Neutral Citation Number: [2020] EWHC 679 (QB)

Case No: HQ13X05885

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/03/2020

Before :

MR JUSTICE FREEDMAN

- -

Between:

LOMBARD NORTH CENTRAL PLC — **Claimant/Respondent**

-and-

(1) EUROPEAN SKYJETS LIMITED (in liquidation) — **First Defendant/Appellant**

(2) STEPHEN WESTLAKE (discontinued) — **Second Defendant**

Mr Philip Coppel QC and Ms Saima Hanif (instructed by Ballinger Law Limited) for the First Defendant/Appellant
Ms Charlotte Eborall (instructed by Addleshaw Goddard LLP) for the Claimant/Respondent

Hearing dates: 21 and 22 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FREEDMAN:

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Background

1. This is an appeal from a decision of Deputy Master Leslie who on 5 July 2019 refused an application on behalf of European SkyJets Limited ("SkyJets") to set aside a default judgment. He concluded that a notice of termination in respect of a long-term lending contract was valid, and that, in any event, the delay of SkyJets in seeking to set aside the default judgment was so long that the Court should not set aside the default judgment.

2. Lombard North Central PLC ("Lombard") is in the business of providing credit finance by way of instalment credit, loans and leasing. It is a subsidiary of the Royal Bank of Scotland plc ("RBS"). SkyJets was a private limited company incorporated on 30 April 2007. SkyJets was a special purpose vehicle formed to acquire and maintain two Learjet aircraft for executive charter. SkyJets was struck off the register on 9 December 2014. It was subsequently restored to the Register of Companies on 28 February 2017 pursuant to a court order dated 9 January 2017. European Skytime Limited ("Skytime"), the intended Second Part 20 Claimant was at all material times the parent company and 100% owner of SkyJets. Skytime operated the executive charter business by using the two Learjets owned by SkyJets. Skytime was dissolved on 17 March 2014 and was restored to the register on 23 August 2016.

3. The proceedings arise from a loan agreement ("the Loan Agreement") made between Lombard and SkyJets, dated 23 October 2008, pursuant to which Lombard advanced the sum of US$8,771,250 to SkyJets by way of a loan ("the Loan"). The Loan Agreement was in a standard form drafted by Lombard. The purpose of the Loan was to enable SkyJets to acquire one of the two aircraft, a Learjet ("the Aircraft"). The loan was repayable by monthly instalments, each one comprising capital and interest repayments.

4. The Loan Agreement was secured by a Mortgage over the sole Learjet aircraft, the purchase of which it financed, and a personal guarantee and indemnity from Mr Westlake.

(a) Terms of the Loan Agreement

5. The base rate of interest was specified in the Loan Details as "1-month RBS US Dollar LIBOR" and was defined in Clause 1.1.1 such that SkyJets' case is that only Lombard could ascertain it. Accordingly, the interest payable fell to be calculated by Lombard or its parent company RBS.

6. Clause 4 of the Loan Agreement set out the express terms for repayment of the Loan, as follows:

   i) SkyJets was required to repay the Loan and interest on the Loan by "Instalments" (see paragraph ii) below) in the amounts and on the "Payment Dates", which were monthly, specified in the Loan Repayment Details until the Loan was repaid in full (clause 4.1.1).

   ii) The Loan Repayment Details provided that, assuming the rate of interest was 5.75% and that there were 120 instalments, the amount of each monthly "Instalment" would be US$96,300.55.

   iii) As clause 4.1.2 noted, the assumed number of Instalments may increase or decrease depending upon the "Applicable Interest Rate". Further, pursuant to clause 6.5.3, the Instalments would be reviewed annually and possibly adjusted to reflect past and anticipated movements in RBS US Dollar LIBOR to ensure that the Loan was repaid within the estimated period (of ten years).

   iv) The "Applicable Interest Rate" was, pursuant to clause 1.1.1 the higher of the "Base Rate" and the "Minimum Base Rate", the Base Rate being at the (variable) 1-month RBS US Dollar LIBOR rate.

   v) Under clause 4.2.1, interest accrued from day to day on the outstanding balance of the Loan during each "Interest Period" defined at definitions at clause 1.1.1 which referred to clause 5.3.1 at a rate equal to the sum of the fixed 2.00% "Add-on Percentage" and the "Applicable Interest Rate".

   vi) Pursuant both to clauses 4.3 and 22, time was of the essence for all payments due from SkyJets and as regards the times and dates referred to in the Loan Agreement.

7. The following were also express terms of the Loan Agreement:

i) Under clause 5, in the event that SkyJets failed to pay any sum due under the Loan Agreement, Lombard was entitled to charge "Default Interest" at a rate of the "Applicable Interest Rate" plus 5.00%.

ii) Pursuant to clause 5.2.2 of the Loan Agreement, the statement of Lombard as to the rate or amount of interest payable was 'conclusive'.

iii) Clause 6.5 granted Lombard the right to call upon SkyJets to pay increased Instalments; to prepay part of the balance of the Loan; or place an amount on deposit should the "Asset Cover Percentage" fall below 133% (this was arrived at by dividing the value of the Aircraft by the balance of the Loan and expressed as a percentage).

8. Clause 9 (and clause 13) of the Loan Agreement provided, *inter alia*, as follows:

> *"**9. Events of default***
>
> ***9.1 Defaults***
>
> *There shall be default if:*
>
> *(a)[SkyJets]…defaults in the payment of principal or interest or any other sum payable under any Transaction Document* [which included the Loan Agreement and the Mortgage (and guarantee)] *or fails to insure or maintain the Aircraft in accordance with the requirements of the Aircraft Mortgage or is in breach of any of its obligations under any Transaction Document;*
>
> …
>
> *(o)any representation, warranty or statement made to [Lombard] by [SkyJets, Skytime or Mr Westlake] in or connection with any Transaction Document proves to have been incorrect in any material respect when made (or deemed made) or if repeated at any time by reference to the facts or circumstances subsisting at that time, would no longer be true and correct in all material respects;*

(p)in the opinion of [Lombard], a material adverse change occurs in the business, assets, conditions, operations or prospects of [SkyJets, Skytime or Mr Westlake]

…

9.2 Acceleration

At any time after the occurrence of an Event of Default [Lombard] may by notice to [SkyJets]:

(a)cancel the Facility and require [SkyJets] immediately to repay the Loan together with accrued interest and all other sums payable under this Agreement or any other Transaction Document, whereupon the same shall become immediately due and payable…

Upon the service of any such notice [Lombard's] obligations under this Agreement shall be terminated."

…

13. Demand or notice

Any demand or notice on [SkyJets] under this Agreement or any other Transaction Document shall be made in writing signed by an officer of [Lombard] and served either by personal delivery on any officer of [SkyJets] at any place or by post or by hand delivery addressed to its registered office…"

9. It will be noted that there was no provision for a notice to remedy provision. A default notice had the effect set out in it without forewarning to or consent of SkyJets as the borrower. In the event of breach, Lombard was given an entitlement to have immediate recourse to the underlying security and all the powers (including sale of the borrower's assets). The Appellant's skeleton argument summarised the position at paragraph 20 as follows:

"SkyJets, as borrower, was afforded no period of grace to rectify or otherwise remedy the breach, regardless of the scale of the breach, regardless of the period of breach, regardless when the breach had occurred and later been remedied, regardless of the

> *cause of default (e.g. misrepresentation by the bank) and regardless of the consequences."*

10. Under Clause 20, it was provided under the heading "non-waiver":

> *"No failure by the Lender to exercise and no delay by the Lender in exercising any right, power or privilege under this Agreement or any other Transaction Document shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law."*

(b) Performance under the Loan Agreement

11. From 30 November 2009, SkyJets began to fall into arrears. SkyJets' own Annexure 4 to the proposed Defence and Counterclaim shows that repayments were neither monthly nor in the amount of the Instalment (as varied).

12. On 22 October 2010, Lombard wrote to SkyJets requiring the arrears to be brought up to date, after which SkyJets made a series of payments in November 2010 bringing SkyJets' arrears down to virtually zero ($0.02) by the end of that year. Between January and April 2011, the position worsened again, until a US$200,000.00 injection by SkyJets at the end of May 2011. Repayments dipped again during the year, causing Lombard to send default notices to SkyJets on 3 November 2011 and 30 November 2011.

13. In 2012, there were further arrears. On 6 January 2012, Lombard wrote to SkyJets referring to arrears and it was confirmed that SkyJets would not be able to meet the Lombard repayments as and when they fell due in the immediate future due to insufficient working capital. A question had been raised about a late payment charge. It was stated that there was an entitlement to levy additional charges arising at any time in connection with the facility, that the charge had been previously notified to SkyJets and that "level of fee is at our discretion."

14. There were then proposals provided including the provision of additional security and termination if there were two consecutive payments in arrears and a late payment charge based on 10% of the arrears. There is no evidence which is before the Court that these revised terms were implemented. From the perspective of Lombard, this meant that it could terminate when any payment was in arrears, and from the perspective of SkyJets, it was not obliged to pay an additional late payment charge based on 10% of the arrears to the extent that this was not in the Loan Agreement. The letter reserved all rights under the Loan Agreement.

15. On 10 October 2012, Lombard sent Mr Westlake of SkyJets an email attaching what was said to be an up to date statement of account for the Loan. The email stated that SkyJets had to pay a sum of US$154,701.36 by 28 October 2012. This was incorrect because as at 10 October 2012, SkyJets was not in arrears under the Loan Agreement. It was in fact US$82,624.64 in credit. The amount payable by SkyJets under the Loan Agreement on 28 October 2012 would not be US$154,701.36 plus the monthly instalment due on 18 October 2012: it would be only US$179.99. The evidence is that SkyJets would have been able to discharge this sum and would have done so if it had known that this was the true amount of the indebtedness.

