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Case No: CL-2020-000552

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 September 2020

Before :

MR JUSTICE FOXTON

- -

Between :

SALAM AIR SAOC

Claimant

- and -

LATAM AIRLINES GROUP SA

Defendant

- -

Hugo Page QC (instructed by **Watling & Co)** for the Applicant

- -

Application date: **7 September 2020**

- -

JUDGMENT

Mr Justice Foxton :

Introduction

1. This is the hearing of an application by Salam Air SAOC ("SalamAir") made without notice for an injunction to restrain Latam Airlines Group SA ("Latam") from making demand under 3 standby letters of credit confirmed by Barclays Bank Plc ("the SBLCs").

2. The SBLCs are intended to secure the payment of rent under 3 aircraft leases, in which Latam was the lessor and SalamAir the lessee ("the Aircraft Leases"). The aircraft which were the subject of those leases ("the Aircraft") were physically redelivered to Latam in June 2020. Latam had entered Chapter 11 bankruptcy shortly before that, on 26 May 2020.

3. SalamAir's application raises two threshold issues:

    i) Whether it would be appropriate for the Court to interfere with the operation of the SBLCs by injuncting Latam from making a demand under them?

    ii) If so, whether SalamAir can demonstrate a sufficiently arguable case that the Aircraft Leases have been frustrated by the effects of the Covid-19 pandemic, and, in particular, restrictions on air passenger flights imposed by the authorities in Oman, where SalamAir and the Aircraft are based?

4. Before I consider those issues, and cogency of the case which SalamAir would have to establish, I will briefly set out the background facts as they appear from the evidence filed by SalamAir for the purposes of this application.

The background facts

5. SalamAir is a joint stock company registered in Oman which was established in 2016. Two companies controlled by the Omani government own 30% of SalamAir and the remaining 70% is owned by private shareholders. It is based at Muscat International Airport and has 500 employees mostly based there or in Salalah.

6. The Aircraft were delivered on 25 January 2017 (MSN 3035), 23 February 2017 (MSN 3047) and 29 March 2017 (MSN 3111). In addition to the Aircraft which are the subject of the Aircraft Leases, SalamAir has leased six other aircraft from other lessors which it has not re-delivered.

7. SalamAir was established to be a profitable low-cost passenger airline, and its original business plan envisaged that it would begin with domestic flights between Muscat and Salalah, and then expand to short and medium haul international flights to Qatar, Bahrain, India, Turkey, Egypt, Iran and Sudan. Between its first flight, in March 2017, and March 2020, when the Aircraft ceased to operate, it carried over 3 million passengers. It was always envisaged that it would operate at a loss in its early years, but move to profitable operation over time.

8. It is SalamAir's case, and the effect of its evidence, that it explained its proposed business to Latam when negotiating the Aircraft Leases, and that Latam was aware that the Aircraft were to be operated from Muscat International Airport.

The terms of the Aircraft Leases

9. I am told that the Aircraft Leases are in identical terms. They are governed by English law and subject to the exclusive jurisdiction of the English courts, albeit Latam (but not SalamAir) has a right to elect to have any dispute resolved by LCIA Arbitration. I summarise the material provisions from the Aircraft Lease for MSN 3035 below.

10. First, the lease was for a period of 72 months (6 years) from the delivery date (clause 3.1). Latam had a right to terminate the Aircraft Leases if it became illegal for SalamAir to perform its obligations under the Lease (clause 3.2). SalamAir had the right to terminate the Aircraft Leases on six months' notice from a date on or after the fourth anniversary of the delivery date if it "ceased to operate a business of air transport" (clause 3.3). I shall return to this provision below.

11. Second, Latam promised that neither it nor anyone claiming through it would interfere with "the use, possession and quiet enjoyment" of the Aircraft by SalamAir (clause 7.1). Latam also agreed, so far as possible, to provide SalamAir with the benefit of all warranties and indemnities which were available to it in respect of the Aircraft (clause 7.3).

12. Third, SalamAir agreed to pay Latam rent in monthly instalments of $215,000 (clause 8.1). Clause 8.2, which is of some importance in the present context, provided:

> "The Lessee's obligation to pay rent and make other payments in accordance with this Agreement shall subject to clause 21.3 (Payment of Rent) be absolute and unconditional irrespective of any contingency whatever".

