governed by, and construed in accordance with, the laws of England, including all matters of construction, validity and performance. Lessor and Lessee hereby expressly submit to the exclusive jurisdiction of the English courts. Lessee further agrees that any legal action or proceeding against it or any of its assets may be brought in any jurisdiction where Lessee or any of its assets may be found.*

(ii) *The parties hereto agree that the courts of England are to have jurisdiction to settle any disputes that may arise in connection with the legal relationships established by this Lease (including, without limitation, claims for set-off or counterclaim) and any other Lessee Agreement or otherwise arising in connection with this Lease and any other Lessee Agreement. The parties hereto hereby irrevocably and unconditionally submit to the jurisdiction of the courts of England in respect of such disputes. The submission to such jurisdiction shall not (and shall not be construed so as to) limit the rights of the Lessor to take proceedings against any other party in any other court of competent jurisdiction by Lessor, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not.*

…

(e) Quiet Enjoyment. Lessor covenants that, so long as no Event of Default has occurred or is continuing, and the Term has not been terminated in accordance with the provisions hereof, neither Lessor nor any Person acting through it will take or cause or permit to be taken any action that shall interfere with Lessee's … quiet and uninterrupted enjoyment, use and possession of the Aircraft.

EXHIBIT C

…

Delivery Location shall mean The Boeing Company facility in Seattle, Washington or another location mutually agreed between lessor and Lessee."

Discussion

7. As noted above, it is not disputed by the Defendant3 that it has not paid Basic Rent and Supplemental Rent in accordance with the Lease Agreements. In the light of the contractual

terms which have been set out above, it might therefore have been thought that the Claimants' application for summary judgment was entirely straightforward. Indeed I did not call upon Mr Shah QC to open the Claimants' case.

8. However, Mr Young QC for the Defendant rightly emphasised that it was not open to me to grant summary judgment under CPR Part 24.2 unless I was satisfied not only that there was no real prospect of a successful defence *but also* that there was no other compelling reason for trial. He argued strenuously that in addition to numerous credible grounds of defence, there was in any event a compelling reason for trial in this case. So eloquent was he that the day set aside for the hearing of the application proved to be insufficient and the matter had to be adjourned for a further full day of submissions.

9. In the event, the consequent delay was not time wholly wasted as it enabled the Claimants to put forward Re-Amended Particulars of Claim supported by a further Witness Statement from Mr Acratopulo. The proposed amendments were not objected to by Mr Young and I accordingly gave permission for them to be made on the usual terms as to costs. They addressed a number of technical procedural points raised by the Defendant on the first day of the hearing, which consequently fell away. I therefore say no more about them.

10. The principles of law applicable to an application for summary judgment were unsurprisingly not in dispute between the parties. For this purpose, I adopt the summary set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd,* [2009] **EWHC** 339 (Ch) at [15]:

"*The correct approach on applications by defendants is, in my judgment, as follows:*

i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*

ii) *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel*

[2003] EWCA Civ 472 at [8]

iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*

iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];*

v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

11. These are the principles that I have endeavoured to apply in the determination of this application.

12. The defences raised by Mr Young fell essentially under the following six heads, which I shall consider in turn. Not all heads applied to each Lease Agreement.

i) Title to sue – MSN 41397 only;

ii) Illegality – MSN 41397 only;

iii) Claim for Restoration of Deposit – MSN 41397 only; iv) Calculation of Supplemental Rent – all three Lease Agreements;

v) Implied condition of satisfactory quality under the Supply of Goods and Services Act 1982 – MSN 64507/MSN 64509 only;

vi) Frustration – MSN 64507/MSN 64509 only.

Title to Sue

13. The evidence of Mr Acratopulo on behalf of the Claimants is that in about May 2016, BOC sold its beneficial interest to Sky Aircraft B41397 Ltd ("Sky"), which company subsequently changed its name to Jetair 17 Ltd ("Jetair") on about 4 September 2017. The

Certificate of Incorporation on the change of name was in evidence before me.

By a Lease Amendment Agreement (No. 2) dated 26 May 2016, the Defendant as Lessee acknowledged that Sky was thenceforth the Participant under the Lease Agreement and that it was entitled to exercise all rights and assume all obligations of the Participant. Paragraph 3 of the Particulars of Claim further pleaded that Jetair and the Second and Third Claimants are all Affiliates of each other within the meaning of the various Lease Agreements, being all direct or indirect subsidiaries of Goshawk Aviation Ltd.

14. A point taken from the outset by Mr Young was that there was insufficient evidence before the court for the purposes of a summary judgment application to establish the relationship between the First Claimant and Jetair. In particular, he said that there was no evidence to show that the relationship was indeed one of trust rather than, for example, one of agency. If it was only the latter, he argued that the First Claimant had no right of suit on the basis of the current pleadings.

15. When the matter was adjourned part heard, I indicated that the First Claimant might take advantage of the hiatus to put in further evidence in this regard if so advised. In the event, it chose not to do so. Mr Young accordingly returned to the attack, inviting me to infer that the First Claimant's reticence on this point betokened an inability to answer the point.