16. A meeting took place between the parties on 8 November 2012, at which a written notice of that date was served by hand by Lombard on Mr Westlake stating that SkyJets was in arrears of US$294,376.91. By this written notice, Lombard terminated the Loan Agreement, in the following terms:

> *"Under clause 9.1 of the Agreement the failure to make any payment under the Agreement is an Event of Default. Clause 9.2 of the Agreement therefore applies. In accordance with clause 9.2 we hereby give you notice that the loan facility contained in the Agreement is cancelled and you are therefore required to immediately pay the full amount due under the loan facility. The sum due from you is currently US$5,879,361.06.*
>
> *As you are aware, in support of the Agreement, you entered into an Aircraft Mortgage (the Mortgage). In accordance with clause 8.1 of the Mortgage we hereby give you notice that the Aircraft, as the security*

under the Mortgage, has become enforceable and we are exercising our powers and remedies as mortgagee of the Aircraft. These powers and remedies include the obtaining of possession of the Aircraft and appointing an agent to sell the Aircraft."

17. On 21 November 2012, Lombard entered the premises of SkyJets and Skytime and seized the Aircraft. The consequence was that the business of SkyJets and Skytime was brought to an end, and this led to them both going into liquidation. Lombard subsequently sold the Aircraft on 31 March 2014 for US$3,105,200.04, and those proceeds were applied in reduction of Lombard's debt.

(c) The proceedings

18. On 13 December 2013, Lombard issued proceedings against SkyJets and Mr Westlake as guarantor. SkyJets had no officers at this stage. No defence was filed on behalf of SkyJets. On 17 January 2014, a default judgment was entered against SkyJets with damages to be assessed. Mr Westlake as guarantor served a Defence and Counterclaim. On 24 April 2014, Lombard applied for summary judgment and/or the striking out of the Defence and Counterclaim of Mr Westlake, and for damages to be assessed against SkyJets.

19. There were hearings on 15 October 2014 and 17 December 2014 before Master Kay QC. Mr Westlake acted in person. Mr Westlake by amendment alleged that Lombard was not entitled to terminate the Loan Agreement or to seize the aircraft. It was at the second hearing that it was first revealed that the arrears in the 8 November 2012 notice might have been a sum of US$179.99 and not US$294,376.91 if there were excluded default charges which were proposed in January 2012, but which had not been agreed.

20. On 14 May 2015, Master Kay QC dismissed Lombard's application for summary judgment. In the course of his detailed reserved judgment, the Master noted at paragraph 33 that Mr Westlake should be allowed to defend his liability under the Guarantee as *"…there is a real dispute as to the liability of the First Defendant..."* Mr Westlake's application for permission to amend the counterclaim to plead a loss based on the wrongful seizure of the Aircraft was refused on the basis that any loss would have been suffered by SkyJets, not him personally. It is apparent that he had

believed that he personally was entitled to make that counterclaim, whereas, in fact, as the Master held, if there was such a counterclaim, it was that of the company and not that of a shareholder of the company.

(d) Restoration of the two companies

21. Following Master Kay QC's judgment, Mr Westlake promptly made an application to the Court to restore SkyJets to the Register of Companies on 8 June 2015. This was done by Mr Westlake in person. The process was difficult and mistakes were made. In July 2016, he instructed solicitors Ballinger Law Limited ("Ballinger Law") in July 2016 to take over the proceedings to restore the companies. With the assistance of Ballinger Law, Skytime was restored to the Register on 23 August 2016 and SkyJets on 28 February 2017. Liquidators were also appointed for both companies on those dates. The liquidator for SkyJets then instructed Ballinger Law to investigate the claim. Ballinger Law then had to retrieve the documents to investigate the claim, seek out ATE insurance and obtain an opinion from external counsel.

22. Under cover of a letter dated 14 February 2018, a draft application notice was served on Lombard. By letter dated 21 March 2018, Lombard indicated that it would be useful for the parties to engage in further correspondence prior to issuing the application and that it would not take any point on delay from 14 February 2018 onwards. Two months later on 16 May 2018 Lombard's solicitors responded to the proposed claim. On 18 June 2018 Ballinger Law provided a detailed rebuttal of the letter. On 26 July 2018, Lombard's solicitors wrote again. The parties' attempts to resolve the dispute were unsuccessful.

23. On 2 May 2019, the application to set aside the default judgment pursuant to CPR r13.3 was issued. On Friday, 5 July 2019, an afternoon hearing took place before Deputy Master Leslie, at the conclusion of which Deputy Master Leslie dismissed the application. The judgment, short relative to the judgment of Master Kay QC, was given ex tempore. Permission to appeal was granted by Mr Justice Saini on 24 October 2019, and an appeal was listed for one day, but in the event the appeal lasted 1½ days.

Judgment of Deputy Master Leslie

24. At paragraph 11, there was recited a submission of Mr Coppel QC that there was a gross mis-statement in the notice of default that the accrued interest was misleading, that is it should have been US$179.99 and not US$294,376.91. The Master held that the lender had the 'whip hand' and the notice of default was valid. He said *"it is true that at one stage, within four weeks of the notice of default going out, the defendant was told what was required to be paid and it was not the full amount, but the full amount was still not paid. It cannot have been unclear or should not have been unclear that, as a result of late payments over a period of time, default interest was due and there was no mention of that in any case in either case".*

25. He also stated by reference to Paget on Banking 15th Edition at paragraph 8.6 that if a bank proceeds on an incorrect basis that a certain event of default occurred, it may subsequently be able to justify its actions by reference to facts then existing, but not expressly relied on, even if only discovered later, which constituted an event of default. He said that Lombard could rely upon a default in connection with engine maintenance and/or failing to maintain the outstanding loan at 133% or less than the value of the aeroplane. The Deputy Master said *"I understand and recognise that those facts may be in dispute, but the evidence I have seen is not particularly clear on the point from the defendant at least"* (paragraph 17).

26. He then went on to say that there was a delay of 4 years in seeking to set aside, that the reasons for letting judgment pass were not known and that an application should have been brought earlier. Deputy Master Leslie took the view that looking at all the circumstances of the case, the prospects were not sufficiently good to set aside the judgment. He said that alacrity in such an application demonstrated enthusiasm for the case and almost a sense of outrage of injustice due to a default judgment: any enthusiasm had only come about too recently (paragraph 21).

Grounds of Appeal

27. There were five grounds of appeal as follows:

> *Ground 1: The Master wrongly held that the defence did not have a real prospect of success because the Notice was valid*
>
> *Ground 2: The Master wrongly held that Lombard was entitled to rely on alternative events of default which were not mentioned in the Notice of Termination*
>
> *Ground 3: The Master failed to address the First Defendant's argument that there was some other ground to set aside default judgment*
>
> *Ground 4: The Master erred in concluding that the application to set aside default judgment was not made promptly*
>
> *Ground 5: The decision failed to take into account and/or explain why it was at odds with the decision of Master Kay QC.*

Ground 1: The Master wrongly held that the defence did not have a real prospect of success because the Notice was valid

28. This ground is essentially that the Notice was not valid. In other words, it is that there was a real prospect of success that there was no event of default or no event of default on which Lombard could trigger a default notice. It is therefore necessary to consider first the trigger of the claimed indebtedness at the time of US$294,376.91 ("the Claimed Indebtedness") when in fact if there was an entitlement, it was solely based on arrears of US$179.99.

(a) SkyJets' submissions

29. SkyJets contends that a breach can be so small or trivial or de minimis that it cannot have been the intention of the parties that the acceleration provision could be triggered. Mr Coppel QC submits that the parties could not have intended that a failure to pay one cent or one dollar could entitle Lombard to invoke an acceleration clause. There is a de minimis principle to be read into the contract.

30. Whilst there is a provision about time being of the essence, that is to say that a failure to pay on time, gives rise to the right of acceleration, it does not say in terms that even a trivial or de minimis breach as to the amount to be paid is a sufficient trigger. In the context of the large sums of money payable over the life of the contract and even monthly payments of over US$80,000, he submits that a sum of US$179.99 is de minimis.

31. There may be scope for finding this, despite time being of the essence as regards payments, in the following context, namely

(1) This was a long-term lending over many years.
(2) The acceleration provisions are particularly draconian in their consequence, when seen alongside the mortgage of the Aircraft.
(3) In this case, the sum involved of US$179.99 was so small that it represented less than 0.3% of each monthly payment.
(4) There was no intention to fail to pay this sum: on the contrary, the sum outstanding had been miscalculated by Lombard, and the evidence is that if the correct sum had been communicated, it would have been paid.
(5) Accordingly, there may be scope for interpreting the events of default as not applying to something which was de minimis, absent express words to the contrary.

32. In the alternative, it is submitted that in the event that a default notice could be based on a sum as small as US$179.99, there was a misrepresentation as regards the amount of the indebtedness that there would be at the end of October 2012. The misstatement occurred in particular by email of 10 October 2012. If instead of saying that it would be US$294,376.91, it had been said that it would be as a little as US$179.99, SkyJets would have paid it. It is said that it was negligent to misrepresent the sum, such that there is a liability in negligent mis-statement or it was a breach of an implied term of the contract to identify a proper sum.

33. It was also submitted that the notice of default was deficient because it was for so wrong an amount. It was not an absolute rule that the notice of default did not have to be accurate, and in the circumstances, this notice of default was so radically wrong

that it was ineffective. In any event, SkyJets submitted that the clause was a penalty clause by accelerating the amount due just by reference to a sum of US$179.99, which was such an exorbitant consequence for such a relative tiny alleged breach. In the alternative, it was submitted that the operation of such an acceleration provision, which in the ordinary course would carry with it the crystallisation of the mortgage and the seizure of the Aircraft was subject to relief against forfeiture. I shall return to the question of whether it was a penalty clause under a separate head.

(b) Lombard's submissions

34. As to failure to make the current payment which became due on 28 October 2012, it was an express term that time was of the essence of the contract (clause 4.3) and accordingly, this was a condition, breach of which went to the root of the contract: *Lombard North Central plc v Butterworth* [1987] 1 QB 527 (CA) at 535F *per* Mustill LJ. Delay in performance is therefore to be treated as breach of a condition of the contract, without regard to the magnitude of the breach and/or howsoever slight: *Lombard (ibid.)* at 535G. As Burton J said in *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75 (Comm) at para 15 *"…it is open to the parties to agree that the breach of a particular term, however slight, is to be treated as having that effect and shall therefore entitle the other to treat the contract as repudiated."*

35. Lombard relies upon the failure to pay the Instalment on 28 October 2012. Lombard accepts that it cannot establish that the "late payment charge" added periodically to the statement of account was default interest under clause 5.1. Lombard therefore relies upon the failure to pay the balance of the Instalment on 28 October 2012, which, on SkyJets' own case, was a failure to pay US$179.99.