Various non-exhaustive examples of such contingencies were then set out including:

> "any unavailability of the Aircraft for any reason, including any lack or invalidity of title or any other defect in the title, airworthiness, merchantability, fitness for any purpose, condition, design or operation of any kind or nature of the aircraft or the ineligibility of the aircraft for any particular use or trade or for registration or documentation under the laws of any relevant jurisdiction, or the Total Loss of, or any damage to, the Aircraft".

Rent continued to be payable even if the Aircraft was subject to a Total Loss, until such time as the proceeds of the Total Loss insurance were paid to Latam, when the Aircraft Leases would terminate (clause 21.3).

13. Fourth, SalamAir was to provide the SBLCs as an alternative to paying a deposit of three months' rent (clause 9.14) and Latam was entitled "without notice to the Lessee [to] withdraw all or part of the amount of the [SBLCs] and apply the same in the same way that the Lessor may apply the Deposit". Clause 9.14 required that the SBLCs be irrevocable and that they be confirmed by a bank meeting certain credit requirements.

14. Fifth, SalamAir was prohibited from sub-leasing the Aircraft or parting with possession or operational control of the Aircraft (clause 15.1), albeit if SalamAir wished to "wet lease" the Aircraft (i.e. to lease it on terms which ensured SalamAir retained operational control) for periods not exceeding 6 months, there was provision

for "good faith" discussions with Latam on this issue (albeit no obligation on Latam's part to consent (clause 15.2).

15. Sixth, SalamAir was obliged to ensure that the Aircraft was based in and operated from its Habitual Base (Muscat International Airport) save with the consent of SalamAir and the various finance parties (clause 16.1(c)).

16. Seventh, "throughout the Lease Period" SalamAir was "to bear the full risk of any loss, destruction, hi-jacking, theft, condemnation, confiscation, seizure or requisition of or damage to the Aircraft and of any other occurrence of whatever kind which shall deprive the Lesser, or the operator of the Aircraft for the time being, of the use, possession or enjoyment thereof" (clause 21.1).

17. Finally, the obligation to pay rent continued even if the Aircraft was requisitioned (clause 22).

The effect of the Covid-19 pandemic

18. It is SalamAir's case that the Public Authority for Civil Aviation in Oman issued 3 regulations in response to the Covid-19 pandemic, the effects of which have been to frustrate the Aircraft Leases.

19. The first, dated 16 March 2020, prohibited the entry into Oman by air of anyone but citizens of Oman and other Gulf Council Countries.

20. The second, dated 17 March 2020, prohibited the entry into Oman through airports of persons of all nationalities except Omani citizens.

21. The third and most significant, dated 26 March 2020, prohibited all flights to or from Oman airports with the exception of cargo flights and flights to and from the Omani exclave of Musandam. When SalamAir contacted the Omani authorities to ascertain for how long the 26 March regulation would remain in effect, they were told that this was uncertain and depended on the rate of Covid-19 infection in surrounding countries. On the latest information available, SalamAir suggests that there is nothing to suggest that the 26 March regulation will be repealed or modified any time soon. SalamAir suggests that even when the regulation is lifted, there is likely to be heavily reduced passenger demand such that it does not believe it will have any use for the Aircraft for the foreseeable future.

22. There have been discussions between SalamAir and Latam in relation to the fate of the Aircraft in the period since March 2020, in which various compromise proposals for early redelivery of the Aircraft have been floated. However, no final agreement was reached. On 26 May 2020, Latam (which is a Chilean company) filed for Chapter 11 bankruptcy in the U.S.A. As I have stated, the Aircraft were physically redelivered on 16 June 2020 (MSN 3035) and 24 June 2020 (MSNs 3047 and 3111). On 17 and 25 June 2020, Latam gave notice of termination of the Aircraft Leases. The last rent paid by SalamAir was in respect of the months expiring on 24 March 2020 (MSN3035), 22 March 2020 (MSN3047) and 27 March 2020 (MSN3111). There have been no communications from Latam since 25 June 2020.