16. It is perhaps unfortunate that the opportunity was not taken to put the matter beyond doubt. My understanding, as a matter of English law at least, is that subject to the formalities of section 53(1) of the Law of Property Act 1925, a beneficiary under a trust can alienate its equitable interest to a third party who can then take the benefit of the trust. However, there was no evidence before me that the requisite formalities had been satisfied, even though one might have thought that this would be a relatively simple matter to establish.

17. The question is therefore whether this is potentially fatal to the First Claimant's claim. I am not persuaded that it is. First, this is a singularly unmeritorious point for the

Defendant to take when it had, by virtue of Lease Amendment Agreement No. 2, expressly acknowledged the sale of BOC's beneficial interest to Jetair and agreed to revise the definition of “Trust Agreement” accordingly. Secondly, the First Claimant signed the Lease Agreement in its capacity as trustee for BOC. If the purported disposition to Jetair was valid, then it is now a trustee for Jetair – as claimed. If not, then the disposition is presumably invalid and the First Claimant remains a trustee for BOC. Which it is does not seem to me to be of any concern to the Defendant; either way the First Claimant correctly sues in its capacity as trustee.

18. But even if (as Mr Young speculated) the relationship between the First Claimant and BOC was one of agency, this does not in my view preclude the First Claimant from suing on the Lease Agreement. The First Claimant did not sign the Lease Agreement purporting to act on behalf of any other person or entity. On the contrary, by signing, albeit “*not in its individual capacity but solely as trustee*”, the First Claimant was in my view clearly indicating that it was itself assuming rights and obligations under the agreement. As such, even if it was in fact acting as an agent rather than a trustee, this was a case where it contracted personally and was thereby both liable and entitled under the contract: see *Bowstead & Reynolds on Agency* (22nd ed.) (Sweet & Maxwell, 2021) Art. 98. I note, moreover, that the Defendant positively admits and avers in paragraph 17 of the Amended Defence and Counterclaim that the First

Claimant was the lawful Lessor under the Lease Agreement. As can be seen from the provisions set out above, “Lessor” is included in the definition of “Indemnitee” and clause 30 of the Lease Agreement expressly provides that each Indemnitee may enforce its rights under the agreement.

19. For all these reasons therefore, I do not consider that the Defendant has any real prospect of successfully challenging the First Claimant's claim for lack of title to sue.

Illegality

20. This again is a point which arises only in connection with MSN 41397. The Defendant's argument was that the restrictions imposed by the Indian Government in the light of the Covid pandemic made it illegal to operate the aircraft and that the Lease Agreement, while not affecting the accrual of rental payments in these circumstances, nonetheless provided on its true construction for a suspension of physical payment for the duration of the illegality.

21. I have no hesitation in rejecting this ground of defence, not least because MSN 41397 has in fact been used during the pandemic, albeit to a much more limited extent that previously. Indeed, this was not disputed. But in any event, I find it impossible – even on the most expansive approach to construction – to spell out any agreement that payment of rent falling due should be suspended for the duration of any restrictions such as those which have in fact been imposed. As argued by Mr Shah, this was a dry lease where possession of the aircraft was transferred by the First Claimant to the Defendant for a term of ten years, such that the Defendant had exclusive possession and undertook all the risks of operation and maintenance in return for a warranty of quiet enjoyment and an assignment of manufacturers' warranties. This is made abundantly clear by numerous provisions in the Lease Agreement, but the terms of clauses 7.5(a) and (b) and 19.1 in particular seem to me to put the matter beyond doubt.

22. In the event, Mr Young wisely did not press the point.

Claim for Restoration of Deposit

23. The bulk of the First Claimant's claim in respect of MSN 41397 relates to the alleged failure of the Defendant to restore the Security Deposit which is said to have been lawfully drawn down by the First Claimant. I have set out the applicable provisions above. So far as relevant, clause 4.3 entitled the First Claimant to draw down the Deposit upon the occurrence of a Termination Event. Termination Events were defined in clause 23 to include a Companion Lease Termination Event. The First Claimant was then entitled to apply the funds drawn down to offset amounts due to it under the Lease Agreement or Companion Lease or to compensate the First Claimant for any loss or expense resulting from a Termination Event or Companion Lease Termination Event.

24. On 22 October 2019, the First Claimant wrote to the Defendant demanding restoration of the entire amount of the Deposit of US$4,200,000 in purported exercise of its rights under Clause 4 of the Lease Agreement. The letter referred to the occurrence and continuation of “*multiple Companion Lease Termination Events*” and recorded that the First Claimant had accordingly made a demand under clause 4.6 of the Lease Agreement for the full amount of the Deposit, which it had applied in accordance with clause 4.3. I have not seen the letter of

demand, but it is referred to by Mr Acratopulo in paragraph 23(a)(ii) of his First Witness Statement dated 31 July 2020 where he stated that "*the First Claimant made a demand on 24 September 2019 for the full amount under the Security Letter of Credit to pay off amounts due under the Companion Leases in accordance with Clause 4.3.*"

25. The Companion Lease Termination Events relied upon by the First Claimant in this respect were the non-payments that had by then arisen in relation to MSN 64507 and MSN 64509. No other Termination Events were relied upon in the 22 October 2019 letter. In particular, it was not asserted that drawdown was justified on the basis of any amounts owed to the First Claimant under the lease of MSN 41397. No doubt this was because (as the schedule produced by Mr Acratopulo makes clear) nothing was in fact then outstanding in respect of MSN 41397.

