

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2003] EWHC 1364 (COMM)

No.2003/303

Royal Courts of Justice
Friday, 6th June 2003

Before:

MR. JUSTICE MORISON

B E T W E E N :

BOEING CAPITAL CORPORATION

Claimant

- and -

WELLS FARGO BANK NORTHWEST & Anor.

Defendants

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Official Shorthand Writers & Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

MR. A. SHAH appeared on behalf of the Claimant.

MR. M. REEVE appeared on behalf of the Defendants.

JUDGMENT

(As approved by the Judge)

1 MR. JUSTICE MORISON:

2

3 1. This is an application by Boeing (the claimant) for judgment
4 in default of acknowledgment of service against both the first
5 and second defendants ("WFB" and "Melissa", respectively).
6 The underlying facts are these.

7

8 2. Boeing made a loan to Melissa of US\$38m-odd to assist Melissa
9 in the purchase of Boeing 737-79U jet aircraft serial no.29441
10 ("the aircraft"). Melissa conveyed its interest in the
11 aircraft to WFB so that it could be registered on the United
12 States aircraft register. The loan was secured partly by a
13 mortgage of the aircraft, granted by WFB in favour of Boeing.
14 Due to various events of default and following service of
15 notice of default on Melissa, dated 7th March 2003, Melissa
16 became obliged under the loan agreement to repay the whole of
17 the outstanding loan, together with interest, immediately.

18

19 3. Immediately prior to the service of the notice of default on
20 5th March 2003, an injunction was obtained by Boeing in this
21 jurisdiction, preventing the removal of the aircraft from out
22 of this jurisdiction. As a result of negotiations between
23 Melissa's ultimate owner, Mr. Kaleefer of Kaleefer Airways, a
24 settlement agreement was reached whereby the injunction was
25 lifted and the proceedings continued. Unfortunately, the
26 terms of the settlement agreement were not performed by
27 Kaleefer Airways and Boeing commenced these proceedings.
28 Again an injunction was sought and granted, on 26th March
29 2003, restraining the removal of the aircraft from out of this
30 jurisdiction and permission was given for these proceedings to
31 be served out of the jurisdiction on both WFB and Melissa.
32 The proceedings were, on the evidence, duly served on WFB on
33 3rd April 2003 in accordance with the law of Utah and, on 4th
34 April 2003, on Melissa in accordance with the laws of
35 Delaware. Neither of the two defendants acknowledged service
36 within the 22-day period allowed. WFB have informed Boeing
37 that they do not intend to oppose or defend the proceedings.

38

39 4. Until yesterday afternoon Melissa simply remained silent.
40 They have emerged, at four o'clock yesterday afternoon, having
41 instructed solicitors within the jurisdiction. I have had,
42 therefore, the benefit of hearing Mr. Reeve of counsel who
43 tells me that he is instructed on behalf of Melissa, no doubt
44 through Mr. Kaleefer, who is the person behind Melissa. He
45 told me (and I accept) that he cannot consent to this court's
46 jurisdiction and therefore the submissions which he made to me
47 were entirely without prejudice to any submission which his
48 client might make in due course as to this court's
49 jurisdiction.

50

51 5. He asked me to adjourn this application. He told me that
52 there has been a late acknowledgment of service filed this

1 morning on behalf of Melissa and that Melissa had issued an
2 application for permission to file a late acknowledgment of
3 service. He is unable to tell me why there has been a delay
4 in acknowledgment of service. He himself was instructed only
5 at about four o'clock yesterday afternoon and, despite staying
6 in his chambers late, missed an email which had been sent,
7 which I shall deal with in a moment.
8

9 6. One of the security documents involved in the arrangements
10 between the parties was a pledge agreement in favour of Boeing
11 whereby effectively the shares in Melissa were pledged to
12 Boeing so that Boeing had access to control of Melissa in the
13 event that there were defaults in the repayment of the loan or
14 in any other respect. Melissa not having taken any part in
15 the proceedings until yesterday, Boeing did not exercise any
16 of its rights under the pledge agreement, no doubt on the
17 basis that there was no need to do so; Melissa were lying
18 doggo. But when they emerged, Boeing then purported to
19 exercise its rights under the pledge agreement so as to
20 instruct Melissa not to oppose Boeing's application for
21 judgment in default in the English proceedings. As I say,
22 that bombshell arrived with Mr. Reeve this morning rather than
23 last night and he says that he needs an adjournment because he
24 needs to investigate whether the rights under the pledge had
25 been lawfully exercised (and that is a matter of Californian
26 law) and in any event he wants an adjournment because he says
27 that he would like to consider arguing that the settlement
28 agreement, which was entered into between the parties, had an
29 impact on the notice of default which had been served. He
30 refers to Mr. Akhil Shah's skeleton argument which raises that
31 as a potential issue to draw to the court's attention.
32