Should the Court grant an injunction which would interfere with the operation of the SBLCs, and if so, what must SalamAir show to obtain such an injunction?

Injunctions against the credit-provider

23. It has long been a cardinal principle of English commercial law that the court will only intervene by injunctive relief in the operation of irrevocable letters of credit and similar instruments (such as performance bonds) in exceptional circumstances. Credits of this kind are intended to operate autonomously from the underlying commercial transaction in connection with which they are established, and generally involve an irrevocable promise by a financially strong third party (such as a bank or insurance company) to pay if certain conditions are met, the payer then enjoying a right of indemnity against the applicant who established the credit.

24. As noted in Gee, *Commercial Injunctions* (6th) para. 15-017:

> "An injunction preventing payment by the bank or restraining presentation of documents by the beneficiary interferes with the letter of credit and prevents it from being treated as the equivalent of cash. The following factors affect the answer to question (c).
>
> (1) It is inherent in the provision of a letter of credit that subject to presentation of conforming documents, it is to be the equivalent of cash. Part of its purpose is to implement an agreement between buyer and seller that the seller gets paid and questions of defects in quality and other such disputes are resolved outside of the payment transaction. The buyer has agreed to this and equity will not intervene so as to enable him to go back on what he has agreed.
>
> (2) The bank itself has made a contractual promise as a banker. It is an essential part of its business that it honours its word. The court should not restrain payment when to do so could be to cause the bank to dishonour its engagement undertaken as a banker, and thereby to damage its reputation for contractual and commercial probity
>
> (3) Letters of credit are relied upon as a means of raising finance. To allow payment to be restrained would threaten the future use of letters of credit as an available mechanism for raising credit to fulfil commercial transactions. Such instruments are regarded as the 'lifeblood' of commerce. Merchants rely upon them as being the equivalent of cash.
>
> (4) The buyer faces 'an insuperable difficulty' on balance of convenience. The buyer is seeking to prevent the bank from paying and debiting the buyer's account. If payment would be in accordance with the contract, the buyer has no basis for an injunction. Alternatively, if the threatened payment is in breach of contract, then the buyer would have good claims for damages against the bank, and the bank would be facing damage to its reputation which could not be compensated for in damages. For these reasons, as a general principle, the court will not grant an injunction interfering with performance by the bank under the banking contract."

25. The statement, which appears frequently in the authorities, that irrevocable letters of credit are intended to be "the equivalent of cash" has particular resonance in the present case, when SalamAir chose to provide the SBLCs as the alternative to paying cash in the form of the deposit.

26. For these reasons, there are two principal circumstances in which the applicant can obtain an injunction restraining the credit-provider from paying out under the instrument:

    i) where the validity of the instrument (as opposed to the underlying commercial transaction) is impeached; and

    ii) where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent (the so-called "fraud exception");

    (Bolivinter Oil SA v Chase Manhattan Bank [1984] 1 WKR 392, 393).

27. Not only are the grounds on which an injunction can be obtained against a credit-provider heavily circumscribed, but the strength of case which the applicant is required to establish in order to obtain such an injunction is an enhanced one. In Alternative Power Solution Ltd v Central Electricity Board [2015] 1 WLR 697, the Privy Council noted that, for an injunction to be granted on the basis of the fraud exception, the requirement is for clear evidence of both the fraud and the credit-provider's knowledge, with the applicant's case supported by strong corroborative evidence. The Board made it clear that the American Cyanamid Co v Ethicon Ltd [1975] AC 396 principles on the granting of interim injunctions did not apply in these circumstances ([54]). After reviewing the English case law, at [59] the Board summarised the test to be applied as follows:

> "In the view of the Board the expression 'seriously arguable' is intended to be a significantly more stringent test than good arguable case, let alone serious issue to be tried. As Mance LJ put it, a case of established fraud known to the bank, is, by its nature, one which, if it is good at all, must be capable of being established with clarity at the interlocutory stage. In summary, the Board concludes that it must be clearly established at the interlocutory stage that the only realistic inference is (a) that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and (b) that the bank was aware of the fraud."