26. The logical first question is therefore whether the leases of these two aircraft were "Companion Leases" within the meaning of the Lease Agreement which in turn depends on whether these aircraft had been leased by the "Participant" or an

"Affiliate" of the Participant. Clearly, they had not been leased by BOC. However, as recorded in Lease Amendment Agreement No. 2, as from 26 May 2016, the Participant under the Lease Agreement was agreed to be Sky (subsequently to become Jetair) and no challenge has been made to the assertion in the Particulars of Claim that the Second and Third Claimants are Affiliates of Jetair. I therefore proceed on the basis that a Termination Event within clause 23(u) had occurred.

27. However, I see considerable force in Mr Young's argument that clause 4.3 only entitles the Deposit to be drawn down in respect of sums which are actually due to the First Claimant itself, or losses and expenses which it has itself suffered as a result of the relevant Termination Event or Companion Lease Termination Event. But sums due under the leases of MSN 64507 and MSN 64509 were owed to the Second and Third Claimants respectively and it is neither pleaded nor asserted that the First Claimant has itself suffered any losses as a result of these non-payments.

28. In these circumstances, I accept that the Defendant has an arguable case that drawdown on the basis articulated in the letter of 22 October 2019 was impermissible

and unjustified and that the Defendant had no obligation to restore a Deposit which had been wrongfully drawn down.

29. The question then arises as to whether the provisions of the Lease Agreement entitle the First Claimant to "reallocate" the sums drawn down – as it has purported to do – to payments of Basic Rent which subsequently fell due and were not paid under the MSN 41397 Lease Agreement itself. As to this, the evidence before me discloses the following sequence of events:

i) By its letter dated 22 October 2019 the First Claimant demanded restoration of the entire Deposit which it had already drawn down in full, as acknowledged by Mr Acratopulo, to offset amounts owing under the Companion Leases. I return below to Mr Acratopulo's suggestion that the Deposit was not in fact applied at that time despite the clear intimation in the letter that

the amount drawn down had already been applied.

ii) By letter of 20 February 2020, the First Claimant noted the continuation of the Companion Lease Termination Events previously referred to, but relied on the Defendant's failure to restore the Deposit in response to the 22 October 2019 demand as a separate Termination Event falling with clause 23(a) of the Lease Agreement. It also relied on a failure to pay Supplemental Rent as a yet further discrete Termination Event under clause 23(a). Clearly, if the initial demand to restore the Deposit was invalid, the Defendant's failure to comply cannot have amounted to a Termination Event. But in any event, the First Claimant did not actually purport to do anything about these further alleged defaults but merely reserved its rights. iii) On 28 April 2020, the original Particulars of Claim were served claiming:

a) US$4,200,000 to restore the Deposit;

b) US$376,496 for Basic Rent:

c) US$1,153,170.81 for Supplemental Rent.

v) On 19 June 2020, the First Claimant purported to notify the Defendant by letter that it had applied the entire Deposit to Basic and Supplemental Rent owed under the lease for MSN 41397. In fact, the schedule attached to the letter showed that only a sum of US$1,129,488 had been applied and that to Basic Rent alone. On any view, this was inconsistent with the letter of 22 October 2019 and the Particulars of Claim..

vi) In his First Witness Statement dated 31 July 2020 in support of the application for summary judgment, Mr Acratopulo asserted that the First Claimant had applied a further US$376,496 of the Deposit to a subsequent instalment of Basic Rent (although no documents were exhibited to support this) and that the amounts claimed had now risen to:

a) US$1,505,984 to restore the Deposit;

b) US$1,268,728.08 for Supplemental Rent.

vii) On 1 September 2020, Amended Particulars of Claim were served claiming the amounts said to be outstanding as at 23 July 2020, namely:

a) US$1,505,984 to restore the Deposit;

b) US$376,496 for Basic Rent;

c) US$1,153,170.81 for Supplemental Rent.

viii) In his Second Witness Statement dated 16 December 2020, Mr Acratopulo deposed that another US$1,882,480 of the Deposit had been applied to offset further instalments of Basic

Rent. The amounts now claimed had accordingly risen to:

a) US$3,388,464 to restore the Deposit;

b) US$1,605,444.19 for Supplemental Rent.

ix) By letter dated 16 February 2021, the First Claimant made a further demand for restoration of the Deposit and notified the Defendant that a total of US$4,141,456 had now been applied from the Deposit against Basic Rent and that a further US$1,680,757.83 was owing in respect of Supplemental Rent.

x) In his Third Witness Statement dated 26 February 2021, Mr Acratopulo deposed to these figures and indicated that a further instalment of Basic Rent in the sum of US$376,996 had meanwhile fallen due. These were the figures relied upon by Mr Shah in his skeleton argument (although he also rather confusingly stated that the Deposit had been applied in full).

xi) Finally, in his Fifth Witness Statement dated 31 March 2021 (and in the draft Re-Amended Particulars of Claim), Mr Acratopulo updated the figures to where they currently stand, namely:

a) US$4,141,456 to restore the Deposit;

b) US$752,992 for Basic Rent;

c) US$1,711,608 for Supplemental Rent.

