Neutral Citation Number: [2023] EWHC 1146 (Comm)

Case No: CL-2022-000479

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 May 2023

Before :

DEPUTY JUDGE CHARLES HOLLANDER KC
(Sitting as a Judge of the High Court)

- -

Between :

VS MSN 36118 CAV DESIGNATED ACTIVITY COMPANY

Claimant

- and -

SPICEJET LIMITED

Defendant

- -
- -

Cleon Catsambis (instructed by **Alius Law**) for the **Claimant**
Thomas Munby KC (instructed by **Dentons UK and Middle East LLP**) for the **Defendant**

Hearing date: 5th May 2023

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JUDGMENT

This judgment was handed down remotely at 10.00am on Monday 15th May by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

CHARLES HOLLANDER KC :

The Lease

1. On 26 April 2018 the Defendant entered into a lease with the Claimant, pursuant to which the Defendant agreed to lease a Boeing 737-700 with Manufacturer's Serial Number 36118 (the "Aircraft") from the Claimant for a term of 96 months (the "Lease"). The Lease was amended by deeds dated 21 November 2018 and 21 November 2019.

2. The Aircraft was delivered to the Defendant in accordance with the terms of the Lease on 4 May 2018. The Lease therefore is expected to come to an end on 3 May 2026. The Defendant continues in possession of the Aircraft.

3. There were payment defaults by the Defendant. On 20 November 2020 the parties entered into a rent deferral agreement pursuant to which the Claimant agreed to waive payments then due from the Defendant totalling US$1,657,376 (the "Rent Deferral Agreement"). Clause 2(e) of the Rent Deferral Agreement also provided that Maintenance Reserves due for January to March 2020 would be deferred and would be paid in 12 monthly instalments of US$45,902 during the course of 2021. However, there were then further payment defaults by the Defendant.

4. In these proceedings the Claimant makes two sets of claims:

    a. claims for accrued sums due

    b. claims for future rentals said to have become due upon Events of Default.

These proceedings

5. After issue of these proceedings the Defendant failed to acknowledge service. The Claimant could have obtained default judgment but, apparently to improve prospects of enforcing in India, sought leave to obtain summary judgment instead**.** After that application was issued, the Defendant instructed solicitors and in due course acknowledged service. The Defendant put in no evidence in response to the summary judgment application but nevertheless disputes the Claimant's entitlement to judgment. Technically, having issued an application for summary judgment prior to acknowledgement of service, the Claimant requires leave to make the application but in the light of the subsequent Acknowledgement of Service, nothing turns on that and such leave is granted.

Summary judgment

6. The principles for summary judgment applications are set out by Lewison J in *Easy Air Ltd v Opal Telecom Ltd 2009 EWHC 339 (Ch*) and are well known. I have applied those principles.

Accrued sums due

7. The first part of the claim made by the Claimant relates to accrued sums due. The Claimant states that the total sum outstanding under the Lease is US$4,127,155 for Rent and Maintenance Reserves as at 6 September 2022.

8. The Defendant's case is that this claim is not properly verified within the rules, essentially because the deponent, Ms Taylor, on behalf of the Claimant, refers to her source of information as being "the Claimant" rather than a named individual.

9. This point was first taken in the Defendant's skeleton argument the day before the hearing. The Defendant does not suggest positively that the sums claimed are not due.

10. The point is a makeweight. Firstly, the sums claimed are verified by a named individual in the Particulars of Claim. That is to be treated as evidence under CPR 32.6.

11. Secondly Clause 25.13 of the Lease states:

> "Any certificate or determination by Lessor as to any rate of interest or as to any other amount payable under this Agreement shall, in the absence of manifest error, be presumed to be correct but reasonable details of any calculations shall be included in any such certificate or determination."

12. The Claimant relies upon (i) invoices sent (ii) schedules produced by the Claimant to the Defendant in relation to sums due and (iii) schedules accompanied with Ms Taylor's witness statement. Whilst these may not be regarded as certificates, they can properly be regarded as determinations.

13. Further, the sums due are a matter of calculation. It is as easy for the Defendant to calculate them as the Claimant. There is no suggestion by the Defendant that there is any error. If necessary, to the extent that there can be said to be any shortcoming or defect in the way Ms Taylor has expressed herself, I would have been willing to waive the defect as it is, in the circumstances, a matter of no consequence and a purely technical point.