28. That enhanced test is a consequence of the importance which is attached to the autonomous nature of letters of credit and similar instruments, and the certainty of payment which it is their commercial purpose to provide. As Mance LJ explained in Solo Industries UK Ltd v Canara Bank [2001] 1 WLR 1800, [31]:

> "If instruments such as letters of credit and performance bonds are to be treated as cash, they must be paid as cash by banks to beneficiaries. The courts in the Harbottle and Edward Owen cases emphasised this, and, in my view, set a higher standard than 'a real prospect of success' in relation to all these situations."

29. Mr Page QC for SalamAir has made it clear that SalamAir does not challenge the validity of the SBLCs, or suggest that any demand made by Latam under them would

be fraudulent. Rather he alleges that the substantive and evidential obstacles which apply to an applicant seeking an injunction restraining the credit-provider from paying out in response to a demand do not apply when the injunction sought is one to restrain the beneficiary from making a demand under the credit.

Injunctions against the beneficiary

30. Where the underlying commercial contract imposes an obligation on the beneficiary not to make a demand save in certain circumstances, the applicant can obtain injunctive relief to prevent a breach of that promise: Sirius International Insurance Company v FAI General Insurance Ltd [2003] 1 WLR 2214. However, if there is no express obligation to this effect, one will not lightly be implied (State Trading Corporation of India Ltd v ED & F Man (Sugar) Ltd *C*AT No.307 of 1981, July 17 and Costain International v Davy McKee (London) Ltd CAT No.1009 of 1990, November 26).

31. Mr Page QC did not seek to argue that there was any such term in the Aircraft Leases, and I can well understand why. Instead Mr Page QC relied on the decision of the majority of the Court of Appeal in Themehelp v West [1996] QB 84. That case concerned a performance guarantee provided by the buyer of shares in a company in respect of the third and largest instalment of the purchase price. Before that third instalment had become due for payment, the buyer sought an injunction restraining the seller from claiming under the performance guarantee. The buyer contended that it had entered into the sale contract by reason of the seller's fraud, but it did not allege that the requirements of the fraud exception would have been satisfied for the purpose of restraining payment by the credit-provider. It argued that those requirements did not apply to an injunction restraining the seller from making a demand under the performance guarantee, and the majority of the Court of Appeal (Waite and Balcombe LJJ) agreed (Evans LJ dissenting in what many have suggested are cogent terms).

32. Subsequent authorities, to which Mr Page QC drew my attention, have expressed little enthusiasm for the majority decision in Themehelp. In Group Josi Reassurance SA v Walbrook Insurance Co Ltd [1996] 1 WLR 1152, 1161-1162, Staughton LJ stated:

> "It is argued by Mr. Bartlett for the reinsurers that the case is altogether different, and the rule which I have been discussing does not apply, when an injunction is sought not against the bank but against the beneficiary of a letter of credit. In my opinion that cannot be right. The effect on the lifeblood of commerce will be precisely the same whether the bank is restrained from paying or the beneficiary is restrained from asking. That was the view of Sir John Donaldson MR in Bolivinter Oil SA v Chase Manhattan Bank NA (Practice Note) [1984] 1 Lloyd's Rep 25 , 254, of Donaldson L.J. in Intraco Ltd v Notis Shipping Corporation [1981] 2 Lloyd's Rep 256, of Lloyd L.J. in the Dong Jin Metal case, 13 July 1993, and of both Clarke and Phillips JJ. in the present case. The contrary view has the support of Balcombe and Waite L.JJ. in Themehelp Ltd v West [1996] QB 84, and to a very limited extent the support of Evans L.J. as well. But none of their remarks were essential to the decision. Whilst I share the view of Balcombe L.J., if such it was, that the law on this topic is not wholly satisfactory, it is in my opinion too well established for change to take place in this court".

33. Rix J in Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd [1999] 2 Lloyd's Rep 187, 202 stated:

> "Thus, in the absence of the fraud exception, a buyer can no more seek to prevent his seller from drawing on the letter of credit for which the seller has stipulated than the buyer can seek to prevent his bank from making payment under it. The reason is that otherwise the special rule could be subverted, and the integrity and insulation of banking contracts could be overthrown, simply by the device of injuncting the beneficiary rather than the bank. The formulation of the fraud exception, to the extent that it requires the timely knowledge of the bank and not merely that of the beneficiary (who, ex hypothesi knows of his own fraud), emphasizes the distinctiveness of this rule. In this connection, *Themehelp v. West* represents either a genuine distinction, based on the fact that the claim against the beneficiary alone was brought at an early stage, well before the question of enforcement of the guarantee arose; or the decision must be regarded as undermined by the concession there that a claim against a beneficiary, as distinct from a claim against a bank, was not covered by prior authority".