30. I have some sympathy with Mr Young's complaint that the whole thing is an unholy mess. Nonetheless, the core point at issue is relatively straightforward: having purported to apply the entirety of the Deposit against amounts owing under the Companion Leases, can the First Claimant now have second thoughts and belatedly reallocate it to amounts owing under the lease for MSN 41397 itself?

31. Mr Young says that it cannot and that it must stand or fall by the purported allocation evidenced by the 22 October 2019 letter. Of course, it might be said that even if the First Claimant cannot properly frame its claim as one for restoration of the Deposit, it is nonetheless owed an equivalent amount in Basic Rent in any event and is thus entitled to claim the same sum whether in meal or in malt. Mr Young accepts the proposition but says that this is not an argument available to the First Claimant since it has not pleaded an alternative claim for Basic Rent. While I do not overlook paragraph 21E of the draft Re-Amended Particulars of Claim which might just be read as encompassing a claim for unpaid Basic Rent, it is clear from the schedule exhibited to Mr Acratopulo's Fifth Witness Statement and relied upon by the First Claimant for the purposes of the summary judgment application that the claim is advanced squarely on the basis of the Deposit and nothing else.

32. I therefore turn to the argument foreshadowed in Mr Acratopulo's First Witness Statement that clause 4.6 draws a distinction between the drawing down of the Deposit and the

application of the proceeds, and that in fact the First Claimant did not apply the deposit when it was first drawn down in September 2019 but held it as cash. I can accept the distinction in principle between drawdown and application but Mr

Shah's difficulty is that it does not correspond with what the First Claimant said that it had done. As I have stated above, it is an entirely fair reading of the letter of 22 October 2019 that the amounts paid under the drawdown had already been applied, in which case they could only have been applied to the amounts owed under the Companion Leases.

33. Mr Shah's response to this was to argue that even if the Deposit had initially been misapplied, clause 4.3 of the Lease Agreement provided that the monies drawn down were the First Claimant's unconditional property such that it could subsequently reapply them as it saw fit. However, I consider it arguable as a matter of construction that the reference to "*unconditional property*" in clause 4.3 only applies where the security deposit is provided in cash, and not where, as here, it is provided by letter of credit.

34. This is a somewhat technical point, but this is an application for summary judgment and I must be satisfied that the Defendant has no real prospect of a defence to the claim which is actually asserted against it. In my judgment, the Defendant does have a credible argument that the Deposit was wrongfully drawn down, that it was therefore not in breach of contract in failing to restore the Deposit as demanded by the First Claimant, and that it is not open to the First Claimant subsequently to reallocate the Deposit in order to cure any prior errors.

35. The claim for restoration of the Deposit in relation to MSN 41397 should therefore go

to trial.

Calculation of Supplemental Rent

36. I can deal with this point briefly. The Defendant's argument was that the accrual of Supplemental Rent depends on the aircraft having been used and that since none of the aircraft have been flying due either to Covid or the grounding of the MAX 8s, no Supplemental Rent can be due.

37. This argument is misconceived. Only some elements going to make up the Supplemental Rent payment are calculated by reference to flying hours and I am satisfied in any event that the Claimants' calculations properly take this into account under all three leases.

Implied condition of satisfactory quality under SOGSA 1982

38. There is no serious dispute that the Defendant has, at the very least, an arguable case on the facts that the two MAX 8 aircraft were not of satisfactory quality for the purposes of SOGSA given the presence of a design fault which rendered them liable to crash. Battle was therefore joined on the legal question of whether this could be deployed by the Defendant as a defence to the claim for summary judgment in respect of MSN 64507 and MSN 64509. Three questions arise for consideration:

i) Whether the statutory implied condition of satisfactory quality was excluded by the express provisions of the Lease Agreements;

ii) If not, whether any exclusion was limited by the requirement of

reasonableness under the Unfair Contract Terms Act 1977;

iii) Whether, in any event, a defence of set-off was precluded by the "no set-off" provision at clause 4(c).

Exclusion

39. It was common ground that the SOGSA implied conditions can only be excluded by language which expressly or necessarily refers to such conditions. The clause relied on as excluding the implied condition of satisfactory quality in this case was clause 5(a) which, as can be seen above, refers only to representations or warranties. Conditions are nowhere mentioned. Mr Shah argued that the clause was nonetheless wide enough as a matter of construction to cover the statutory implied conditions. Mr Young argued the contrary. Both counsel referred me to *The Mercini Lady,* [2010] EWCA Civ. 1145; [2011] 1 Lloyd's Rep. 442 and *Air Transworld v Bombardier Inc.,* [2012] **EWHC** 243 (**Comm**.); [2012] 1 Lloyd's Rep. 349.