14. There is no Defence to this part of the claim. The Claimant claims Default Interest at 3% and there has been no objection to this figure.

The Claimant's case on Future Rentals

15. The more substantial issue related to the Claimant's entitlement to future rentals.

16. Although the point was canvassed in general terms a few days before the hearing by the Defendant's solicitors in correspondence, it was only developed in detail for the first time in the Defendant's skeleton argument. It was unfortunate that in consequence it was only dealt with very shortly in the Claimant's skeleton and therefore much of the argument on the point was only developed at the oral hearing before me.

17. The Claimant declared an Event of Default under the Lease. The provisions of the Lease which deal with that are as follows:

> *"23.2.1*
>
> *Upon the occurrence of any Event of Default and at any time thereafter so long as the same shall be continuing, Lessor may,*

at its option and without notice to Lessee, declare this Agreement to be in default and Lessor may exercise one or more of the following remedies as Lessor in its sole discretion shall elect:

(i) *demand that Lessee, and Lessee shall upon such demand of Lessor and at Lessee's expense, immediately return the Aircraft to Lessor at such location as may be directed by Lessor, in the manner specified in such notice, and such return shall not be delayed for purposes of complying with the Return Conditions (none of which conditions shall be deemed to affect Lessor's right to take possession of the Aircraft) or delayed for any other reason. Notwithstanding the foregoing, at Lessor's option, Lessee shall be required thereafter to take such actions, at Lessee's expense, as would be required by the provisions of this Agreement if the Aircraft were being returned at the end of the Lease Term. In addition, Lessor, at its option and to the extent permitted by applicable Law, may enter upon the premises where all or any part of the Aircraft is located and take immediate possession of and, at Lessor's sole option, remove the same (and/or any engine which is not an Engine but which is installed on the Airframe, subject to the rights of the owner, lessor or any secured party thereof), all without liability accruing to Lessor for or by reason of such entry or taking of possession whether for the restoration of damage to property, or otherwise, caused by such entry or taking, except damage caused by the gross negligence or wilful misconduct of Lessor;*

(ii) *sell at private or public sale, as Lessor may determine, or hold, use, operate or lease to others the Aircraft as Lessor in its sole discretion may determine, all free and clear of any rights of Lessee;*

(iii) *proceed by appropriate court action or actions, either at Law or in equity, to enforce performance by Lessee of the applicable covenants of this Agreement and to recover damages for the breach thereof and to rescind this Agreement;*

(iv) *retain and / or liquidate the Security Deposit and apply the same to Lessee's obligations hereunder;*

(v) *terminate the leasing of the Aircraft under this Agreement by written notice to Lessee and/or repossess and in accordance with the Cape Town Convention, if applicable, procure the deregistration of the Aircraft*

and export of the Aircraft to a jurisdiction of Lessor's choice pursuant to the IDERA;

(vi) *exercise any other remedy available under applicable Law.*

(vii) *retain and / or liquidate the Security Deposit and apply the same to Lessee's obligations hereunder;*

(viii) *terminate the leasing of the Aircraft under this Agreement by written notice to Lessee and/or repossess and in accordance with the Cape Town Convention, if applicable, procure the deregistration of the Aircraft and export of the Aircraft to a jurisdiction of Lessor's choice pursuant to the IDERA;*