36. In respect of this Event of Default, Lombard wrote in the Notice as follows:

> *"I write further to the letter dated 19 September 2012 sent to you by solicitors.*
>
> *As you were made aware from that letter you are currently in arrears in respect of the Agreement. Whilst I recognise the attempts that you have made to reduce the arrears, including the part payments of US$248,408.49 on 5 October 2012 and a further*

US$165,599.36 on 9 October 2012, there are still arrears totalling £294,376.92 outstanding."

37. Thus, the Event of Default of arrears was identified. However, the amount of arrears was not correct, but Lombard says that there was no requirement that the amount need be correct. It all depends on the term of the contract and the purpose. It is said that in the instant case, it is not stated in the Loan Agreement that the notice of default needs to identify the event of default. Further, if it does do so, it is not stated that it need be accurate. However, it is required to state the consequence of the notice of default which it has purported to do so, albeit that the sums outstanding may have been overstated.

38. Lombard says that the event of default is not the same as a notice to remedy: here there is no notice required to remedy. Once there is an event of default and the notice is given, this crystallises without more the acceleration. Indeed, even where a notice to remedy is required, for example preceding an entitlement under a debenture to appoint a receiver, it is not mandatory to identify correctly the amount of the indebtedness. This is because usually, there is no ability on the part of the debtor to pay forthwith the amount of the indebtedness: see *Bank of Baroda v Panessar* [1987] Ch 335. A fortiori in the instant case, where there is no ability to reverse the event of default and the entitlement to accelerate if it has accrued.

39. As regards the contentions that there might have been a breach of contract or negligent misstatement, Lombard relies on the reasoning of the House of Lords in the context of a trust deed and a notice of acceleration. In *Concord Trust v The Law Debenture Trust Corp* [2005] 1 WLR 1591 at paragraphs 36-37, Lord Scott said that an invalid notice of acceleration was not a breach of contract: there was no necessity to imply a term that any notice should be valid. It was open for there to be a challenge about the existence of an event of default or the validity of a notice of acceleration without such an implication. Further, Lord Scott in the same case at paragraph 38 went on to find that if there was no contractual duty, it was very difficult to understand how it was arguable that there could be owed a duty of care in tort. On the facts in that case, there was no negligence in giving the wrong notices.

40. In the absence of a duty of care and the like, it may be said that it would be unreasonable to rely upon Lombard, unless SkyJets indicated to Lombard that that is what it was doing. Further, there would be issues as to how there was reliance, in that no payment took place at all. Lombard says that such a clause about acceleration does not offend the rule against penalties because all that is happening is that the loan is accruing earlier than otherwise would have been the case.

41. To similar effect, Lombard submits that there is no application of relief from forfeiture to give relief against such an acceleration clause, at least in the context of a property not relating to real property. It draws attention to the absence of authorities cited in respect of relief from forfeiture in the instant case. I shall return to the subject of penalties and forfeiture below.

(c) Discussion

42. In my judgment, underlying all of the arguments come the combination of two points, namely first how small a sum in the context of this Loan Agreement is the sum of US$179.99, and secondly, the arguable case that Lombard got it so wrong in identifying a sum of US$294,376.91 instead of the sum of US$179.99. The suggestion is that in these circumstances, it is the consequence of the hard commercial bargain which entitled Lombard to hold on to its default judgment. However, by contrast it is said that the combination of these points requires close scrutiny of the kind which could only come through a trial. In these circumstances, it is said that if this were an application for summary judgment, the Court would have been right to adopt the same approach as Master Kay QC, namely to dismiss the application.

43. It is important to say at the outset that any criticisms of the position of SkyJets for not knowing the balance should be scrutinised carefully against a background that Lombard conspicuously found it difficult to work the state of the account. Add to this the fact that the interest rate was by reference to the amount charged by RBS to Lombard, which prima facie is a matter where the lender has superior knowledge to that of the borrower. Thus, whilst in most cases, it is for the debtor to hunt out the creditor, there may be scope to temper in this case the usual rigours of the law in the context of a commercial agreement.

44. There is little scope for an application of a de minimis rule in commercial contracts. In Carter's Breach of Contract 2nd Edition at para. 2-05, it is written that *"notwithstanding the rule that performance must be exact, the law does not regard minute departures from contractual requirements as involving a failure to perform…The de minimis concept is…a very narrow one. Only a minute and trivial difference will be regarded as de minimis."* In the case of *Vivienne Westwood Limited v Conduit Street Development Limited* [2017] EWHC 350 (Ch), Mr Timothy Fancourt QC (as he then was) sitting as a Deputy Judge of the High Court, decided that it was necessary to exclude a trivial or de minimis breach from triggering a right to terminate a side letter which provided for a reduced rent subject to observing the obligations. He said the following at paragraph 58 as follows:

> *"However, as the Claimant has argued, the reduced rent enshrined in the Side Letter is properly to be regarded as part of the substantial bargain made by it and the lessor. It does therefore seem that the parties cannot have meant that a trivial breach of contract by the Claimant would entitle the lessor to put an end to the Side Letter. Among all the obligations arising from the terms of the lease and documents supplementary to it, there is bound to be a trivial breach of some obligation from time to time. That is particularly so where, as here, there is an obligation to keep the Premises in good and substantial repair and condition. I therefore agree with the Defendant that some qualification is necessarily implicit in the terms of the Side Letter, otherwise the bargain for the Claimant to be entitled to pay a reduced rent becomes little more than a concession at the whim of the lessor. If the terms of the Side Letter are to have any sensible commercial effect, it is necessary to exclude a trivial (or de minimis) breach of covenant from triggering the lessor's right to terminate the Side Letter. But in my judgment it is not necessary that any breach would have to be "material" or "substantial" in a colloquial sense (as opposed to the more legalistic sense of a breach that is more than trivial) before the termination provision could be activated. Although there may be a dispute about whether a particular breach is trivial, there*

is no real difficulty in applying such a test, whereas the test of materiality is fraught with conceptual uncertainty."

45. This is not a decision that the acceleration provisions must be read subject to a de minimis exception, nor that the sum of US$179.99 necessarily comes within such an exception if it exists. The law is far from clear as regards the operation of a de minimis principle. There is sufficient in my judgment in this case to show that it has a real prospect of success in being applied such as to negative an entitlement which might otherwise exist for Lombard to operate the acceleration provision because of an indebtedness of US$179.99.

46. In the alternative, there is scope to criticise the email of 10 October 2012 from Lombard to SkyJets. Normally, there is no liability for breach of contract or negligent misstatement in respect of wrong statements of account for the reasons set out in the Concord case. Whilst not excluding the possibility, the argument that there is an implied term in contract seems to be out of the question for those reasons. Nevertheless, whilst the letter of 10 October 2012 was from the perspective of a lender seeking to warn its borrower from the lender's perspective, the possibility of a duty in tort cannot be dismissed altogether. Lombard must be taken to have known in the circumstances of this case that SkyJets would be likely to rely upon the same and that if the true amount of the indebtedness had been set out that SkyJets would have been likely to have paid in full. The reasoning of Walton J in *Bank of Baroda v Panessar* above is relied upon by Lombard to exclude a duty to state the precise figure, such that a demand of payment can be valid even if it is for the wrong sum. This is because there would normally be no possibility of the debtor paying the correct sum. However, the putative dialogue between lender and borrower contained in Walton J's judgment makes this case particularly unusual and one where there might be scope for such a duty of care. Walton J said the following in order to meet the exceptional case where a debtor may be able to pay, that there could be communications between the creditor and the debtor and as to the amount required. At page 347, he said:

"If, on the contrary, the debtor is in a position to pay off the sum demanded and wishes to know the exact and precise sum, he can communicate with the creditor and ask the creditor what sum he is expecting to be paid. And, under those circumstances,

one imagines that the creditor would say: 'Well, the last accounts, which are not complete, show in fact a sum of £X owing from you. If you can pay that sum at once, then we need not worry too much about the additional sum, we can settle that later', or something along those lines…"

47. The necessity for a default notice which contains information at least approximating to the correct figure of the indebtedness in the context of this case is consistent with the reasoning below as to why there is at lowest an argument with real prospects of success to the effect that the default notice must identify all events of default relied upon. Without knowledge of what was being asserted by Lombard, the recipient of the default notice would be inhibited from accessing and exercising the rights and remedies otherwise available to challenge the notice whether by declaratory relief or injunction or any argument based on relief from forfeiture. In those circumstances, Mr Coppel QC submitted as a matter of construction or as an implied term based on business or legal efficacy that the default notice required identification with reasonable accuracy of the nature of the breach. This applies to a default notice which fails to identify Events of Default now relied upon, and it applies also to the issue of an Event of Default which so starkly misstates the amount of the indebtedness, that is hundreds of thousands of dollars instead of US$179.99.

48. An alternative approach might be through an estoppel preventing Lombard from relying on the US$179.99 figure. The reason for this is that having represented that it would be the much higher figures, this arguably caused SkyJets to resign itself to not being able to pay at the end of October. It is then inequitable for Lombard to treat the small sum of US$179.99 as being the correct sum without first correcting the representation and giving SkyJets a reasonable to pay the same, no doubt a very short period of time. That never occurred. On that basis, it is arguable that there is an estoppel by representation precluding Lombard from invoking acceleration based on the sum of US$179.99. There are also points about penalties and forfeiture which I shall address below.