40. In *The Mercini Lady,* a similar argument arose in relation to a clause which purported to exclude "*guarantees, warranties or representations, express or implied, [of] merchantability, fitness or suitability … for any particular purpose or otherwise*". In discussing the proper construction of this provision, Lord Justice Rix, which whom the other two Lords Justice agreed, drew attention to two competing principles in English law. The first, supported by long-standing and high authority, reflected a judicial consensus that conditions implied under the Sale of Goods Act (and, by parity of reasoning, under SOGSA) cannot be excluded merely by reference to "guarantees" or "warranties" and that clear language covering "conditions" themselves was required. The second, reflecting the modern trend deriving from cases such as *Photo Productions v Securicor Transport Ltd,* [1980] A.C.827, was that exclusion clauses should be construed in a common sense and reasonable way like any other contractual provision. Rix L.J. clearly felt that the clause before him would be reasonably be understood as having been intended to apply to conditions, but in the event felt unable to depart from the long-established judicial consensus that conditions could only be excluded express wording or necessary implication.

41. In *Bombardier*, the clause in question excluded "*all other warranties, obligations, representations or liabilities, express or implied, arising by law, in contract, civil liability or in tort, or otherwise, including but not limited to a) any implied warranty of merchantability or of fitness for a particular purpose, and b) any other obligation or liability on the part of seller to anyone of any nature whatsoever*". Mr Justice

Cooke held that the words "*all other obligations… or liabilities express or implied*

arising by law" were fairly susceptible of only one meaning and, notwithstanding the absence of any explicit reference to "conditions", were sufficient to exclude the Sale of

Goods Act implied conditions since they necessarily included any and all types of legal obligation.

42. Like Mr Justice Cooke, I am bound by the decision in *The Mercini Lady.* Unlike him, however, I cannot read the clause before me as necessarily excluding the statutory implied conditions. The critical distinction between this and the *Bombardier* case, as it seems to me, is the absence of any such general words as "obligation" or "liability". The clause refers specifically only to representations and warranties. A condition of satisfactory quality is not a representation and, as recognised by *The Mercini Lady*, wording excluding warranties is not effective to exclude conditions. I further note that the equivalent clause in the Lease Agreement for MSN 41397 did expressly exclude implied conditions.

43. Mr Shah also relied on the "*as is, where is*" wording in clause 3. However, Mr

Young referred me to the comments of Flaux J (as he then was) in *The Union Power,* [2013] 1 Lloyd's Rep. 509 at [77]-[84]. Whilst this was admittedly only an *obiter* expression of opinion, the learned judge's reasoning seems to me to be compelling – certainly to the extent of demonstrating that there is a real argument to be had as to the effect of these words.

44. For these reasons, the Claimants fail to satisfy me that the statutory implied conditions were unarguably excluded by the relevant Lease Agreements.

Unfair Contract Terms Act

45. In those circumstances, the application of the Unfair Contract Terms Act 1977 does not strictly arise. But as the point was fully argued, I express my views briefly in case this matter goes further.

46. The question here is whether the relevant provisions of the Act were disapplied, either because the Lease Agreements were international supply contracts within the meaning of section 26(3) of the Act or because they fell within section 27 on the grounds that they would have been governed by a system of law other than English law but for the parties' choice of law.

47. As to section 26(3), it was common ground that the Lease Agreements satisfied the requirements of section 26(3) itself in that they were contracts under or in pursuance of which the possession of goods passed which had been made by parties whose respective places of business were in different states. The critical question was whether they also satisfied section 23(4) which provides (so far as relevant) that a contact can only qualify as an international supply contract if either: "*(a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or (b) the acts constituting the offer and acceptance have been done in the territories of different States*"

48. My own untutored reading of sub-section (4)(a) would have been that it only applies where transport across national boundaries is required in order to fulfil the contract, for example where the aircraft is situated in one country at the time of conclusion of

the contract and it is contemplated that it will be delivered in another. However, that reading is not open to me in the light of the decision of the Court of Appeal in *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd,* [2009] EWCA Civ. 290; [2010] Q.B. 86 at [32] which clearly held that the provision is also apt to cover the situation where at the date of the contract the parties contemplate that the aircraft will be transported across national boundaries by the lessee *after* delivery in order to fulfil the commercial purpose of the contract. See also *Bombardier (supra)* at [89].

49. I accept, as urged by Mr Young, that the contemplation of the parties involves a factspecific enquiry, albeit one directed at the objective contemplation of the parties. I also accept that there was no direct evidence before me as to that contemplation. However, in circumstances where, amongst other things: (i) the lessee is a wellknown low-cost Indian airline; (ii) the aircraft were to be delivered in Seattle; and (iii) the Lease Agreements were liberally sprinkled with references to the registration and operation of the aircraft in India and the pivotal role of the DGCA and other Indian authorities, I regard it as fanciful to say otherwise than that the parties contemplated at the time of conclusion of the Lease Agreements that the aircraft would be transported from the USA to India in order to fulfil the commercial purpose of the contracts.