(ix) *exercise any other remedy available under applicable Law.*

23.2.2 In addition to the foregoing, Lessee shall be liable (x) for any and all unpaid Rent during the exercise of any of the aforementioned remedies, together with interest on such unpaid amounts at the Default Rate, and until satisfaction of all of Lessee's obligations to Lessor hereunder, (y) all remaining Rent due until the redelivery of the serviceable Aircraft shall become due and payable to Lessor and (z) for all legal fees and other costs and out-of-pocket expenses incurred by Lessor by reason of the occurrence of any Event of Default or the exercise of Lessor's remedies with respect thereto, including all costs and expenses incurred in connection with the return of the Aircraft in accordance with the terms of Clause 22 hereof or in placing the Aircraft in the condition and with airworthiness certification as required by such Clause. Lessee shall pay to and indemnify Lessor demand against any amount of interest, fees or other sums whatsoever paid or payable on account of funds borrowed in order to carry any unpaid amount and amounts payable by Lessor to any Bank in respect of any loss, premium, penalty or expense that may be incurred in repaying funds raised to finance the Aircraft or in unwinding any swap, forward interest rate agreement or other financial instrument relating in whole or in part to Lessor's financing of the Aircraft. Further, upon the occurrence of any of the events specified in paragraphs (xii), (xiii), (xiv) or (xv) of Clause 23.1, the leasing of the Aircraft under this Agreement shall immediately terminate and Lessee shall forthwith, or shall require and instruct any such receiver or trustee to, return the Aircraft to Lessor in the condition required by and otherwise in accordance with Clause 22 hereof or (at Lessor's option) in its then current condition."

18. The Claimant relies on 23.2.2 (y):

> *"all remaining Rent due until the redelivery of the serviceable Aircraft shall become due and payable to Lessor"*

19. Once there has been an Event of Default, as is the case here, the Claimant says that it is are automatically entitled to payment of all sums which would become due up to the date of redelivery under the Lease, 3 May 2026. Once the aircraft has been redelivered, and all monies due paid by the Defendant, any excess sums are repayable to the Defendant under 10.2.1 which provides;

> "*10.2.1 Within five (5) Business Days after:*
>
> (i) *redelivery of the Aircraft to Lessor in accordance with and in the condition required by this Agreement; or*
>
> (ii) *payment to Lessor of the Agreed Value following a Total Loss after the Delivery Date;*
>
> *or in each case such later time as Lessor is satisfied Lessee has irrevocably paid to Lessor all amounts which may then be outstanding or which may become payable under the Transaction Documents, Lessor shall (provided that no Event of Default has occurred and is continuing) pay to Lessee:*
>
> *(a) an amount equal to the balance of the Security Payment paid by Lessee under this Agreement and then held by Lessor; and*
>
> *(b) the amount of any Rent received in respect of any period falling after the Redelivery Date of the Aircraft in accordance with the terms of this Agreement or payment of the Agreed Value, as the case may be."*

20. The Claimant claims US$5,890,000 plus interest (taking into account certain payments received) under this head, Rent until 3 May 2026.

The Defendant's case on Future Rentals

21. The Defendant disputed that the Claimant had any such entitlement.

22. The Defendant submitted that the Claimant's construction was unworkable. This was a badly drafted provision where the grammar did not make sense, (y) being a subparagraph of "*Lessee shall be liable."* It was a provision that did not explain when it operated and what the trigger was: unlike 23.2.1 it did not appear to require any exercise of a right by the Claimant but appeared to arise automatically upon an Event of Default.

23. On the Claimant's construction (y) provided for rent to be due "*until the redelivery of the serviceable Aircraft*." But it was impossible to know in advance on what date redelivery would take place. The Lease defined Redelivery Date as:

> *"the Expiry Date or the earlier date of termination of the leasing of the Aircraft in accordance with the terms of this Agreement".*

Expiry Date was defined at 4.2:

> "*The Expiry Date shall be ninety six (96) months after the Delivery Date, subject to the following provisions:*
>
> (i) *if Lessor, acting in accordance with the provisions of this Agreement, terminates the leasing of the Aircraft to Lessee under this Agreement, the date of such termination shall be the Expiry Date and Clause 23 shall apply;*
>
> (ii) *if the Aircraft or Airframe suffers a Total Loss, the Expiry Date shall be the Total Loss Date;*
>
> (iii) *if Clause 22.4 becomes applicable, the Expiry Date shall be extended to the date when any non-compliance referred to therein has been fully rectified and Lessor shall have accepted redelivery of the Aircraft;*
>
> (iv) *if paragraph (d) of the definition of Total Loss becomes applicable, the Expiry Date shall be sixty (60) days after notice by Lessee to Lessor of Total Loss;*
>
> (v) *if Clause 21.4 is applicable, the Expiry Date shall be at the end of the period described therein; and*
>
> (vi) *if Clause 22.2 is applicable, the Expiry Date shall be the date upon which the Aircraft is redelivered in accordance with that Clause.*
>
> (vii) *For the avoidance of doubt, the obligations of Lessee in respect of payment of Rent and all other obligations of Lessee shall continue (pro-rata) to be payable and valid in respect of those days prior to the Expiry Date. The obligations of Lessee and Lessor that were due to have been performed but have not been fully performed prior to the termination of this Agreement pursuant to this Clause 4.2, will survive the Expiry Date."*

The Redelivery Date was not a fixed date and depended on whether one of the eventualities in 4.2 occurred. If (i) to (vi) applied, redelivery might occur on a different date to the end of the eight year lease period.

