



Neutral Citation Number: [2023] EWHC 69 (Comm)

Case No: CL-2021-000225

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: 18/01/2023

Before :

CHRISTOPHER HANCOCK KC

Between :

ILFC AIRCRAFT 32A-1808 LIMITED
- and -
FLY BOSNIA D.O.O.

Claimant

Defendant

Erin Hitchens (instructed by **Alius Law**) for the **Claimant**
The Defendant did not appear and was not represented

Hearing dates: Friday 16 December 2022

JUDGMENT

This judgment was handed down remotely at 10.30am on Wednesday 18th January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Christopher Hancock KC :

Introduction and factual background.

1. I heard on Friday 16 December 2022 the Claimant's applications for judgment on admissions and/or summary judgment on part of the claim.
2. The application was made on the grounds that:
 - (i) the Defendant has admitted the Rent Claim for the purposes of CPR 14.3; and/or
 - (ii) the Defendant has no real prospect of successfully defending the Rent Claim and there is no other reason to allow the Rent Claim to go to trial, for the purposes of CPR 24.
3. The claim is for breach of the terms of an aircraft lease agreement ("**the Lease**") dated 12 July 2018 by which the Claimant leased to the Defendant an Airbus A319-100 aircraft with registration number MSN 1808 ("**the Aircraft**") for a term of 72 months.
4. The aircraft was delivered on 20 December 2018.

The original lease.

5. The material provisions of the Lease are as follows:
 - a. Article 5.4.1 stated that the Defendant was obliged to pay Base Rent at the rate set out in Schedule 1. Schedule 1(C) then defined Base Rent as \$133,000 per month, in advance.
 - b. Article 5.5.1 provided that the Defendant was obliged to pay Maintenance Rent in accordance with a formula laid down in Article 5.5.
6. The Claimant issued invoices to the Defendant in respect of the Base Rent and Maintenance Rent which fell due for payment under the terms of the Lease on various dates.
7. In breach of those terms of the Lease, the Defendant failed to pay sums which fell due for payment from March 2020 onwards by their respective due dates as set out in Schedule 1 and Schedule 2 to the Particulars of Claim.

I find that these sums included Base Rent for the period from 1 March to 31 May 2020.

The Deferral Agreement

8. On 16 April 2020 the Claimant and the Defendant entered into a Deferral Agreement whereby the Claimant agreed to defer payment by the Defendant of Base Rent (but not Maintenance Rent) for the period from 1 March to 31 May 2020 in the total sum of US\$399,000 (“**the Deferred Amounts**”) on terms that this would be paid in three equal instalments together with the Base Rent falling due in October, November and December 2020. The Deferred Amounts were to be paid together with interest at 5% per annum from the date the Deferred Amounts would otherwise have become due (“**the Deferred Interest**”).

9. Clauses 2 and 3 of the Deferral Agreement provided as follows:

*“2. **Deferral of certain future Base Rent amounts: Repayment.** Subject to the conditions referred to in Paragraph 3 below, LESSOR agrees to defer payment by LESSEE of the Deferred Amounts¹ during the Deferral Period² in accordance with the provisions of this Paragraph 2.*

(A) The principal balance of the Deferred Amounts will bear interest thereon at 5% per annum from and after the date such deferred amounts would otherwise have become payable under the Lease (“Deferral Interest”);

(B) LESSEE will continue to pay all other amounts due and payable (including, without limitation, Maintenance Rent) under the Lease’

(C) LESSEE shall pay the Deferred Amounts (together with Deferral Interest) in respect of the Aircraft in three equal instalments, to be paid together with, and in addition to, the Base Rent for the Aircraft falling due in the months of October, November and December 2020; ...

*3. **Conditions to Deferral.** LESSOR’S agreement in Paragraph 2 is conditional upon the following:*

(A) No Default or Event of Default having occurred and continuing under the Lease. Upon the occurrence of a Default or an Event of Default which is continuing under the Lease, LESSOR shall have the option to terminate the Deferral in respect of the Aircraft by notice to LESSEE, whereupon each of the Deferred Amounts will be due and payable on the later of (i) the

¹ Defined as 100% of Base Rent amount which will fall due pursuant to the terms of the Lease on or after March 1 2020 until and including May 31 2020.

² Defined as the period beginning on March 1, 2020 up to and including May 31, 2020.

original due date under the Lease and (ii) three Business Days following LESSOR's delivery of the foregoing notice to LESSEE;

(B) In respect of the Lease, LESSEE will continue to perform all other obligations in a timely manner in accordance with the Lease (including, without limitation, the payment of Maintenance Rent)....