34. In Sirius Insurance v FAI [2003] 1 WLR 2214, [31], May LJ described the decision as "questionable", and Jacobs J at first instance ([2003] 1 WLR 87, [16] suggested that it been received with "less than lukewarm praise".

35. It has also been heavily criticised by commentators (for example Gee, paras. 15-03 and following; *Benjamin's Sale of Goods* (10th) para. 24-035 and Andrew and Millett, *The Law of Guarantees* (7th) para. 16-031).

36. For the purposes of this application, I accept that the ratio of the decision in Themehelp remains binding on me, and in any event, a without notice application before a first instance judge is not the place in which to consider the present status of that decision. I have, therefore, assumed in Mr Page QC's favour that it is arguable that in some circumstances an injunction to prevent the beneficiary from making a demand under an irrevocable letter of credit or performance bond can be obtained even though the applicant is unable to satisfy the requirements of the fraud exception so as to obtain an injunction against the credit-provider. However, given the cogency of the criticisms of the majority decision in Evans LJ's dissent, the subsequent authorities and the commentary, I am not willing to give the decision any broader application than it strictly requires. In my view that involves at least the following limitations.

37. First, the decision is only authority that such an injunction may be obtained against the beneficiary when the applicant has a claim in fraud against the beneficiary. Waite LJ made it clear at p.99 that he was not deciding "whether the principle extends beyond instances of fraud". Similarly, Balcombe LJ's judgment suggests that he had only fraud in mind (p.106):

> "The same considerations of policy do not apply where the beneficiary has not yet made a demand upon the bank and where, as here, injunctive relief is sought to stop the beneficiary from making such a demand pending the trial of the action in which the issue of his fraud will be determined. *In such a case* I see no reason why the ordinary principles for the grant of interlocutory injunctive relief should not apply"

(emphasis added).

38. Mr Page QC suggested that there is no principled basis for distinguishing between fraud and other causes of action, particularly in circumstances in which it was accepted in Themehelp that it might be too late to rescind the sale contract. However, there are a number of respects in which fraud is treated as "a thing apart" in private law (HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] 2 Lloyd's Rep 61, [15], Lord Bingham). They are not limited to cases in which fraud is relied upon to rescind a contract.

39. Second, with some hesitation, I adopt Rix J's interpretation of Themehelp as a case which depended on the fact that the injunction was sought "well before" the seller's right to claim under the performance guarantee had accrued (Czarnikow-Rionda p.1168). By contrast, the injunction has been sought here after Latam's right to call on the SBLCs has arisen.

40. Third, I see nothing in the decision which holds that the enhanced merits standard for obtaining interim relief against the credit-provider should not also apply to an injunction to restrain the beneficiary from making a demand:

    i) The first instance judge in Themehelp applied the enhanced merits standard (which he took from Ackner LJ's judgment in United Trading Corporation SA v Allied Arab Bank Ltd (Note) [1985] 2 Lloyd's Rep 554, 561) in reaching his decision that the grounds for granting an anti-demand injunction were made out (p.97).

    ii) Waite LJ did not find it necessary to decide whether the enhanced test was the correct one because there was no challenge to that aspect of the judge's decision on appeal (p.99).

    iii) Balcombe LJ used the fraud exception standard when defining the first issue which arose on the appeal ("was there evidence which entitled the judge to find that the buyers had established that it was seriously arguably that on the material available the only reasonable inference was that the sellers were fraudulent?") (p.105). While on p.106 he suggested that he could see "no reason why the ordinary principles for the grant of interlocutory injunction should not apply", he referred to the seller as someone against whom "a strongly arguable case of fraud has been presented".