49. The Deputy Master had a somewhat general approach to the position of the lender in these circumstances, which may turn out to be justified retrospectively after a trial. It was to the effect that "the commercial reality is that the lenders hold the whip hand", and that this was particularly the case here where it was agreed that an act of default is

late payment and time was of the essence and it is an irremediable breach (paragraph 14). Despite this, I am satisfied that the analysis above is such that there is a real prospect in the very unusual circumstances of this case of this giving way to an analysis in favour of SkyJets. If there had been an application for summary judgment against SkyJets, I am satisfied that on these arguments the appropriate order would be one against summary judgment and in favour of SkyJets.

Penalty/forfeiture

50. Before moving on to issue 2, it is necessary to address the question of penalty/forfeiture. I am concerned about the process here. It was hardly, if at all, addressed by SkyJets in its written argument. It was mentioned in some more detail orally in its first address, but not as a central argument. Cases cited were about penalty clauses which were distinguishable from the instant facts. As regards forfeiture, there was hardly, if any, law deployed. Ms Eborall was able to deal with this aspect of the matter quite summarily in her response. However, in reply, Mr Coppel QC has majored on the penalty aspect of the case and he has reformulated the nature of the case with several propositions suggesting that the penalty argument worked because of the combination of a number of features including acceleration, default interest, compounding of interest and that there was an argument that this went beyond protecting any legitimate interest and was extravagant and/or exorbitant and/or unconscionable.

51. The starting point in the light of the Supreme Court authority of *Cavendish Square Holding BV v Makdessi*: *ParkingEye Ltd v Barry Beavis* [2015] UKSC 67 (*"Cavendish"*) is the two stage process, namely whether any (and if so what) legitimate business interest is served and protected by the clause, and, if so, whether the provision made for that interest is extravagant, exorbitant or unconscionable. The effect is that whilst the doctrine of penalties survived from the House of Lords case 100 years earlier, Dunlop Pneumatic Tyre Company Ltd. v New Garage and Motor Company Ltd. [1915] AC 79, a clause may be valid even if it does not represent a genuine pre-estimate of the loss, and even though it is aimed at deterring a party from breaking the contract.

52. In respect of clauses involving default interest, Paget on Banking 15th Ed. comments on this at paragraph 8.8 as follows:

> **"**It is common for loan agreements to specify a default rate of interest, i.e. a higher rate which applies after the borrower's default. In *Lordsvale Finance plc v Bank of Zambia ([1996] 3 WLR 688)*, Colman J had to decide whether a default rate of interest is a penalty as being a stipulation for payment of money in terrorem of the offending party rather than a genuine pre-estimate of damage (propositions 2 and 3 in the speech of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*). He held that it was not.
>
> The trend in the authorities following *Lordsvale* is that provisions in loan agreements for uplifting the interest rate for the future after a default should not be regarded as penalties (unless the uplift is evidently extravagant), such provisions being commercially justifiable because the default bears on the credit risk and the cost of administering the loan. This development of the law was approved by the Supreme Court in *Makdessi v Cavendish Square Holdings BV*. In that case the Supreme Court took the opportunity to review the law on penalties generally, and held that 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'."

53. In *Cavendish* at paragraphs 146 and following, Lord Mance said the following:

> **"**146. In *Lordsvale Finance* Colman J was concerned with a loan agreement providing that the rate of interest would increase prospectively from the time of default in payment. He noted, at pp 763-764 (italics added):
>
> "… the borrower in default is not the same credit risk as the prospective borrower with whom the loan agreement was first negotiated. Merely for the pre-existing rate of interest to continue to accrue on the outstanding amount of the debt would not reflect the fact that the borrower no longer has a clean record. Given that money is more expensive for a less good credit risk than for a good

credit risk, there would in principle seem to be no reason to deduce that a small rateable increase in interest charged prospectively upon default would have the dominant purpose of deterring default. *That is not because there is in any real sense a genuine pre-estimate of loss, but because there is a good commercial reason for deducing that deterrence of breach is not the dominant contractual purpose of the term.*

It is perfectly true that for upwards of a century the courts have been at pains to define penalties by means of distinguishing them for liquidated damages clauses. The question that has always had to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss. That is because the payment of liquidated damages is the most prevalent purpose for which an additional payment on breach might be required under a contract. However, the jurisdiction in relation to penalty clauses is concerned not primarily with the enforcement of inoffensive liquidated damages clauses but rather with protection against the effect of penalty clauses. *There would therefore seem to be no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach.*"

147. In a whole series of cases across the world, courts have taken their cue from *Lordsvale* and held that provisions in loan agreements for uplifting the interest rate for the future after a default should not be regarded as penalties, save where the uplift is evidently extravagant: see eg *Hong Leuong Finance Ltd v Tan Gin Huay* [1999] 2 SLR 153, *Beil v Mansell (No 2)* (2006) 2 Qd R 499, *PSAL Ltd v Kellas-Sharpe* [2012] QSC 31, *Elberg v Fraval* [2012]

> VSC 342, *Place Concorde East Ltd Partnership v Shelter Corp of Canada Ltd* (2003) 43 BLR (3d) 54 and *In re Mandarin Container* [2004] 3 HKLRD 554.
>
> 148. The rationale of these cases is that the default bears on the credit risk (and, as *Beil v Mansell* identifies, may also bear on the cost of administering the loan). The uplift is conditioned on the breach, but the breach reflects directly upon the continuing appropriateness of the originally agreed interest terms. In substance, the uplift amounts to a variation of the original terms. If on the other hand, it is evident from the size of the uplift that it is in its nature a punishment for or deterrent to breach, rather than an ordinary commercial re-rating to reflect a change in risk (or administration cost), then it will still be disallowed as a penalty – as the actual decisions in *Hong Leuong*, *Beil v Mansell* and *Elberg v Fraval* illustrate."

54. It follows from the above that a legitimate business interest and concern is served by a default interest provision, and it would have to be shown, the burden being on the person seeking to impugn the clause as a penalty, how an additional 5% was extravagant, exorbitant or unconscionable. Since this line of attack has appeared in this belated way, there has been no evidence to support this proposition. There were cited, particularly Australian cases, but none directly in point which show that default interest can be impugned as penal. Everything turns on its own facts, and no doubt a court would consider the entirety of the facts of the case including the pre-default interest rate, the security provided, the degree of additional risk and the possible administration charges. Lordsvale concerned a default interest rate of an additional 2 per cent. In *ZCCM Investments Holdings plc v Konkola Copper Mines plc* [2017] EWHC 3288 (Comm) (Mr Lionel Persey QC sitting as a Deputy Judge of the High Court), higher default interest rates than those in this case were considered and upheld. It does not sound an easy task to persuade a court that a 5% default interest rate would satisfy any of the strong adjectives referred to at the start of this paragraph.

55. Mr Coppel QC sought to tie in the default interest rate into the acceleration provision with a number of other matters intended to make the acceleration provision as a whole

penal. I do not intend to set out the entirety of his argument, which was essentially to say that even if one aspect by itself was not penal, each of the matters were indicative of penalty and may be held at a trial to be penal. The submission of Mr Coppel QC is difficult in that the courts have frequently said that it is not a penalty to stipulate that in the event of a failure to make an instalment payment on the due date the whole loan becomes due and repayable forthwith: see *Holyoake v Candy* [2017] EWHC 3397 (Ch) at 466 and following per Nugee J who said:

> "*It is not suggested that it was penal to stipulate for the balance to become due on default, and I do not see how it could have been: such provisions are standard in agreements for payment of liabilities by agreed instalments, and CPC were already entitled to payment of the whole sum in any event: see The Angelic Star [1988] 1 Ll Rep 122 at 125 col 2 per Lord Donaldson MR ("the mere fact that the capital sum becomes immediately repayable upon a failure to comply with the conditions upon which credit was extended cannot constitute a penalty"). So the only question is whether, if the balance became due, it would be penal to stipulate for interest in addition. That too seems to me to be a standard provision in commercial loan agreements: once the debtor is in default, the creditor is not only being kept out of his money but running an enhanced credit risk: see the approval in Cavendish Square Holding BV v Makdessi of the decision of Colman J in Lordsvale Finance plc v Bank of Zambia [1996] QB 752.*"

56. Added to the foregoing is the defect in process in not highlighting this at an earlier stage and hence the matter is not addressed in evidence. I do not exclude the penalty argument here onwards, but any decision to set aside the default judgment is not made because of any argument by reference to a penalty.

57. I now refer to the possibility of relief from forfeiture. Relief from forfeiture in a commercial context of parties at arm's length is almost never invoked. No authority was cited which convincingly makes a case for its application. However, there is an argument to be added to the above to the effect that there might be an equitable extension of time for the amount to be paid having regard to the false information

provided to SkyJets by Lombard, on the basis that it would be unconscionable (even without sharp practice on the part of Lombard) for the lender to insist on its strict legal rights in the highly unusual circumstances of this case: see Chitty on Contracts 31st Ed. at paras.26-254 – 26-255. In my judgment, in addition to the other arguments by reference to Lombard not being able to proceed to accelerate on the basis of an indebtedness of $179.99, there is some prospect of relief from forfeiture (rather than the law against penalties) being invoked in this context to delay the operation of the acceleration clause. Here too, there is the objection about this not being introduced significantly until oral submissions: here too, I would reach the same conclusion in respect of Ground 1 even without forfeiture being added as an argument. However, in respect of forfeiture, this is another route worthy of being explored through a trial with the effect that an acceleration based on an alleged default of only US$179.99 should not summarily shut out SkyJets from defending this matter.

Ground 2: The Master wrongly held that Lombard was entitled to rely on alternative events of default which were not mentioned in the Notice of Termination

58. There are three such alternative events, namely

(1) The arrears which had been paid prior to 28 October 2012, that is based on numerous earlier defaults and which had been paid off prior to the default of US$179.99 on 28 October 2012;

(2) The alleged failure in the maintenance obligations;

(3) The alleged failure in the loan to asset value of the Aircraft.