10. Thus, as can be seen, the deferral was conditional upon the Defendant continuing to perform all other obligations under the Lease, including payment of Maintenance Rent (article 3(B)) and upon no default or Event of Default occurring and continuing under the Lease (article 3(A)).
11. It is alleged that in breach of the terms of the Lease the Defendant failed to make payments of Maintenance Rent from June 2020, and failed to make payments of Base Rent from July 2020.
12. It is further asserted that in breach of the terms of the Deferral Agreement the Defendant failed to make payments of the Deferred Amounts and/or the Deferred Interest.

The Claimant's claim.

13. There are three limbs to the claim, only the first of which was the subject of this application. Those three limbs were as follows:
 - (i) The Rent Claim, a debt claim for unpaid Rent and Maintenance Rent, as defined above and described in more detail herein;
 - (ii) A claim in damages for Base Rent and Maintenance Rent to the end of the Lease term; and
 - (iii) A claim in damages for the Defendant's failure to return the Aircraft in accordance with the Return Conditions set out in Article 23 of the Lease.
14. The Defendant filed a defence to the claim, and evidence in response to the summary judgment application. The parties then agreed a stay for settlement negotiations. However, no agreement was reached. By order dated 11 October 2022 the Defendant's former solicitors, Carter Ruck, were removed from the record.
15. Shortly before the hearing before me, the Claimant was informed that the Claimant had filed insolvency proceedings in Bosnia. Documentation relating to the decision to file insolvency proceedings and the application to

the Bosnian Court, together with a receipt for that documentation, was then sent to me.

16. I decided that it was appropriate to go ahead and hear the applications, but to expressly provide for a liberty to the liquidator to apply in the event that the view was taken that these applications should not have proceeded. I return to this below.

The Applications.

17. As identified above, the application is made on the grounds that:
- (iii) the Defendant has admitted the Rent Claim for the purposes of CPR 14.3; and/or
 - (iv) the Defendant has no real prospect of successfully defending the Rent Claim and there is no other reason to allow the Rent Claim to go to trial, for the purposes of CPR 24.

Admissions.

18. **CPR 14.3 provides that:**

(1) Where a party makes an admission under rule 14.1(2) (admission by notice in writing), any other party may apply for judgment on the admission.

(2) Judgment shall be such judgment as it appears to the court that the applicant is entitled to on the admission.

19. The relevant paragraphs of the pleadings are as follows.
20. Dealing first with *Deferred Payments and Deferred Interest*, then in paragraph 21(iv) of the Particulars of Claim, the Claimant pleaded that the Defendant failed to make payment of the Deferred Amounts and Deferred Interest in October 2020, November 2020 and December 2020. At paragraph 8(d) of the Defence the Defendant admits that it did not make payment of the Deferred Amounts and the Deferred Interest. At paragraph 29(i) and 29(ii), the Claimants claim that the Defendant is liable to make payment of Deferred Amounts and Deferred Interest, and at paragraph 17(a) of the Defence the Defendant admits that it is liable to pay these sums to the Claimant, subject to its alleged right to set off the Security Deposit (which is discussed in more detail below). These sums total US\$399,000 plus

interest. The Defendant admits that interest is payable on this sum at 5% per annum (paragraph 17(a) of the Defence).

21. The Defendant however alleges that although it admits these amounts are due, it is entitled to set off the security deposit in the sum of US\$1,000,000 pursuant to clause 5.1.3 of the Lease. I deal with this dispute below.
22. However, before I do so, it is convenient to deal with the claim in relation to *Outstanding Lease Payments and interest thereon*.
23. At paragraph 29(iii) and 29(iv) of the Particulars of Claim, it is pleaded that Base Rent and Maintenance Rent remain unpaid in relation to the period June 2020 to 24 December 2020 (the date of termination of the Lease). The total sum of \$1,044,126.44 (principal) plus interest from the due date of each instalment at the contractual rate of 5% plus the relevant one month US LIBOR rate.
24. At paragraph 8(a) of the Defence the Defendant admits that it did not make payments of Maintenance Rent due under the Lease from 15 June 2020. At paragraph 8(b) the Defendant admits that it did not make payments of Base Rent due under the Lease from 20 July 2020.
25. At paragraph 17(b) the Defendant identifies two alleged errors in the calculation of the Maintenance and Base Rent which put in dispute US\$127,977.82. The admitted amount due under the Lease is therefore US\$916,148.62. The Defendant admits that interest is payable on this sum at 5% plus 1 month USD LIBOR (paragraph 17(c)).
26. The Claimant only claimed judgment for the sum of US\$916,148.62, as set out above – ie the sum admitted to be due by the Defendant – together with the interest at the contractual rate of interest, a rate again admitted by the Defendant.
27. I turn to the alleged set-off Defence, which is based on clause 5.1.3 of the Lease.
28. Clause 5.1.3 provides as follows:

“After the Termination Date³, provided (a) no Event of Default has occurred and is continuing and (b) no default by the Lessee exists under

³ Defined in clause 4.3 of the Lease as one of various dates including where the aircraft is repossessed by LESSOR or where the Lease is cancelled under clause 3.6.

any Other Agreement⁴, the Lessor will pay to Lessee an amount equal to the amount of the Security Deposit then held by Lessor as cash, without interest, less an amount determined by Lessor to be a reasonable estimate of the costs, if any, which Lessor will incur to remedy any unperformed obligations of Lessee under this Lease, including the correction of any discrepancies from the required condition of the Aircraft on return of the Aircraft.”

29. There is no dispute that the following Events of Default have occurred and are continuing:
- a. Article 25.2(b) provides that an Event of Default occurs if the Defendant fails to make a payment of Base Rent, Maintenance Rent or any other payment due under the Lease after payment has become due and such failure continues for four business days. The Defendant has expressly admitted that this Event of Default has occurred (paragraph 8 of the Defence).
 - b. Article 25.2(d) provides that an Event of Default occurs if the Defendant fails to return the Aircraft on the Expiration Date in accordance with Article 23. The Defendant admits that the Aircraft failed an engine borescope inspection (paragraph 14 of the Defence) and that this constituted a breach of Article 23 (Schedule 1 of the Defence).
30. In conclusion, the Claimant contended, and I accept, that the Claimant is entitled to judgment on admissions in the sum of US\$1,315,148.62 plus interest. I was provided with a helpful spreadsheet showing the amounts of interest due as at the date of the hearing before me, which totalled US\$162,056.76. I would be grateful if my understanding of the interest calculation could be checked. Subject to this, the Claimant is entitled to judgment for the total sum of US\$1,315,148.62 plus US\$162,056.76.

Summary Judgment.

31. Alternatively, the Claimant applies for summary judgment on the grounds that the Defendant has no real prospect of defending the Rent Claim.
32. CPR Part 24 provides as follows:

⁴ Defined as any agreement between a LESSEE and a LESSOR and where an aircraft is the subject of the Agreement.

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue;

or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

(Rule 3.4 makes provision for the court to strike out^(GL) a statement of case or part of a statement of case if it appears that it discloses no reasonable grounds for bringing or defending a claim)”

33. The test to be applied upon an application for summary judgment was restated most recently by Lewison LJ in *Mellor v Partridge* [2017] EWCA Civ 477. Whilst reference was made to the entire passage at paragraph 3 of that case, the following sub-paragraphs have particular relevance:

“i) The court must consider whether the [respondent] has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 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]

iv) This does not mean that the court must take at face value and without analysis everything that a [respondent] 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]”

34. The Rent Claim is a simple debt claim, the basis for which is set out above, and is admitted by the Defendant. The only line of defence raised by the Defendant is its alleged right to set off the security deposit. For the reasons outlined above, it is not entitled to do so. I accept this submission.

Interest.

35. As I have indicated, the Claimant submits that interest is due:

(i) On the sum of US\$399,000 at 5% per annum (pursuant to article 2A of the Deferral Agreement); and

- (ii) On the remaining amount at 5% plus 1 month US LIBOR per annum (pursuant to clause 5.8 of the Lease).

36. The Claimant further submits that the rates of interest pleaded have been admitted, and I accept this. A schedule of the interest due to the date of the hearing was provided to me. I am satisfied that these sums were due as at the date of the hearing.

Conclusion and liberty to apply.

37. In view of my conclusions as set out above, I am satisfied that the Claimant is entitled to judgment in relation to the debt claimed in the sums claimed, together with interest as set out above.

38. However, as I have already indicated, I understand that the Defendant has filed for insolvency in Bosnia. I therefore think it right to give the liquidator in Bosnia liberty to apply in the event that the view is taken that this hearing should not have taken place. Such application should be made within 28 days of any winding up order in Bosnia.

39. Finally, I would be grateful if Counsel could draw up an order reflecting this judgment.