41. As Themehelp does not itself address this issue, I approach it as a matter of principle. In my view there is a very powerful case that an anti-beneficiary injunction should have to meet the same enhanced merits test as an injunction against the credit-provider. As I have noted, the enhanced merits requirement is a concomitant of the decision to treat irrevocable credits and similar instruments as equivalent to cash, a consideration which weighs as much in favour of its application to injunctions against the beneficiary which (if granted) would make the instrument very inferior to cash, as to injunctions against the credit provider preventing payment.

42. For that reason, the enhanced merits test is not limited to cases in which the fraud exception is relied upon, but also extends to applications to injunct payment on the basis that the pre-conditions to a call on the instrument have not been satisfied. As

Popplewell J noted in Ouais Group Engineering & Contracting v Saipem SpA [2013] EWHC 990, [45]:

> "In my view the court must have a high degree of assurance that the beneficiary is not entitled to call on an on demand bond before it will, at an interlocutory stage, restrain payment of the bond. That follows from the very nature of an on demand bond, and the importance which such bonds have in international commerce. They are the commercial equivalent of cash security for performance of obligations, payable against bona fide assertion of breach. By agreeing to provide a bond which is payable on demand, a party agrees that the bond may be called pending resolution of any dispute with the counterparty beneficiary. He thereby agrees to assume the risk of payment being made notwithstanding that he can subsequently establish in litigation or arbitration that the dispute is to be resolved in his favour. That is so where the dispute is whether he is in breach of the obligations for which the bond stands as security. It is equally so where the dispute is whether circumstances have arisen which permit the bond to be called or require payment to be made under it. The nature of an on demand bond is that it is payable merely upon an assertion by the beneficiary of his entitlement to payment, without inquiry into the validity of the grounds asserted by the beneficiary as giving rise to that entitlement. The court should be reluctant to interfere unless confident that the grounds asserted do not give rise to the entitlement to payment. For this reason what is usually required at the interlocutory stage is, at the least, a strong case that there is no such entitlement".

43. The first and second of these conclusions are sufficient for me to conclude that SalamAir is not entitled to the injunction it seeks. As I have stated, SalamAir does not contend that any there has been any fraud by Latam in relation to the Aircraft Leases, nor does it contend that it is a term of the Aircraft Leases that Latam is not permitted to make a demand under them in the prevailing circumstances. Further, as I have stated, this is not a case in which SalamAir seeks an injunction "well before" the right to claim under the SBLCs has arisen.

44. However, I will go on to consider the issue of whether SalamAir is able to make out its frustration case to the requisite degree of arguability which, for the reasons I have given, requires it to establish a strong rather than merely an arguable case.

SalamAir's frustration case

The applicable legal principles

45. It is not necessary to rehearse the law relating to frustration at any length for the purposes of this part of SalamAir's application. The authorities were recently reviewed in detail by Marcus Smith J in Canary Wharf (BP4) T1 Limited v European Medicines Agency [2019] EWHC 335 (Ch). Mr Page QC referred me to the formulation of the test set out by Lord Simon in National Carriers v Panalpina [1981] AC 675, 707:

> "Would outstanding performance in accordance with the literal terms of the contract differ so significantly from what the parties reasonably contemplated at the time of execution that it would be unjust to insist on compliance with those literal terms".

46. So far as the application of that test is concerned, in Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel) [2007] 1 CLC 876, Rix LJ said at [111]-[112]:

> "In my judgment, the application of the doctrine of frustration requires 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 the 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 the 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 circumstances.
>
> 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."

The provisions of the Aircraft Leases

47. While I accept that the terms of the contract in issue are not necessarily determinative of the issue of frustration, the nature of the contract and its terms are of obvious relevance when considering whether the contract has been frustrated by a particular event and how particular risks have been allocated.

48. A 6-year "dry" aircraft lease is a challenging context in which to establish frustration. The lessor assumes very limited obligations under such a contract – essentially only that of ensuring quiet possession of the Aircraft – in return for the income stream represented by the rent, with the lessee assuming the commercial risks and rewards of operating the aircraft. From the lessor's perspective, it matters not whether the lessee

uses the aircraft at all, how frequently or with what level of occupancy. Latam was at the material times still able to perform its obligation to provide SalamAir with quiet possession of the Aircraft, and SalamAir to perform its obligation to pay the rent.