24. But (y) did not even provide for sums due on the Expiry Date to be due. It referred to all remaining rent due "*until the redelivery of the serviceable Aircraft*." 22.4 provided:

> *"If the Aircraft is not returned to Lessor in compliance with the provisions of this Agreement on or before the day that would, but for the provisions of this Clause 22.4, be the last day of the Lease Term, the Lease Term shall be deemed to be automatically extended, and Lessee's obligations hereunder shall continue until the Aircraft is returned to Lessor in a condition satisfying the requirements of this Agreement. Lessee shall pay Rent during any such extension period on written demand (pro rated on a daily basis) at the rate of (i) 100% of Rent for the period from but excluding the Expiry Date up to and including the date falling thirty (30) days thereafter; and (ii) 120% of Rent for any period falling thereafter….."*

If the Aircraft was not redelivered in a serviceable condition, the Rent continued to be paid until the condition of the Aircraft satisfied the terms of the Lease.

25. So the problem was not merely that redelivery was not, under the Lease, a fixed point or date. The wording as to "*redelivery of the serviceable Aircraft*" added a further layer of uncertainty.

26. The Defendant submitted the consequences of the clause were extraordinary. The Claimant was seeking to rely on a clause with draconian effect where the wording was difficult to make sense of at best. The Claimant would on its interpretation receive all rentals in advance with no provision at all for accelerated receipt. If this was what the Lease had intended, it would have used clear words.

27. It was very uncertain whether 10.2.1, which did not apply when an Event of Default was continuing, would apply in circumstances such as the present.

28. Another problem was that the Events of Default were numerous, some extremely minor. It could hardly have been intended that these dramatic consequences occurred where a minor breach occurred.

29. Alternatively, the provision was at least arguably a penalty clause which could only be determined finally at trial. The Defendant relied on the principles set out in *Cavendish Square Holdings BV v Makadesi[2015] UKSC 67, [2016] AC 1172:*

> *"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity.[[1]] But compensation is not necessarily the only legitimate interest that*

[1] The four tests set out by Lord Dunedin in *Dunlop* [1915] AC 79 at 87, treated for many years until *Makdessi* as the leading statement of the law on penalty. The four tests are summarised in *Makdessi* at [21] as follows:

> *the innocent party may have in the performance of the defaulter's primary obligations"*

at [32] per Lord Neuberger PSC and Lord Sumption JSC (with whom Lord Carnwath JSC agreed);

> *"What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable." at [152] per Lord Mance JSC (with whom Lord Toulson JSC agreed in relevant part as may be seen at [292]);*
>
> *"…the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable"*

at [255] per Lord Hodge JSC.

30. The Defendant submitted that whilst the purpose of (y) is not easy to discern, it can be read as confirming that rent was payable until redelivery of the serviceable Aircraft.

Discussion

31. The application was well argued on both sides.

32. There is no doubt that the wording of (y) is unsatisfactory. However, there are a number of important indications as to its proper meaning.

33. Firstly, although the grammar is unsatisfactory, it is clear from 23.2.1 and 23.2.2 that 23.2.2 provides for a number of consequences which follow on the declaring of an Event of Default. Whilst the remedies under 23.2.1 are options in favour of the Claimant, 23.2.2 provides for automatic consequences of an Event of Default *"In addition to the foregoing, Lessee shall be liable…"*

"*They were (a) that the provision would be penal if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach; (b) that the provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum; (c) that there was a presumption (but no more) that it would be penal if it was payable in a number of events of varying gravity; and (d) that it would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss.*"

34. Secondly, "*all remaining Rent due until the redelivery of the serviceable Aircraft shall become due and payable*" is an acceleration clause. Whilst the two uses of "due" are confusing, the provision *"shall become due"* deems sums which would not otherwise be due (yet) to be due and payable.