33 7. I refused his application for an adjournment. It seems to me,
34 to put it bluntly, that Melissa are simply playing for time.
35 There is no merit in their position. As far as I can see,
36 they have had plenty of time to serve an acknowledgment of
37 service in accordance with the rules and to present any
38 argument which they felt appropriate in response to this
39 application, had they chosen to do so. It is simply just not
40 appropriate for me to grant an adjournment. I would willingly
41 have done so if I thought that there was the hint of an
42 arguable defence to this application.
43

44 8. The only additional matter which Mr. Reeve has relied upon is
45 a technical (but none the worse for that) point on the
46 interpretation of the rules. He says that if you look at
47 r.12.3.1(a) and the practice direction 12.4.1(2), it is an
48 essential condition of the giving of judgment for default of
49 an acknowledgment of service that no acknowledgment of service
50 has been filed at any time before the court gives judgment.
51 So that, as it was put in a judgment to which I shall refer,
52 by serving a late acknowledgment of service outside the time
53 permitted, the defendant would be able to trump an application

1 for judgment in default under r.12.3.

2
3 9. That argument seems to me to be hopeless. It cannot have been
4 the intention of the rule-makers that such would be the
5 position and I am happy to adopt entirely the judgment of
6 Neuberger J. given on 21st November 2001 and in particular the
7 passage beginning: "In my view ..." on p.6 of the transcript
8 of that judgment. Of course when a court is faced with an
9 application such as this and where a party has indicated,
10 through the filing of a late acknowledgment of service, that
11 it wishes to participate, the court will be likely to permit a
12 late filing of the acknowledgment of service but only in
13 circumstances where it considers that that acknowledgment of
14 service is a genuine preliminary to a defence to the claim.
15 That, in my view, is not the position here. There is no
16 defence which can credibly be argued to the claim brought by
17 Boeing.

18
19 10. I will therefore refuse the application for an adjournment and
20 continue with the facts.

21
22 11. Because Boeing are not simply asking for a money judgment or
23 for damages to be assessed, they have had to apply to this
24 court for the orders which they seek; hence this present
25 application. Essentially, Boeing are seeking to recover
26 possession of the aircraft, its engines and documentation so
27 that they may sell it or otherwise dispose of it in accordance
28 with their rights as unsatisfied mortgagees. There is no
29 defence to the claim for the relief sought in the draft order,
30 which includes declarations and an order for delivery up of
31 the aircraft and its papers and costs.

32
33 12. There are, however, two matters with which the court should
34 deal before any such orders are made: firstly, a potential
35 argument that the settlement agreement vitiated the
36 effectiveness of the notice of default served on 7th March
37 2003 and, secondly, the fact that, on 28th May 2003, Jet
38 Aviation obtained a freezing order in respect of the aircraft,
39 which prevents WFB and Melissa from "disposing of, dealing
40 with, diminishing in value, mortgage assign, charge or pledge
41 the aircraft".

42
43 13. In my view, the settlement agreement has no legal effect upon

1 the notice of default. Firstly, it may be that the settlement
2 agreement was not made between Boeing and Melissa but, more
3 importantly, the agreement makes clear that the right to
4 continued possession of the aircraft was contingent on the due
5 performance of the obligations under the agreement. By non-
6 performance, that permission was withdrawn; or, as I would
7 prefer, there was a repudiation of the settlement agreement,
8 which thus permitted Boeing to revert to their original causes
9 of action, including their rights under the notices of
10 default.

11
12 13. The effect of the protective order obtained by Jet Aviation
13 does not, in my judgment, impinge on Boeing's rights. The
14 grant of a freezing order does not create a security right
15 over the assets concerned, whereas the right created by the
16 mortgage is for the purpose of securing due payment of the
17 loan and is a security right (see Flightline Limited v.
18 Edwards & Anor. [2003] 1 W.L.R. p.1200. Boeing's security
19 right will prevail over such rights as were conferred by the
20 freezing order. However, it would not be appropriate for
21 Boeing under this order to take possession of the aircraft in
22 circumstances which might involve a breach of the freezing
23 order and they correctly appreciate that orders for delivery
24 up and for Boeing to take possession of the aircraft are not
25 to be enforced until after the injunction obtained by Jet
26 Aviation has formally been discharged or varied so as to
27 permit Boeing to take possession of the aircraft pursuant to
28 the order which I make. In those circumstances, I make the
29 order as asked.

30
31 MR. SHAH: Would you just hear me on the terms of the order, my
32 Lord? There is quite a wide order for delivery up of
33 documents, which amounts to an order for disclosure, I think.
34 It requires the delivery up of all documents relating to the
35 aircraft, as I understand it.

36
37 MR. JUSTICE MORISON: It is all the --?

38
39 MR. SHAH: It is the documents necessary, I think, required by FAA
40 for operating the aircraft.