49. For that reason, Mr Page QC accepts that it is necessary for SalamAir to establish a sufficiently arguable case of "frustration of purpose", a doctrine which has seldom been applied since it first emerged in the Coronation cases at the start of the last century, and in particular in Krell v Henry [1903] 2 KB 740. In holding that a contract to hire a flat in Pall Mall in the daytime for the two days of King Edward VII's coronation procession had been frustrated when the coronation was postponed, the Court of Appeal emphasised that viewing the procession was a "state of things assumed by both contracting parties as the foundation of the contract" (p.749). This was contrasted with the position where it was "merely the purpose of the hirer" (Vaughan Williams LJ at p.751). It was for that reason that the frustration plea failed in Herne Bay Steamship Company v Hutton [1903] 2 KB 683, where Romer LJ described Mr Hutton's object in hiring a boat to sell tickets to persons who wished to participate in the King's naval review as "a matter with which the defendant, as hirer of the ship, was alone concerned, and not the plaintiffs, the owners of the ship" (p.690). Stirling LJ noted the fact that the cancellation impacted Mr Hutton's ability to sell tickets on the boat was "the risk of the defendant whose venture the taking the passengers was" (p.692).

50. While SalamAir says that it shared its business plan with Latam, and I accept that this was arguably the position, there is nothing in the Aircraft Lease to suggest that SalamAir's use (still less profitable use) of the Aircraft was a shared purposes of both parties to the Aircraft Leases as opposed to a matter with which SalamAir was alone concerned. Indeed (as I will set out shortly) numerous provisions in the Aircraft Leases make it clear that the very opposite was the case. While SalamAir points to the term that the Aircraft's base of operations could not be changed from Muscat International Airport without Latam's permission, provisions of this kind appear in aircraft leases not because the operation of the aircraft from that particular location is the common foundation of the contract, but because of the lessor's continuing interest in the physical and legal safety of the aircraft, and in ensuring that that aircraft can be safely and efficiently re-possessed if it is necessary to do so,

51. Further, the Aircraft Leases were drafted to make it clear that SalamAir's obligation to pay rent continued in almost any conceivable circumstances (what is sometimes referred to as a "hell or highwater" basis: e.g. Bitumen Invest AS v Richmond Mercantile Ltd FZC [2016] EWHC 2957 (Comm), [8]). Thus the obligation to pay rent was expressed to be "absolute and unconditional irrespective of any contingency whatsoever" including "the ineligibility of the aircraft for particular use or trade" (Clause 8.2), and even if the Aircraft became a Total Constructive Loss (clause 21.3) or was requisitioned (clause 22). The Aircraft Lease expressly placed on SalamAir "the full risk of any … occurrence of whatever kind which shall deprive [SalamAir] of the use, possession and enjoyment thereof" and while this was stated to be the position during the Lease Period, that is nonetheless highly relevant in determining whether SalamAir's inability to use the Aircraft to carry passengers within and to and from Oman was capable of frustrating the Aircraft Leases. These clauses are, in my opinion, fundamentally inconsistent with any suggestion that regulations in Oman which (for so long as they remained in force) prevent SalamAir from using the Aircraft to earn revenue through passenger flights with an Omani terminus, or any long-term

suppression of air travel even after such regulations had ceased to have effect, had the effect of terminating the Aircraft Leases and freeing SalamAir of its obligation to pay rent.

52. In ACH Acquisition XX LLC v Olympia Airlines SA [2012] EWHC 1070 (Comm), Teare J considered an argument that an aircraft lease had been frustrated because the aircraft could no longer be operated due to the revocation of its airworthiness certificate (an argument not raised on the appeal at [2013] EWCA Civ 369). The terms of the aircraft lease there were similar to, but not identical, to those at issue here. One difference was that the examples of circumstances in which rent would continue to be payable included the following:

> "any other cause which, but for this provision, would or might otherwise have had the effect of terminating or in any way affecting any obligation of Lessee under this Agreement".