59. The first point is that none of these matters were relied upon in the default notice. There is a question as to whether this rendered Lombard unable to rely upon the same retrospectively as justifying the acceleration. The reasoning of Deputy Master Leslie in his ex tempore judgment was not particularly convincing. It was to quote paragraph 8.6 of Paget on Banking as follows:

> *"If a bank proceeds on the incorrect basis that a certain event of default occurred, it may be able subsequently to justify its actions by reference to facts then existing but not expressly relied on, even*

> *if only discovered later, which constituted an event of default. The bank would in any event be well-advised to draft its termination notices broadly."*

60. Deputy Master Leslie went on to say the following:

> *"16. The notice has not distinguished itself by being broad in that way, but what it does mean is that the bank could rely upon the default of or in connection with the engine maintenance and/or failure to maintain the outstanding loan at 133 per cent or less than the value of the aeroplane.*
>
> *17. I understand and recognise that those facts may be in dispute, but the evidence I have seen is not particularly clear on the point from the defendant at least."*

61. Although Deputy Master Leslie appears to take the law as being to the effect that an event not mentioned in the event of default can be relied upon, the Deputy Master appears to recognise a dispute on the facts, albeit that, in his judgment, the evidence is not particularly clear from SkyJets at least.

62. In my judgment, there is in fact an argument with a real prospect of success that in the instant contract, as a matter of construction, an event of default cannot be relied upon if it is not mentioned in the default notice.

63. The relevant law as to a unilateral notice is derived from *Mannai Investment Co. Ltd v Eagle Star Assurance* [1997] AC 749 especially per Lord Steyn at pp 767-768. The relevant law was helpfully summarised by Ramsey J in *Vivergo v Redhall* [2013] EWHC 4030 (TCC) at paragraph 420 in the following terms, namely

> *"I consider that the following principles can be derived from Mannai and Architectural Installations. First that unilateral notices are to be construed in the same way as contractual documents and therefore it is necessary to construe them objectively against the background or "the relevant objective contextual scene" known to both parties. Secondly the relevant*

meaning of the unilateral notices is the meaning that a reasonable recipient would have understood by the notices. The reasonable recipient "would have had in the forefront of his mind the terms" of the relevant underlying contract. Thirdly, that the purpose of the notice is relevant to its construction and validity. Prima facie, if a notice unambiguously conveys the purpose, a court will ignore immaterial errors which would not have misled a reasonable recipient. Fourthly, the notice must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when the notice is intended to operate. Fifthly, in the context of clause which require a default notice and then a termination notice, the two notices must be connected both in content and in time. Sixthly, in this case the notice must notify the default. However, I also consider that something is needed either indicating the seriousness of the situation or making some link to Clause 43.2 so that the reasonable recipient would realise that it was a Clause 43.2 notice. Obviously the background known to both parties may supply that. To that extent, I consider that the obiter statement in Architectural Installations requires some elaboration."

64. SkyJets submits that where a contract provides that in specific circumstances, one party to a contract has an option or entitlement to give a notice to the other party which materially increases the contractual burden on the other party, then unless the express terms of the contract preclude it, the notice must state the primary facts relied upon giving rise to the entitlement with sufficient specificity that those stated facts can be checked by the recipient. In the instant context, the default notice has the effect of transforming the nature of the obligations by accelerating the time for repayment of the loan. In the context of a business founded upon borrowing long term in order to fund a business in which the loan was repaid out of hire revenue, the acceleration would be liable to most borrowers to affect existentially the business. In those circumstances, a borrower would want to know at the outset what had given rise to that consequence. In particular, it would be necessary to know this in order to

consider challenging the default notice and the basis for acceleration. Without it, a borrower would be thrown back on having to prove that no Event of Default occurred. This involves proving a negative in respect of the literally many tens of possible such events in the Loan Agreement as drafted.

65. In these circumstances, SkyJets submits that it is not correct to say, as Lombard does, that since the default notice was not a demand to rectify a breach that it was not necessary to identify the breach. There is an argument with at very lowest a real prospect of success that it would have been obvious to the parties at the time of the contract that the identification of the breach was necessary as a matter of business sense given the potentially catastrophic effect of acceleration, and to provide the recipient with the real opportunity for challenge at that crucial point in time.

66. I accept that it is well arguable, as Mr Coppel QC submitted, that having regard to the nature of the acceleration clause, such an interpretation is required in order to give commercial sense to the provision about the default notice: see Clause 9.2 of the Loan Agreement. Mr Coppel QC also derived support from a decision of Burton J in *Nakanishi Marine Co Ltd v Gora Shipping and Ors* [2012] EWHC 333 (Comm) who stated at paragraph 35 (iii) that "I am far from persuaded (nor was any authority produced by Ms Selvaratnam) that the principle of Boston Deep Sea Fishing and Ice Co. v Ansell [1888] L.R.39 Ch. D339 CA (entitlement for the innocent party to rely upon a repudiatory breach of contract unknown to it at the time) extends to a case where there is a requirement for an EOD, as here, in order to terminate a contract, with specified consequences, and where the Proof of Default clause provides that "any other Event of Default shall be proved conclusively by a written statement of the Lender", of which there was none at the time or even, in the absence of pleading, as of now."

67. Lombard relies on *Boston Deep Sea Fishing*, which allows a party to justify a termination on a repudiatory breach not identified at the time of termination, frequently because it is not known about as a result of a fraud of the party whose contract has been terminated. In the instant case, the relevant grounds of termination not identified at the time were known about at the time, and do not involve unearthing a fraud or concealment on the part of SkyJets. There are significant exceptions to the

Boston Deep Sea Fishing principle as set out in Chitty on Contracts 31st Ed. at 24-014:

"The general rule is the subject of a number of exceptions. First, a party cannot rely on a ground which he did not specify at the time of his refusal to perform "if the point which was not taken could have been put right". Secondly, a party may be precluded by the operation of the doctrines of waiver or estoppel from relying on a ground which he did not specify at the time of his refusal to perform. Thirdly, a party may be held to have accepted the goods so that he is no longer able to justify his refusal to perform. However, there does not appear to be any separate principle which would preclude a party from setting up a different ground simply because it would be unfair or unjust to allow him to do so."

68. Lombard seeks to erect a different principle from the cases cited in Paget on Banking at paragraph 8.6 above. They include *Byblos Bank v Al Khudhairy* [1987] BCLC 232. That is a case where the point was the subject of a concession from Counsel on behalf of the Defendant about the entitlement to rely upon some other ground not taken at the time for the appointment of a receiver, and the point was the existence of insolvency. The other cases referred to where *Byblos* was applied included *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514 at 526f. That case considered a much earlier edition of Chitty on Contracts and rejected a notion that there was a separate ground based on unfairness or injustice, but it did recognise that there could be a ground of waiver subject to finding an unequivocal representation on which to base it. The third case is *Brampton Manor (Leisure) Ltd v McLean* [2006] EWHC 2983 (Ch) in which *Byblos Bank* was followed. In that context, there was no need for a default notice, but only a demand for payment of the loan following an event of default.

69. Against this background, I shall now consider each of the additional grounds. They are as follows:

(a) historic non-payments, where before the default notice the sums were paid;

(b) maintenance agreement;

(c) loan to 1.33 value of the Aircraft.

(a) Historic non-payments

70. It was submitted on behalf of Lombard that there had been prior defaults which comprised an Event (events) of Default. Reference was made to the 23 missed payments pleaded in the Particulars of Claim at paragraph 19 and to narrative about this of Mr Dibb in his witness statement of 1 July 2019 at paragraph 16. Lombard submitted that since time was of the essence under the Loan Agreement, any missed payment was a repudiatory breach of contract. Further, the fact that all the payments had been made up (albeit late) did not matter because the right to terminate for breach had not been waived by reason of delay. Lombard relied on the above quoted non waiver Clause 20 of the Loan Agreement.

71. If Lombard is correct, the effect of that clause is that notwithstanding the fact that a late payment may have been repaid, there is still an entitlement thereafter to rely on the late payment as a reason for invoking a notice of default. That could be done shortly after receipt of the moneys or a much longer period thereafter. Lombard submits that this is right because the late payment does not provide the consequence of default, that is late payment (for which interest is required). Further, it is submitted that there has been a persistence here about the default.

72. I am satisfied that there is an argument with a real prospect of success that Lombard cannot invoke the notice of default for arrears of payment after the outstanding payment or payments have been repaid. There are provisions about default interest which can be invoked for late payment, and if that was not paid when due, then that would give rise to a default by itself. The non-waiver provision is not necessarily an answer in that whilst this allows for omissions e.g. a failure to exercise a right or a delay in the same, it does not deal with what occurs where the lender has received an outstanding sum. As Chitty on Contracts 32nd Edition points out at paragraph 22-045:

> *"Contracting parties are free to stipulate that a particular act, such as payment of a rental instalment under an equipment lease, should not be taken to waive a right to terminate for an earlier breach."*

73. In the case of *State Securities Plc v Initial Industry Limited* [2004] EWHC 3482 (Ch), Mr Jonathan Gaunt QC sitting as a Deputy Judge of the High Court pointed out that

the strictures in respect of forfeiture for breach of a lease of real property might not apply to breach of a hire agreement. He said at paragraph 57:

> "I can, however, see no reason in principle why the parties to an equipment lease (which is really a financing transaction and different in many ways from a lease of real property) or other commercial contract, should not be free to stipulate that a particular act, such as payment of a rental instalment should not be taken to waive a right to terminate for an earlier breach. After all, such a provision may be very convenient and operate to the benefit of both parties. The finance company may want to encourage the lessee to correct the breach but not want him to fall behind with his payments while he does so. It may be in the interests of the lessee that the finance company should not have to take an early decision whether to terminate."

74. By contrast with the above, Clause 20 does not stipulate that a payment of rental instalment should not be taken to waive a right to terminate for an earlier breach. There is, in my judgment, at least a real prospect of success that such a stipulation is not covered by its general words referring merely to the inaction of failure to exercise a right or delay. Where the payment is received there is the receipt of moneys and at least an argument with a real prospect of success of an election to go on with the Loan Agreement without invoking a Notice of Default.