35. Thirdly, the submission by the Defendant that (y) merely makes clear that rent is payable till redelivery of the serviceable Aircraft renders (y) redundant and unnecessary and is an unlikely construction in a provision plainly intended to provide for additional remedies for the Claimant. 4.2 (vi) already provides:

> *"(vi) if Clause 22.2 is applicable, the Expiry Date shall be the date upon which the Aircraft is redelivered in accordance with that Clause.*
>
> *For the avoidance of doubt, the obligations of Lessee in respect of payment of Rent and all other obligations of Lessee shall continue (pro-rata) to be payable and valid in respect of those days prior to the Expiry Date."*

36. Fourthly, the deeming of monies due not otherwise due until a future date dovetails with 10.2.1, which provides for monies to be potentially repayable to the Defendant after redelivery.

37. The fact that it is a draconian provision is hardly unusual in a list of remedies in an aircraft lease drafted for the protection of the lessor. Where there has been an Event of Default it is not particularly unlikely that the lessor would wish to secure future payments by advance payment, the monies being repayable after redelivery and full payment.

38. That leaves the problem that it refers to Rent "*due until redelivery of the serviceable Aircraft*." What does that mean? It could not be known whether redelivery would take place (i) *earlier* than 3 May 2026, or (ii) whether the failure to return the Aircraft in serviceable condition at the end of the Lease period would extend the duration of the rental *later* beyond 3 May 2026.

39. These are unsatisfactory words. But the prima facie redelivery date is 3 May 2026 unless extended. It cannot have been intended that the acceleration provision would cover sums after 3 May 2026. Nor can it cover a possible early redelivery on a basis which could not at the relevant time be contemplated. In my view (y) is intended simply as an inelegant way of referring to 3 May 2026. I cannot attribute any other meaning to the provision and in my view it is not so unclear that it should simply be discarded as incomprehensible.

40. There is support for the above interpretation when read together with 10.2.1, which requires the Claimant after redelivery and payment of all sums due to the Claimant to repay:

> *"the amount of any Rent received in respect of any period falling after the Redelivery Date of the Aircraft in accordance with the terms of this Agreement".*

As indicated above, Redelivery Date is defined as

> *"the Expiry Date or the earlier date of termination of the leasing of the Aircraft in accordance with the terms of this Agreement;"*

41. Thus 10.2.1 contemplates that the Claimant may have received Rent payable after the Redelivery Date (ie the date when the Aircraft is redelivered in accordance with the terms of the Lease) which it is required to repay.

42. 10.2.1 only applies "*provided that no Event of Default has occurred and is continuing."* Although there is a no waiver provision (25.1) the Lease contemplates that once a default is remedied by subsequent payment, the Event of Default no longer continues: see for example 23.2.1 ("*Upon the occurrence of any Event of Default and at any time thereafter so long as the same shall be continuing, Lessor may, at its option and without notice to Lessee, declare this Agreement to be in default*").

43. As for the contention that (y) is a penalty clause, that would certainly be arguable were it not for the effect of 10.2.1. That clause provides that the monies paid in advance are potentially repayable, and all that has occurred is an acceleration of payments subsequently due. There is nothing extravagant, exorbitant or unconscionable in requiring a commercial party to pay immediately the full amount of the lease in the event of non-compliance with its terms: *ZCCM Investments Holdings plc v Konkola Copper Mines 2017 EWHC 3288 (Comm) at [33]-[34]*. It is true that many similar cases are concerned with loan agreements (where monies due by way of a loan become payable on default) but there is nothing in principle objectionable in an acceleration clause. In effect, it renders (y) a form of security payment and in my view does not have the characteristics of a penalty. Given the terms of 10.2.1 I cannot see that the lack of an accelerated repayment provision is capable of rendering the clause a penalty.

44. In those circumstances I accept the Claimant's contention that there is no defence to this part of the claim either.

Conclusion

45. I give judgment for the sums claimed by the Claimant. If the interest and other calculations cannot be agreed I will hear argument on them.