Given that, in both the lease in ACH Acquisition and the Aircraft Leases, the list of examples of circumstances in which rent would continue to be payable were expressly not exhaustive of the general principle that the obligation to pay rent was "absolute and unconditional irrespective of any contingency whatever", this difference can only be of limited significance.

53. Teare J had little difficulty in dismissing the argument that the lease was frustrated, holding at [181]:

> "I have already set out the terms of the lease of most relevance when considering the possible application of the doctrine of frustration. They are found in the context of a 'dry' lease pursuant to which possession of the aircraft is transferred to the lessee who is the operator of the aircraft. In such a lease, particularly one where the lease is for a substantial period of 5 years, the parties would expect the lessee to assume the risks inherent in operating an aircraft. One such risk is that the aircraft authority might withdraw the certificate of airworthiness and impose certain conditions before it is reinstated. Whilst such events might occur only rarely it is an obvious risk of operating a passenger aircraft. Clause 5.14 emphasises the risk assumed by the lessee because it provides that the lessee's obligations are absolute and unconditional irrespective of any contingency whatever. The examples given of matters which are not to affect the lessee's obligations, and hence of which it is envisaged that the lessee will take the risk, are not obviously limited to 'a temporary period of unairworthiness which could be remedied by some relatively simple maintenance process'. Rather, the examples contain no words of limitation ('any unavailability of the Aircraft for any reason, including … any prohibition or interruption of … Lessee's use, operation or possession of the aircraft' and 'any lack … of airworthiness'). Since the clause includes the words 'irrespective of any contingency whatever' it is not possible, in my judgment, to imply words of limitation. This is emphasised by the inclusion within the list of examples of 'any other cause which, but for this provision, would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement."

54. The present case – in which it is not any feature of the Aircraft leased which prevents their operation, but restrictions on the business in which SalamAir wishes to deploy the

Aircraft, namely carrying passengers within and to and from Oman – is, if anything a clearer case. The risk that SalamAir might be unable to undertake passenger flights from Muscat or elsewhere in Oman for some significant period, or that there might be a dramatic and long-lasting fall in the demand for air travel more generally, were risks inherent in the commercial operation of the Aircraft and assumed by SalamAir under the Aircraft Leases. If total destruction of the Aircraft, or dispossession through requisition, do not relieve SalamAir of the obligation to pay rent, then it is highly improbable that the matters relied upon by SalamAir in this application have this effect.

55. Finally, as I have noted, these were six year leases with three years left to run at the time it is alleged that the inability to operate passenger flights to, from and within Oman frustrated them. While the Aircraft Leases gave SalamAir the option to terminate the leases after 4 years if it ceased to carry on the business of air transport at all, there is nothing to suggest that this contingency has materialised. It is SalamAir's case that it is retaining 6 aircraft leased from others, but that it does not expect to have sufficient business for three additional aircraft. In my view, the contention that the effects of the 26 March regulation were sufficient to frustrate aircraft leases with three years to run is a weak argument. However, in contrast to my conclusions in paragraphs [49] to [54], I accept that this issue is sufficiently arguable to satisfy the conventional American Cyanamid merits test had it applied.

56. For these reasons, I regard SalamAir's frustration case as weak. It is, in my view, far too weak to justify the step of interfering with the operation of the SBLCs which SalamAir agreed to provide as an alternative to paying a cash deposit, and which were commercially and legally intended to be equivalent to cash.

The balance of convenience

57. Had I concluded that it was in principle permissible to grant an injunction to prevent Latam from making a demand under the SBLCs, and that the merits test for granting such an injunction was met, I would have concluded that the balance of convenience favoured granting such an injunction.

58. If an injunction is not granted, and SalamAir makes out its frustration case at trial, it would be left with a personal remedy against Latam which has, I have said, filed for Chapter 11 bankruptcy. By contrast, if an injunction is granted, and Latam succeeds at trial, then the SBLCs (which remain valid until 2023) should still be available to be called on, and, if necessary, SalamAir could be required to extend the SBLCs as a condition of continuing any injunction. The prejudice to Latam which would follow from granting an injunction would be loss of use of the money in the interim, which is in principle compensable by interest, which could be the subject of an undertaking in damages from SalamAir with fortification if necessary.

Conclusion

59. For these reasons, SalamAir's application is refused.