75. In addition to the foregoing, it is necessary to bear in mind how a default notice is to operate in the instant contract. As Mr Coppel QC submitted, its effect is to transform the nature of the obligation so that everything is accelerated. Given how onerous it is, the Court ought to scrutinise with care whether something is or is not an Event of Default. The argument with a real prospect of success that there has not been an Event of Default is fortified by the notion that an Event of Default ought not lightly to be found. This is not an attempt to rewrite the contract, but if there is an ambiguity as to whether an event is an Event of Default, any ambiguity might be resolved in favour of the party who did not write the contract and who bears the potential onerous obligation.

76. In all the circumstances, I am satisfied that there is an argument with at lowest a real prospect that historic failures do not provide a basis for invoking the Notice of Default.

(b) Maintenance agreement default

77. I shall first consider the alleged breaches on the premise that they can be relied upon even although they were not in the Notice of Default. I shall later in the Judgment consider whether in any event the failure to include these matters in the Notice of Default is a bar in itself to reliance on these matters.

78. Lombard submits that

    i) By clause 8(g) of the Loan Agreement, SkyJets undertook not to terminate any Maintenance Agreement.

    ii) Mr Westlake's evidence was that he terminated the Honeywell "MSP" (emails at exhibits SW11 and SW12 in May and August 2012; Westlake statement of 29 May 2014 at paragraph 19.

    iii) Under clause 9.1(a) of the Loan Agreement, breach of the above identified undertaking constitutes an Event of Default.

    iv) Lombard relies upon that *"occurrence"* of an Event of Default. This Event of Default was not identified in the default notice.

79. SkyJets submits that there was not a Maintenance Agreement within the meaning of Clause 1.1.1 of the Loan Agreement in that this is a Maintenance Agreement is an agreement between SkyJets and the relevant Maintenance Performer. There is no Maintenance Performer identified in the Loan Details. There was a reference in Clause 2.1(h)(ii) of the Loan Agreement to "each Maintenance Agreement (if any)", contemplating that there might not be a Maintenance Agreement. As such, there is an argument with a real prospect of success that there was no Maintenance Agreement and that accordingly, Clause 7.1(l) about the Maintenance Agreement and Clause 9.1(a) about breaches of obligations were not engaged. This is reinforced by the fact that whereas it is contended that a Maintenance Agreement was a condition precedent to the Loan Agreement, there is an argument with a real prospect of success that Lombard knew that there was no Maintenance Agreement. On this basis, Lombard entered into the Loan Agreement knowing that there was no such agreement, and that this was an election to have an agreement without one. Likewise, there were not

particularised or established the breaches alleged of Clause 7.1(l) and/or Clause 9.1(o) and (p) referred to in paragraph 20 of the Particulars of Claim. If and to the extent that there is something to answer other than by way of bare denial, a case with a real prospect of success has been raised in paragraph 91(a)-(j) of the draft Defence and Counterclaim.

80. In response, Lombard seeks to rely on a statement in a letter of SkyJets' solicitors of 18 June 2018 that it did have an engine support programme which it cancelled. However, there is a case with a real prospect of success that (a) this does not amount to the Maintenance Agreement, and/or (b) the decision not to continue with the engine support programme was not a breach of contract, and/or (c) the cancellation was notified to Ms Bowron for Lombard and conveyed to Kit Holding for Lombard, and that it was agreed that this programme was not viable, but that the Aircraft engines were maintained in accordance with standards set by the European Aviation Safety Agency and audited every 6 months by the Civil Aviation Authority: see letter of Ballinger Law of 18 June 2018 at paragraph 5.

81. In all the circumstances, irrespective of the fact that this ground was not contained in the default notice, there is in my judgment at lowest a real prospect of success that there was no relevant breach of contract and therefore an answer to the ex post facto attempt on the part of Lombard to rely on this as an Event of Default and a justification for acceleration.

(c) Asset cover percentage

82. It is also contended by Lombard that the Asset Control Percentage fell below 133%, meaning the value of the Aircraft divided by the balance of the Loan expressed as a percentage from time to time. Here too, this was not relied upon in the default notice. Further, when it was referred to in the Particulars of Claim at paragraph 22, it was by reference to an email of 8 October 2012 requiring the recipient Skytime (as opposed to SkyJets) to make a lump sum capital repayment of US$1,982,000. This email is referred to secondarily in the papers: there were emails of an apparently consequential nature in the exhibit SW6 to Mr Westlake's statement, and the information relating to the email in question is from the pleadings (Particulars of Claim [21] and draft Defence [41] and [92] and the skeleton arguments. The above arises out of Clause

6.5.1 which does not refer to a different undertaking in Clause 8(i) of the Loan Agreement,

83. Even on the basis of Lombard's figures of the value of the Aircraft being US$6.3 million and the balance of the loan being US6.006 million, this would have increased the asset percentage to 156%. This was well in excess of a percentage greater than 133% as stipulated in Clause 6.5.1(a). In fact, the contention of SkyJets is that the value of the Aircraft was worth in excess of US$7,000,000 and that the balance of the loan outstanding was US$5,596,617.85.

84. It is therefore submitted by SkyJets that there was no valid call: in addition to this, there are contentions which may be more tenuous that the call was to Skytime rather than SkyJets and that email was not a prescribed method, but that depends on characterising a call as a notice under clause 13 of the Loan Agreement.

85. In those circumstances, there had not been an event of default because of each of the above defects in the notice under Clause 6.5.1(a). In the course of the submissions, Lombard has sought to say that in any event, without a demand under Clause 6.5.1(a), there has been an event of default because there is an undertaking in Clause 8(i) on the part of SkyJets to ensure that the asset cover afforded by the Aircraft should remain above 133% on the Facility based on a quarterly review of the aircraft, the subject of Lombard's security. Lombard relies on the figures in the draft Defence and Counterclaim and say by reference to paragraph 92(a) to the effect that there was an admission that no more than US$330,000 was required to reduce the Asset Coverage Percentage (that is the above mentioned figures of the balance of the loan of US$5,596,617.85 and a value of the Aircraft in excess of US$7,000,000.

86. In my judgment, there is an argument to be tried in respect of the above analysis in that

(1) as the Deputy Master concluded, there was an argument that "those facts may be in dispute" (paragraph 17);

(2) there was no reliance on the Asset Coverage Percentage in the default notice of 8 November 2012, which then arguably precludes Lombard from relying on the same thereafter;

(3) the only other relevant Event of Default in paragraph 12 of the Particulars of Claim was by reference to the email of 8 October 2012 which arguably did not give rise to an Event of Default by reason of its shortcomings referred to above;

(4) the attempt in submissions to rely on a breach of the undertaking in Clause 8(i) is already inadequate because it was not mentioned either in the default notice nor in the Particulars of Claim;

(5) in any event, SkyJets has not admitted that the true value of the Aircraft was US$7,000,000: rather it said that the true value was in excess of US$7,000,000. It follows as stated in the skeleton argument for the hearing below at paragraph 68(3)(a) that any shortfall or any material shortfall required evidence to be tested at trial;

(6) not only is there an argument that the absence of reference to this in the notice of default by itself precludes Lombard from relying on this as an event of default, but it can be argued that it may be a deliberate choice not to do so because of possible difficulties in proving the same as an event of default.

87. For all these reasons, there is a real prospect of success of SkyJets in resisting the retrospective attempts of Lombard to rely on matters which were not mentioned in the default notice to justify the trigger of the acceleration provision. If and insofar as the Deputy Master decided that Lombard was entitled to rely upon such events both in law and in fact (albeit that he appears to have recognised an issue on the facts at paragraph 17 of his judgment), he ought not to have so concluded. Instead, he ought to have found that there were arguments with a real prospect of success to the contrary.

88. These conclusions do not depend on the default notice being defective because of its failure to identify grounds subsequently relied upon. They are because there are arguments in respect of each of the additional grounds. In addition to the foregoing, there is an argument with a real prospect of success that in circumstances where there is transformation of the liability by its being payable at once following a default notice, an identification of the ground is necessary in order to give the debtor the opportunity to know and challenge whether an Event of Default has arisen. I accept that the submissions of Mr Coppel QC referred to above raise a real prospect of

success that the default notice was defective. The cases referred to by Lombard do not rule out those arguments. Further and in any event, this particular argument about the default notice is better considered in the context of the facts as a whole including the other substantive reasons for challenging the alleged events of default, both that which was relied upon at the time and those which have relied upon thereafter.

Ground 3: The Master failed to address the First Defendant's argument that there was some other ground to set aside default judgment

89. Some other 'compelling' reason rarely bears fruit. However, it does connect with the fifth ground. The Deputy Master was dismissive of the argument that the judgment of Master Kay QC was significant to his judgment. He rejected it on the basis that that decision was decided on different evidence, much of which was not before him. A part of that decision was based on the fact that at that time, it was so uncertain what the figures were that there was even the possibility that nothing was owed on 28 October 2012 and as at the time of the default notice from SkyJets to Lombard. It appears that much more detailed sums have now been done. However, so small is a sum of US$179.99 that it is possible that at trial that it will be discovered that even that figure was erroneous, either so that there was a balance was in favour of SkyJets or a more substantial balance in favour of Lombard.

90. Before Master Kay QC, it was found that (paragraph 16) *"Since it is also clear that all the outstanding instalments had been paid it is not entirely clear how this sum arises. It may emanate from past interest due or other charges."* In a statement dated 30 October 2012 produced by Lombard, there are 11 entries from November 2011 to October 2012 entitled Default Charge late payment fee. There are no such charges prior to November 2011 albeit that there were arrears before that time. Interest is applied separately. In the course of the first day of the hearing on this appeal, it was submitted that at least some of these charges might include default interest which was chargeable under Clause 5 of the Loan Agreement. The Court invited further information about this overnight to be given on the second day of the hearing. In a Supplemental Note, it was stated *"Lombard accepts that it cannot establish that the "late payment charge" added periodically to the statement of account was default interest under clause 5.1. Lombard therefore relies upon the failure to pay the*

balance of the Instalment on 28.10.12, which, on SkyJets' own case, was a failure to pay US$179.99."