41
42 MR. REEVE: It is all the maintenance records and ----

43
44 MR. JUSTICE MORISON: It is the maintenance records, the log
45 books. You probably can identify them better than me.

46
47 MR. SHAH: My Lord, the mortgage defines them as the documents
48 which are required by the FAA to be maintained in respect of
49 the aircraft.

50
51 MR. REEVE: And those are the aircraft logs, the engine logs, the
52 maintenance records.

53

1 MR. JUSTICE MORISON: Will you adjust the order to take that into
2 account?
3
4 MR. SHAH: To take what into account?
5
6 MR. JUSTICE MORISON: That the documents should be identified by
7 reference to the documents defined in the agreement.
8
9 MR. SHAH: Yes, there is a draft order at the smaller of the two
10 bundles and it is behind tab 2. Your Lordship will see that,
11 at para.2, the documents there are defined by reference to
12 what is set out in the mortgage.
13
14 MR. REEVE: I do not think it is. The parenthesis, I think, is in
15 relation to the mortgage, but I think the phrase "all other
16 documentation of whatever description relating thereto" goes
17 further. I think what my learned friend wants is the
18 documentation identified in the parenthesis.
19
20 MR. SHAH: That is what we want.
21
22 MR. JUSTICE MORISON: Unless you tell me to the contrary, it looks
23 to me as though you do not need the wider claim; you need to
24 go straight into the bracket. But I do not want there to be
25 any difficulty about this because I have known a case - you
26 may be aware of a case which is going on in this jurisdiction
27 about documents belonging to aircraft - Uzbekistan, if
28 I remember rightly.
29
30 MR. SHAH: It is fiendishly difficult to give a comprehensive
31 description, which is why one has that ----
32
33 MR. JUSTICE MORISON: I have not got the mortgage agreement or the
34 loan agreement in front of me.
35
36 MR. SHAH: I can hand up to your Lordship a copy or a I can read
37 it out.
38
39 MR. JUSTICE MORISON: Yes, what does it define them as?
40
41 MR. SHAH: Aircraft documentation means with respect to the
42 aircraft ...[reading to the words]... records, logs, data ..."
43 So in fact it is what is in parenthesis, so I probably do not
44 need ----
45
46 MR. JUSTICE MORISON: No, then I think that that is a reasonable
47 point for Mr. Reeve to make, even though he is not really
48 here.
49
50 MR. SHAH: Yes, I will make that adjustment. In terms of this
51 order, we will also make the adjustment to reflect the
52 variation of the jet injunction as well because this order was
53 drafted before ----

1
2 MR. JUSTICE MORISON: Quite.
3
4 MR. SHAH: And we ask for an order for costs.
5
6 MR. JUSTICE MORISON: Yes, can you deal with costs?
7
8 MR. REEVE: My Lord, I do not know enough about this history of
9 matter really. No, my Lord, I do not think I can.
10
11 MR. JUSTICE MORISON: No, thank you. Very well, I think you
12 should have your costs. Have you produced your schedule?
13
14 MR. SHAH: My Lord, we have not because we seek the costs of the
15 action and we did not think a schedule was going to be
16 appropriate for that. We can produce one if that is what your
17 Lordship requires.
18
19 MR. JUSTICE MORISON: If there has to be another hearing about
20 costs then you will have to pay for that. Maybe you are right
21 that it is not just the costs of this application.
22
23 MR. SHAH: No, it is the costs of the action.
24
25 MR. JUSTICE MORISON: Costs of the action.
26
27 MR. SHAH: That is right, that is what we seek. The usual order
28 for costs of the action.
29
30 MR. JUSTICE MORISON: Yes, then you can have costs of the action,
31 with a detailed assessment.
32
33 MR. SHAH: I am grateful. I will amend this order.
34
35 MR. REEVE: There is one other matter. I hope I did not mislead
36 the court. I noticed that, during the judgment, it was
37 indicated that the acknowledgment of service was entered
38 yesterday. I am sorry to say it was not; it was this morning.
39
40 MR. JUSTICE MORISON: I thought yesterday it was lodged and this
41 morning it was an application to do it out of time.
42
43 MR. REEVE: No, my Lord, they were both issued this morning.
44
45 MR. JUSTICE MORISON: Thank you for telling me.
46
47 MR. REEVE: I am sorry if I may have led to that misapprehension.
48
49 MR. JUSTICE MORISON: I did not say, in the judgment, Mr. Akhil
50 Shah has told you, and you know in any event that presumably
51 you can apply to set the judgment aside if you were so minded
52 to do it.
53

1 MR. REEVE: My Lord, yes.

2

3 MR. JUSTICE MORISON: But no doubt you would need to be better
4 equipped than you have been able to be for this morning.
5 I should like to thank you and your solicitor for appearing,
6 thank you very much indeed.

7

8