50. As to sub-section (4)(b), the Claimants' evidence was that the Second and Third Claimants signed the Lease Agreements in Ireland, while the Defendant's solicitor "*based in London*" signed on its behalf. However, the place of signature does not necessarily say anything about where the actual acts of offer and acceptance took place. This is pre-eminently a factual question and the evidence before me was exiguous to say the least. I would accordingly have held that the Defendant had an arguable case on this point although it would have made no difference to the result since the Claimants only need to satisfy one or other of sub-sections (4)(a) or (b).

51. The Defendant nonetheless had another string to its bow, arguing that the Lease Agreements would not have been governed by English law but for the express choice of English law in clause 21 and that the relevant provisions of the Act were therefore excluded by section 27.

52. But for clause 21, the governing law of the Lease Agreements would have fallen to be determined in accordance with the Rome I Regulation EC No. 593/2008, under which there is a presumption that they are governed by the law of the country where the lessor has its habitual residence (in this case Ireland): see *Dicey, Morris & Collins on The Conflict of Laws* (15th ed.) (Sweet & Maxwell, 2012) at §33-12. The presumption can be displaced but only where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a different country: *Dicey, Morris & Collins (op. cit.)* §§33-14ff.

53. In the present case there are no factors which demonstrate any substantive connection with England other than the fact that the Lease Agreements were drafted in English and (possibly) signed on behalf of one of the parties in England. Neither of these to my minds demonstrates any particular connection with England, let alone a connection manifestly closer than that with Ireland. By contrast, the Lessor in each case is Irish, the Lessee is Indian, the rental and other payments were calculated in US Dollars, payment was to be made in Ireland, the aircraft were to be delivered in the USA but registered and operated in India. Given these disparate factors, there may well have been good reasons for the parties to choose a

well-respected neutral law and

forum, such as English law and jurisdiction, for the resolution of their disputes. However, I accept Mr Shah's argument that this simply explains *why* English law was chosen when it would not otherwise have applied rather than demonstrating any independent connection with England. I also accept his further argument that the other factors relied on by the Defendant, such as the express references in the Lease Agreements to certain English legislation and the choice of English jurisdiction, were consequences of the choice of English law as the proper law, and not connecting factors in their own right.

54. For these reasons, had it been necessary, I would have held that the Defendant did not have any real prospect of relying on the Unfair Contract Terms Act in the circumstances of this case.

55. Finally under this head, there is the question of the “no set-off” provision in clause 4(c). In the event, it was not seriously contested by Mr Young that the purpose of such clauses is to ensure immediate payment of sums due to one party irrespective of any other disputes that have arisen between them and that the courts will usually give effect to any clause which so provides on its proper construction: *Credit Suisse International v Ramot Plana OOD,* [2010] **EWHC** 2759 (**Comm**.) at [45]. Instead he concentrated his fire on the discretion which the court nonetheless retains to stay execution notwithstanding a “no set-off” clause. I return to this below.

Frustration

56. This was the defence which occupied the bulk of Mr Young's argument before me.

57. As indicated at the outset of this judgment, the two MAX 8 aircraft have been grounded in India since early 2019 and there is no indication that the DGCA is imminently about to lift the ban. Paragraphs 5 and 22 of the Amended Defence and Counterclaim assert that the common purpose of the leases was the provision of aircraft for commercial use, to wit the safe carriage of passengers and that such purpose has been frustrated by the events which have occurred.

58. There was no significant dispute between the parties as to the principles of law to be applied when considering whether a contract has been frustrated. The test commonly adopted is whether, through no fault of either party, performance of the contract has been rendered “radically different” from the obligation undertaken. In *The Sea Angel,* [2007] 2 Lloyd's Rep. 517 at [111], the Court of Appeal held that this required the application of a multi-factorial approach:

“*Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one.*

In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstance."

59. In this case, the parties differed at the outset as to the common purpose of the leases. The Claimants argued that, objectively, the common purpose of the *lease* was the hire of the aircraft in return for the payment of rent; nothing more, nothing less. How the Defendant in fact operated the aircraft was, they said, irrelevant. The only obligation undertaken by the Lessor was to warrant quiet enjoyment, which they had done. (I pause to note that this line of argument does not sit altogether easily with their argument in relation to section 26(4) of the Unfair Contract Terms Act that the contract necessarily contemplated the commercial exploitation of the aircraft in India.) But even if they were wrong about that they argued that there was no necessary common purpose that the Defendant should operate the aircraft at a profit. This was therefore a case where the leases had not become radically different; merely commercially unprofitable.

60. For present purposes, I am prepared to assume in favour of the Defendant that the common commercial purpose of the leases was as it alleges, not least given the provisions of clause 6(a)(ii) which only authorises sub-leases to commercial air carriers and operators.