91. That was a realistic way of expressing the matter on behalf of Lombard. However, the fact that the matter was in doubt even until the second day of the appeal hearing does not mean necessarily that all doubt has gone. The matter is sufficiently unclear for the possibility to arise that on further calculations, a negative balance against Lombard will be discovered as at the end of October 2012 or the time of the default notice. This is the effect both of how small is the sum of US$179.99 identified in the course of the various hearings and the fact that only a very small adjustment could tilt the balance the other way. In that event, the arguments of de minimis and the like would not arise for consideration, but the only identified event of default in the default notice would be disproved.

92. The Deputy Master did not go on to consider this aspect of the matter. In the end, in circumstances, where a business was brought to an end, but the indebtedness may have been so tiny (US$179.99) and far less than that contended for at the time by Lombard, there is some other reason to have the matter fully examined at a trial rather than subject to a default judgment, subject to the determination in respect of Ground 4. All of this amounts to a deeply troubling case where the debtor may not even owe anything or may have owed a tiny sum in circumstances where the information given to it by the lender was false, and the information as to the indebtedness from time to time was quite opaque.

Ground 4: The Master erred in concluding that the application to set aside default judgment was not made promptly

93. As regards delay in the application for the setting aside of the default judgment, this is considered in the witness statement of Steven John Westlake in support of the application to set aside. He is a director of SkyJets and Skytime. He was the Second Defendant until the case against him as guarantor was discontinued in August 2015.

94. Although some of the relevant events have been set out above, it is necessary to set out in one place the sequence of events. As noted, on 8 November 2012, the loan facility was accelerated by the Claimant, and the Aircraft were repossessed. The

subsidiary of SkyJets, that is Skytime, which operated the aircraft, went into administration on 17 December 2012.

95. The claim was brought against SkyJets (and Mr Westlake) on 10 December 2013. On 30 November 2013, Mr Westlake had resigned as a director of SkyJets, and his resignation was filed at Companies House on 18 December 2013. This left SkyJets without officers. Mr Westlake's evidence is that he passed on the claim to the administrators of Skytime.

96. On 17 January 2014, there was a default judgment against SkyJets for damages to be assessed. Mr Westlake says that the reason why there was a default judgment was that SkyJets did not have any officers and therefore failed to acknowledge service or to serve a defence or thereafter to set aside the judgment. There was a summary judgment application brought on 24 April 2014 against Mr Westlake as Second Defendant, which was dismissed in a judgment of Master Kay QC dated 14 May 2015 following hearings on 15 October 2014 and 17 December 2014. Mr Westlake acted as a litigant in person. Master Kay QC was invited at that hearing to assess the damages or sum due against SkyJets, but he declined to do so. No further attempt was made to have the damages or sums due assessed.

97. On 17 March 2014, Skytime was dissolved. On 9 December 2014, SkyJets was struck off the Register of Companies. On 8 June 2015, Mr Westlake made an application to have SkyJets restored to the Register. On 9 September 2015, Mr Westlake made an application to have Skytime restored to the Register. On 25 September 2015, the court adjourned the restoration hearing in respect of SkyJets to 5 February 2016, so that the Court could deal with the restoration of Skytime first for reasons set out below. The hearing on 5 February 2016 was adjourned. There was a confusion on Skytime's documents which referred to SkyJets instead of Skytime. Eventually the Skytime application was adjourned to 22 July 2016, and SkyJets' application was adjourned to 2 September 2016.

98. The judgment of Master Kay QC rejected a claim by Mr Westlake personally for damages arising out of the removal and sale of the Aircraft. Since this was intimated in the draft judgment circulated before formal hand down, Mr Westlake informed Master QC in a letter of 21 April 2015 of an intention to set aside the default

judgment. When he handed down his judgment, Master Kay QC stated that it would not be straightforward to set aside the judgment. Hence the process of making the application to restore SkyJets on 8 June 2015.

99. In his witness statement dated 9 February 2018 prepared for the set aside application, Mr Westlake adverts (at paragraph 11) to complications in that there were no directors of SkyJets upon its being dissolved, and it would be necessary for its shareholder Skytime to appoint one. However, Skytime had also been dissolved, and so it was necessary to restore Skytime first. Further, it was expected that both Skytime and SkyJets should enter into liquidation upon restoration.

100. The problems regarding the restoration of Skytime and SkyJets to the register were such that by June 2016, the companies still had not been restored to the Register. By that time, Mr Westlake started to consult with Mr Michael Ballinger of Ballinger Law. He formally instructed that firm on 13 July 2016. It is said that this period of delay in inexcusable in that unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise themselves with the rules which apply to any step they are about to take: see *Barton v Wright Hassall* [2018] UKSC 18. That case concerned basic steps as regards service of original process within the jurisdiction, but the practices in respect of restoration of companies are significantly more complex, and enough has been advanced to indicate how difficult it was for Mr Westlake to progress this matter.

101. In a witness statement for the set aside application dated 2 February 2018 of Mr George Davies, a barrister employed by Ballinger Law, he refers to the fact that Mr Westlake had not appreciated that he could not restore SkyJets without Skytime first being restored. His witness statement contains a very detailed account of many steps taken from July 2016. Paragraphs 11 to 56 list numerous events between July 2016 and March 2017.

102. Mr Davies in his statement explains how Ballinger Law did not engage a detailed review of the potential claim until liquidators of SkyJets were appointed on 22 March 2017. The reason for this is that it was far from certain that the liquidators Mr Talby and Mr Phillips would be appointed, and there was a concern that the Claimant would vote for other liquidators with a view to ensuring that Ballinger Law was not

instructed to pursue a claim against the Claimant. Once Mr Talby and Mr Phillips were instructed and it was apparent that a claim could be pursued against the Claimant, Ballinger Law conducted the exercise of retrieving and then reviewing documents. There was also an exercise in establishing how much money had been paid by SkyJets on 5 November 2012, and especially whether it was $294,376.91 as per an original statement (SW7 to Mr Westlake's statement) or a sum of $248,408.89 as per a revised statement (SW8 to Mr Westlake's statement). On one view if it was the higher sum, there would be no indebtedness to the Claimant at the point of the acceleration of the indebtedness, but if it were the lower of those sums, there may have been arrears of only $179.99.

103. The delay was therefore explained by reference to

(1) the absence of officers of SkyJets at the point of the default judgment and until the dissolution of SkyJets;

(2) the belief of Mr Westlake that he could make the counterclaim himself until the decision of Master Kay QC refusing permission for that;

(3) the complicated and extensive steps thereafter to restore SkyJets and Skytime to the register;

(4) the time spent by Ballinger Law to investigate the claim, and the reasons why that did not start in a detailed sense until the appointment of the liquidators;

(5) the process of document retrieval followed by the process of seeking support from ATE insurers/third party funders;

(6) it was also the case that there were delays in obtaining documents from the administrator of Skytime and bank statements for Skytime from RBS, the holding company of the Claimant: see the witness statement of Mr Talby dated 9 February 2018.

104. On 14 February 2018, Ballinger Law issued a draft application to set aside the default judgment and served on the Claimant's solicitors the application and a draft defence and counterclaim and the above-mentioned witness statements of Mr Westlake, Mr Davies and Mr Talby together with second witness statement of Mr Davies. There then ensued at the request of the Claimant's solicitors a period of engaging with the issues in correspondence until July 2018. Then the parties agreed to attend mediation and to a sequential exchange of experts' reports on a without prejudice basis. This was all set out in the second statement of Mr Davies dated 2 May 2019.

105. Lombard challenges all of this through a witness statement of Mr Dibb, a solicitor of Addleshaw Goddard for Lombard. He says that there is no explanation why Mr Westlake left SkyJets without an officer by reason of his resignation as a director, and despite the fact that proceedings had been issued by then of which Mr Westlake had knowledge since he was a defendant in his personal capacity as director. He said that there was then a delay between January 2014 and dissolution in December 2014, and then for a further 5 months until deciding to restore SkyJets to the register. Further, it is said that in the period from then until February 2018, there was a failure to inform and keep informed Lombard of the steps being taken.

The law

106. The modern practice as regards how delay is dealt with on an application to set aside a default judgment was considered in *Standard Bank PLC v Agrinvest International Inc* per Moore-Bick LJ emphasised that:

> *"[21] The authorities relating to setting aside default judgments laid considerable emphasis on the desirability of doing justice between the parties on the merits. Delay in making an application to set aside rarely appears to have been a decisive factor if the defendant could show that he had a real prospect of defending the claim against him. Thus in J H Rayner (Mincing Lane Limited) v Café Norte S.A. Importadora e Exportadora S.A. [1999] EWCA Civ 2015 judgement was set aside after 7½ years on the applicants' showing that they had a defence with a real prospect of success.*

[22] The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in Rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. ***No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one****…" (Emphasis added.)*

107. In the instant case, the Claimant stated in a letter dated 16 May 2018 that:

> *"16.4 …There has obviously been a considerable delay since the judgment was entered.* ***SkyJets has provided an explanation for the majority of the time,*** *the reason being the difficulties that were encountered restoring both SkyJets and Skytime to the register…But there remains a period of 11 months (immediately after the Judgment was entered) [i.e. from 17 January 2014 when default judgment was entered until 17 December 2014 on the second day of the hearing before Master Kaye] which remains unexplained…"* (Emphasis added.)

108. Accordingly, the only period for which an explanation had not been provided was from the date of the default judgment (17 January 2014 to the 17 December 2014). The witness statement of Mr Westlake set out what events took place and explained

what had happened throughout the other periods of time to demonstrate that SkyJets had explanations for the period from 17 December 2014 onwards. It appears that it was not apprehended prior to Master Kay QC's remarks in the course of the hearing before him that any counterclaim could not be in the name of Mr Westlake since that would be based on reflective loss.