61. I am also prepared to assume (without deciding the point as I do not wish to foreclose any arguments which may arise in the future) that clause 4(c) does not operate to exclude the possibility of frustration in circumstances such as the present. In this latter connection, I recognise that clause 4(c) is comparable to the clause considered by Teare J. in *ACG Acquisition XX LLC v Olympic Airlines SA,* [2012] **EWHC** 1070 (**Comm**.) In that case a certificate of airworthiness had been withdrawn for a period of about one year due to corroded flight cables and worn pulleys. The lease agreement was for a period of five years and provided that the lessee's obligations were "*absolute and unconditional irrespective of any contingency whatever*". It was nonetheless argued that the lease had been frustrated. The argument was rejected by the learned judge who held that it was not possible to imply any words of limitation into the words "*irrespective of any contingency whatever*" and that the contract clearly placed the risk of withdrawal of an airworthiness certificate on the lessee.

62. The differences in wording between that clause and clause 4(c) do not in my view warrant a different approach. I therefore accept that the general risk of the aircraft being grounded due to any prohibition on use or defect in airworthiness was foreseen by the parties and allocated to the Defendant. I also note that, as far as the Lease Agreements are concerned, the reasons for any prohibition are irrelevant: see *Canary Wharf (BP4) T1 Limited v European Medicines Agency,* [2019] **EWHC** 335 (Ch.) at [243].

63. Nonetheless, the grounding here, unlike that in the *Olympic Airlines* case*,* is related to the defective design of the aircraft themselves, not simply to government regulations (such as a sanctions regime) or matters of maintenance which can reasonably be expected to be resolved. It seems to me that this consideration may well add another dimension to the question which is deserving of fuller argument.

64. That said, these were ten-year dry leases under which the Defendant assumed the entire commercial risk of operating the aircraft. This was made abundantly clear by the provisions of the Lease Agreements, and if, for example, the Defendant was not absolved from paying rent

by the total loss of the aircraft, it is difficult to see how a temporary prohibition on use could put it in a better position. If the ban imposed by the DGCA were permanent, that might be a different matter but it has never been suggested that the ban is other than temporary even if it is currently indefinite with no sign of imminent removal. Indeed, MAX 8 aircraft were approved for return to use by the US FAA in November 2020 and also by other countries, although they have apparently been grounded again since then for a totally unrelated reason.

65. I am far from saying that these leases can never be frustrated. It may be (I express no view one way or the other) that if there is still no sign of the ban being lifted in, say, three years' time, that might amount to frustration. But in the context of a ten-year lease, I find it very difficult to say that a suspension of use for roughly 10% of the term of the lease amounts to a change of circumstances which renders performance of the lease “radically different” rather than simply more onerous. I am therefore quite satisfied that, whatever the position may be in the future, the leases have not yet been frustrated as at today's date. Nor is it open to me to anticipate the future. The Claimants have applied for summary judgment on the basis of the situation as it currently stands and they are entitled to have the position adjudicated as at today's date. Should the Defendant successfully argue at a later date that the leases have become frustrated, any sums which have meanwhile been paid to the Claimants will become repayable under the Law Reform (Frustrated Contracts) Act 1943.

66. Mr Young urged me to take account of the interests of justice, referring to the further comments of Rix L.J. in *The Sea Angel* at [112] as follows:

“*What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.*”

67. However, as I read those comments, the interests of justice only come into play if the court is otherwise minded to hold that a contract has been frustrated. In other words, it is required to pause before reversing the contractual allocation of risk. I do not understand him to be saying that the court effectively has a discretion to invoke the doctrine even if it is not satisfied that the threshold test of “radical difference” has been met. Since in my view that test has not presently been met, I do not consider that the interests of justice arise for separate consideration.

Stay of execution/Compelling reason for trial

68. The effect of my decision so far is that:

i) the Defendant has an arguable defence to the claim for restoration of the Deposit under

the Lease Agreement relating to MSN 41397; and

ii) the Defendant has an arguable case that its counterclaim in respect of MSN 64507 and MSN 64509 is not excluded by the terms of the contract although it cannot be deployed as a defence because of the “no set-off” clause.

69. Were I to give judgment for the Claimants on the remainder of their claims, is this case where the circumstances are so exceptional that I should grant a stay of execution (see *Credit Suisse (supra)* at [45]) and, if so, should such a stay be limited to the claims relating to MSN 64507 and MSN 64509?