109. In concluding that delay in making the application to set aside would have caused him to decline the application the Master was very troubled by the overall period of delay of about 4 years, which was "about as long as I have come across." In a long career as a Queen's Bench Master, that was significant. However, in so doing, he failed to have adequate regard to the chronology. In summary:

  i) the Deputy Master failed to recognise that Lombard had acknowledged that SkyJets had provided an explanation for majority of the time save for the period of 11 months until 17 December 2014. As regards the early period, it may be that absence of a director is some mitigation, and further Mr Westlake appeared to believe, wrongly, that he could adopt the reflective loss of SkyJets.

  ii) The Deputy Master should therefore not have been so dismissive of the total period of 4 years. He recognised that "it took time to restore [the companies] and appoint [a] liquidator and find funding" (something that took approximately 3 years).

  iii) The Deputy Master stated: "…What are the reasons for it? [The delay]. We don't know. What are the reasons for the lack of progress?..." In fact, the reasons for it were set out in the evidence filed on behalf of the First Defendant, to which the Master made no reference. None of that evidence could be gainsaid. The path that SkyJets had to take was long and tortuous. It was able to account for all of it, with the time taken resulting from matters that were in the hands of third parties.

  iv) The Master's response to this that what SkyJets ought to have done was to have made "…an application and not list it until funding was available…" has to be tested against commercial reality. That was that it was necessary for

funding arrangements to be in place before the solicitors instructed by SkyJets could make an application to the Court. Further, the liquidator was not prepared to engage in litigation unless the proposed action was supported an opinion as to merits from external counsel and funding by ATE insurance.

110. The Deputy Master appears to have treated the absence of promptness as critical, the case law was not to the same effect. In *Standard Bank PLC v Agrinvest International Inc* Moore-Bick LJ emphasised that:

> *"[21] The authorities relating to setting aside default judgments laid considerable emphasis on the desirability of doing justice between the parties on the merits. Delay in making an application to set aside rarely appears to have been a decisive factor if the defendant could show that he had a real prospect of defending the claim against him. Thus in J H Rayner (Mincing Lane Limited) v Café Norte S.A. Importadora e Exportadora S.A. [1999] EWCA Civ 2015 judgement was set aside after 7½ years on the applicants' showing that they had a defence with a real prospect of success.*
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> *[22] The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in Rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made*

> *promptly. The strength of the defence may well be one…" (Emphasis added.)*

111. In *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298, Christopher Clarke LJ said the following at paragraph 36:

> *"The qualification is that it does not seem to me that the merits of any defence are ever irrelevant if by that the judge meant that the court will not even consider them. When it does consider them, it may conclude that they are of little or no weight. The court is engaged in an exercise of weighing delay against merits, which will include considering the nature and extent of the delay, the reason and any justification for it, the strength of the supposed defence and the justice of the case. The stronger the merits (and any justification for the delay) the more likely it is that the Court may be prepared to exercise its discretion to set aside a judgment regularly obtained despite the delay and vice versa. That is not to say that a real or even a good case on the merits will usually lead to the judgment being set aside despite significant delay since delay is now a much more potent factor than heretofore. If there is a marked and unjustified lack of promptness, that, itself, may now justify a refusal of relief because the delay is a factor that outweighs the defendants' prospect of success. As Moore Bick LJ recognised in Agrinvest the climate has changed with the introduction of the CPR from that which applied when this court in JH Rayner (Mincing Lane) Ltd v Cafenorte S.A. Importadora e Exportadora S.A. [1999] 2 Lloyds Rep 750 upheld a decision of his own setting aside a judgment after a delay of 7 ½ years."*

112. In my judgment, the Deputy Master underrated the prospects of success, particularly by reference to the indebtedness being only US$179.99 and/or the misstatement of the Defendant. He also failed to characterise the actions on behalf of SkyJets and Skytime in restoring the companies, saying that any alacrity was only recent. In so

doing, insofar as the Deputy Master conducted a balancing exercise of merits against delay, he underrated the merits and he wrongly characterised the explanations for delay as being confined to the last period of time. In these circumstances, if the Deputy Master did conduct a balancing exercise, he failed to give adequate weight to the merits of the defence and to the reasons for delay. The balancing act needs to be redone. Either this Court is entitled to consider the balance afresh or to adjust the scales to give more correct weights. Either way, in applying the balance of delay against merits including the matters to which Christopher Clarke LJ drew attention "*considering the nature and extent of the delay, the reason and any justification for it, the strength of the supposed defence and the justice of the case"*, this Court considers that the discretion should be exercised to set aside the judgment.

113. As regards the merits, the Deputy Master apparently regarded the position of the SkyJets as barely arguable due to ideas about how difficult it is about being a borrower with terms all stacked up in favour the lender. However, he failed to give sufficient emphasis to the combination of an indebtedness of a sum as low as US$179.99 and the argument that Lombard misled SkyJets as to the state of the indebtedness. This led to arguments about the merits which are more compelling than in the characterisation of the judgment of the Deputy Master. There flows from this the real possibility at least, but more than this bare minimum, that the acceleration was wrong with the consequence that the Aircraft should not have been taken. When a proper balance is undertaken, in my judgment, it is in favour of setting aside the judgment.

114. It is said on behalf of Lombard that it has suffered prejudice as a result of this delay, and in particular there was no destruction hold on documents, key personnel has left the business of Lombard and there must have been fading of memories. Although no doubt some of this is true, there was no specific evidential prejudice which was demonstrated or no prejudice so substantial that it weighs the balance against SkyJets such as to make unjust the setting aside of the default judgment. It is said also that Lombard had discontinued its claim against Mr Westlake, but it did not make this conditional on no restoration of SkyJets or Skytime, which it could have done. It is said that the restored companies, if they sue, will not be good for costs, and so they will be ordered to provide security for costs which they will not be able to provide or

there will be oppression to Lombard in being against impecunious counterclaimants. This makes a number of assumptions which may not be well made. There is a suggestion that such claim may be backed by ATE (after the event insurance) in which case it is possible that the insurers would be held liable for the costs in the event that such claim fails. If that is not the case, there might be an application for security for costs which would be decided on its merits: it is not to be ruled out that some form of security will be found or that the Court would be sympathetic to SkyJets and would form the view that in the circumstances a potentially good counterclaim should not be stifled.

115. The Deputy Master did not adequately consider the defence, considering in effect that the lender held the dominant hand in such disputes, whereas in fact there were reasons to believe that the SkyJets had substantial matters to advance, and that the combination of the small amount of the indebtedness and the misleading information in this regard provided by Lombard is of concern. Further, no adequate assessment was made of the serious attempts to restore SkyJets and Skytime to the register and of how tortuous and protracted they were. The Deputy Master appears not adequately to have considered both the merits and the reasons for delay, which was necessary in order then to do a balancing exercise of the merits and the delay.

116. This is a case where understandably it was decided by Deputy Master Leslie in the pressured circumstances of a half day application. This Court has been able to allocate far more time particularly at the oral hearing than was available to the Deputy Master, and, in particular, as with Master Kay QC, to be able to reserve the judgment. The pressure of time and busy case lists of Masters are fully appreciated.

117. In these circumstances, it is available to the Court to do the balancing exercise on this appeal. In my judgment, in the exercise of the Court's discretion, the judgment should be set aside because even after such delay, the merits of the case are sufficiently substantial that the matter requires a proper trial to get the bottom of what occurred. Combined with adequate explanation for most of the delay, the overall justice of the matter militates in favour of not allowing the default judgment to stand.

Ground 5: The decision failed to take into account and/or explain why it was at odds with the decision of Master Kay QC.

118. In my judgment, the Deputy Master ought to have laid greater weight to the decision of Master Kay QC. He was right to a point that he did not know what were the documents before Master Kay QC as compared with the documents in the instant case. However, Master Kay QC reserved judgment and had a very full consideration of the issues in the course of a judgment of 36 pages in length. By contrast, the judgment of the Deputy Master was a more summary determination leading to a relative short *ex tempore* judgment. The judgment of Master Kay QC has informed this judgment and has given rise to lines of enquiry. The Deputy Master said that he had taken it into account. In my judgment, it would have been difficult for the Deputy Master to have given greater consideration to the matters considered by Master Kay QC in the time allotted. Had he given greater consideration, at least as regards the merits of the defence, it is likely that he would have come to a judgment more in favour of the Defendants on the merits than the one which he gave.

119. In my judgment, the judgment of Master Kay QC is a still further factor indicating that the Deputy Master should have concluded that there was a real prospect of success on the merits or that there was some other compelling reason why the judgment ought to have been set aside.

Conclusion

120. The Court was reminded about the cases as regards summary judgment, particularly in reviewing the judgment of Master Kay QC. It is encapsulated in a judgment of Mummery LJ in *Doncaster Pharmaceuticals Group v Bolton Pharmaceuticals 100 Ltd* [2006] EWCA Civ 661 who said as follows:

> "5. …The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.

6. The outcome of a summary judgment application is more unpredictable than a trial. The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made."

121. To similar effect, Lewison J in the case of *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at paragraph 15:

> *"(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63"*

122. It is recognised in this case that it is different from summary judgment. There is a different calibration in the cases cited above where a case is not simply summary judgment, but setting aside a default judgment, where the bar may be set higher depending on the circumstances of the default and the nature and extent of the delay. Nevertheless, both summary judgment and setting aside a default judgment have in common that there has not been a trial with the opportunity to consider *"the fuller*

investigation into the facts at trial than is possible or permissible on summary judgment." This is a case where there are obvious conflicts of fact and at least uncertainties as regards many of the aspects of the case, with reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge capable of affecting the outcome of the case.

123. For the reasons set out above, the Court has accepted the grounds of appeal. In its judgment, the merits and the nature and the extent of the delay are different from the analysis of the Deputy master, and this has led to a different calibration of the two and the outcome of the application and thus the appeal. A close examination of the circumstances as a whole drives this Court to consider that the judgment should be set aside.

124. It follows that each of the above-mentioned grounds have been decided in favour of SkyJets and that the appeal will be allowed and the default judgment will therefore be set aside. It is therefore necessary to consider the consequential directions, and in particular the consequences as regards the counterclaim of SkyJets and the joinder of Skytime and any other consequential matter which might arise. I invite consequential submissions which I shall consider on handing down this judgment.

125. Finally, it remains for the Court to express thanks to Counsel for their detailed and helpful written and oral submissions throughout this case.