70. I deal first with the claims relating to MSN 64507 and MSN 64509. My conclusion is that it would be appropriate to grant a stay of execution in relation to these claims. This is for the following reasons:

i) There is no evidence before me as to the financial standing of the Second and Third Claimants. Accordingly, their ability to repay should the contracts become frustrated at a future date cannot be assured.

ii) By contrast, the evidence suggests that the Defendant is currently in a parlous financial state and that being required to pay all outstandings now may well tip it over the edge into insolvency at the very time that there is some small indication that it may be able to trade its way out of difficulty if given enough time.

iii) As argued by the Defendant, insolvency would be contrary to the Claimants' own interests as it would inevitably result in them only receiving a dividend when, with patience, they might recover a larger payout in due course. In other words – and somewhat counter-intuitively – the risk of prejudice to the Claimants will in fact be *minimised* by not permitting them to enforce any judgment.

iv) The obvious riposte to this latter argument is two-fold. First, the whole purpose of a “no set-off” clause is to assure payment to the creditor even where (or perhaps especially where) the debtor is in financial difficulties. Secondly, it is a matter for the Claimants. If they take the view that their interests are best served by seeking to enforce a judgment which they have no hope of being paid in full, it is not for the court to say otherwise. That said, I accept that this is more than simply a question of financial difficulty for the Defendant; its continued existence is at stake. Its ability to pay rent under the Lease Agreements was wholly dependent on its ability to operate the aircraft and, through no fault of its own, the wholly unforeseeable “double whammy” of Covid and the MAX 8 tragedies now renders it unable to fly MSN 64507 and MSN 64509 at all and able to operate MSN 41397 only to a very limited and unprofitable extent.

71. The next question is whether these considerations take me one step further and amount, either singly or in combination, to a compelling reason for trial such that I should withhold judgment on the Second and Third Claimants' claims altogether. I have found this much more difficult. Part 24.2 requires there to be a compelling reason *for trial*. However, I have found that there is no realistic prospect of defence to the claims as they currently stand and in the absence of authority to the contrary, I am not prepared to say that there is a compelling reason for trial merely because the Defendant may acquire a defence of frustration in the future if

circumstances change. This is not a case where fuller investigation might bolster a existing defence. Rather it would be a case of Micawberish optimism that “something will turn up”: see subparagraphs (vi) and (vii) of the citation from *Easyjet* at paragraph 10 above. In my view, if the Second and Third Claimants are entitled to judgment on their claims as at today's date, the uncertain prospect of a future defence is not a compelling reason to send the matter to trial. Neither can I see that the existence of the Defendant's counterclaim amounts to a compelling reason for trial, given the “no set-off” clause. In any event, the counterclaim is adequately protected by the stay of execution.

72. The only other reason for trial suggested by Mr Young was that by withholding judgment, the court could effectively bring pressure on the Claimants to mediate. He pointed out that judgment on this application would not bring finality since the leases have many years to run and the problem will therefore be ongoing. He argued forcefully that the most productive course for the parties was by mediation or some other form of alternative dispute resolution but that the Claimants had refused to engage with this suggestion. I do not need to be persuaded of the benefits of mediation and while I cannot force the parties to mediate, it does seem to me that this would be a sensible step which I should encourage – robustly if necessary: see *PGF II SA v OMFS Co. 1 Ltd,* [2013] EWCA Civ. 1288; [2014] 1 W.L.R. 1386 at [22]. However, withholding a judgment to which I have found that the Second and Third Claimants are otherwise entitled seems to me to cross the line from robust encouragement to undue pressure and I decline to do so.

73. That does not quite conclude matters, since the position in relation to MSN 41397 remains to be considered. Here I have held that the claim for restoration of the Deposit should proceed to trial. Is that a compelling reason for not granting judgment in respect of the separate amounts claimed for Basic Rent and Supplemental Rent? Alternatively, if there is in any event to be a stay of execution in relation to the

Second and Third Claimants' claims, should that stay also extend to the indisputable parts of the First Claimant's claims?

74. I do not consider that there is any reason to withhold judgment on the First Claimant's claims for Basic and Supplemental Rent. Even if the First Claimant now seeks to recast its Deposit claim as a claim for Basic Rent in the alternative, that cannot in my judgment affect the discrete claim for the subsequently accrued amounts of Basic and Supplemental Rent. However, I have also expressed strong encouragement that some form of ADR should take place in the hope that this might result in a permanent solution to the ultimate benefit of all parties. It is plainly sensible that any such solution should encompass the entirety of the disputes between the parties, both current and future. In those circumstances, I consider that the course most conducive to the furtherance of the overriding objective and the interests of justice is to give judgment for the First Claimant's undisputed claims but to stay execution. In that

way, the entire dispute can be brought within the ambit of any ADR procedures that the parties may choose to adopt.

Conclusion

75. The First Claimant is entitled to judgment for a total principal sum of US$2,464,600 made

up of US$752,992 for Basic Rent and US$1,711,608 for Supplemental Rent. Summary judgment on the remainder of its claims is refused.

76. The Second Claimant is entitled to judgment for a principal sum of US$11,663,456.59.

77. The Third Claimant is entitled to judgment for a principal sum of US$11,534,534.38.

78. Execution of all judgments is to be stayed for a period to allow the parties to undertake mediation or some other form of alternative dispute resolution and, in the case of the First Claimant's claim, at least until trial of the remaining claims and cross-claims between the parties.

79. The Claimants also sought an interim payment but since execution is to be stayed, this does not arise.

80. I will hear counsel in relation to questions of interest and costs and the appropriate form of order.