TRANSCRIPT OF PROCEEDINGS

**Claim no. LM-2020-000156**
**Neutral Citation Number [2021] EWHC 464 (Comm)**

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**LONDON CIRCUIT COMMERCIAL COURT**

7 Rolls Buildings
Fetter Lane
London

**Date: 8 February 2021**

**Before MR ANDREW HOCHHAUSER QC**
**Sitting as a Deputy Judge of the High Court**

**BETWEEN:**

**(1) WALTON FAMILY ESTATES LIMITED**
**(2) AIRFIELD FARMS SULBY LIMITED**
**(3) DAVID WALTON**
**(4) ELIZABETH WALTON**
**(5) JOHN WALTON**
**(6) PETER WALTON**

**- and –**

**(1) GJD SERVICES LIMITED**
**(2) GJD AEROTECH LIMITED**
**(3) KEPLER AEROSPACE LIMITED**
**(4) AGD SYSTEMS CORPORATION**
**(5) TRISTAR AIR LLC**
**(6) TEMPUS APPLIED SOLUTIONS HOLDINGS INC**
**~~(7) ECJ HOLDINGS LIMITED~~**
**(8) JAPAN SKY SERVICES K.K.**

**MR A PEPLOW, instructed by Bird Duckworth Mee, appeared on behalf of the Claimants**
**MR J C TOWNSEND & MS J KANE, instructed by Sperrin Law, appeared on behalf of the Eighth Defendant**
**The First, Second, Third, Fourth, Fifth and Sixth Defendants did not appear and were not represented**

**Hearing date: 8 February 2021**

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## APPROVED JUDGMENT

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**ANDREW HOCHHAUSER QC:**

1. This is the judgment on the Eighth Defendant's application dated 29 January 2021.

2. By an Application Notice dated 29 January 2021, the Eighth Defendant ("**JSS**") seeks permission to serve responsive evidence to the fifth witness statement of Mr David Walton, dated 26 January 2021 ("**Walton 5**"), regarding the viability of methods of removal other than dismantlement.

3. That application is supported by the third witness statement of Andrew Webber, dated 29 January 2021 ("**Webber 3**"). Relying on that statement, it seeks the following orders:

   (1) an order that JSS be permitted to remove the aircraft by any viable means and that the removal of the aircraft shall not be restricted to removal by dismantlement; and
   (2) that JSS be permitted an extension of time to achieve that removal until 15 April 2021.

4. The background to that application is as follows: on 21 January 2021, I handed down my judgment in this matter. It had been provided to the parties in draft on 19 January 2021. Save as otherwise appears, I will use the same definitions here that I used in that judgment.

5. In relation to JSS, I granted the First Claimant's application for summary judgment. I found that the notice given by the Claimants to JSS on 18 May 2020, re-served on 21 May 2020, requiring the removal of the two 747s by 4 pm on 31 July 2020, was a valid

notice and after that date, the 747s had no lawful entitlement to remain part of the aerodrome.

6. I also found that JSS did not have any right to use the runway on the aerodrome, which had fallen into disuse and was being used as a car park by CWL, the existing tenant. Indeed, CWL had notified the Aeronautical Information Service that the runway at the aerodrome is not available for general aviation use and that aircraft can no longer land there. It is common ground that the 747s are not currently airworthy. At the conclusion of the judgment, I invited the parties to agree a draft order to reflect the findings, declarations and orders contained in the judgment. I indicated that I would deal with any consequential applications when the judgment was handed down.

7. When the matter came before me, the draft order had been agreed, for the most part. There remained some controversy as to the arrangements for the removal of the 747s from the Aerodrome. I was keen that, because the relationship between the Claimants and JSS had deteriorated over the course of 2020, there should be a clear understanding as to what was and was not permitted in terms of the steps to be taken to remove the 747s. It was clear that, because of their size, they would have to be dismantled in order to remove them. Unsurprisingly, the Claimants were keen that (a) CWL's use and enjoyment of the Aerodrome should not be adversely affected to a material degree; and that (b) that JSS should cause as little damage as possible to the Aerodrome and as little disturbance and inconvenience as possible to CWL.

8. After hearing submissions from the Claimants, the Fifth Defendant and JSS, an Order was finalised with detailed provisions for the removal of the 747s. In the course of argument, Mr Townsend submitted that JSS wished to remove the 747s by removing their wings and lifting the fuselages onto large vehicles for removal by road. In this way, he said, there was the possibility of enabling the 747s to be restored and rendered airworthy for commercial use, which was always JSS's intention.

9. That was the subject of strenuous objection by Mr Cloherty on behalf of the Claimants. He said that such an exercise was not practically possible, and it would cause substantial damage to operations and fixtures at the Aerodrome. Mr Townsend offered no answer to the objections raised, because he was unable to provide any details of how the exercise would be conducted. He simply had no instructions.

10. In those circumstances, I refused to permit this method of removal to be adopted by JSS, subject to the Claimants serving a witness statement, verifying the difficulties as described by Mr Cloherty, by 4 pm on Monday 25 January 2021. No application was made by Mr Townsend to serve any evidence on behalf of JSS.

11. On behalf of JSS, Mr Townsend then sought permission to appeal in two respects. First, in relation to the date by which the removal of the 747s should take place, namely 15 March 2021. Secondly, in relation to my refusal to permit removal of the 747s from the aerodrome by lifting the fuselages onto vehicles for removal by road.

12. I refused permission to appeal in both respects. When refusing permission on the second ground, I pointed out that it was incumbent on JSS to set out how it was proposing to carry out the exercise of the removal of the fuselages by road, in a manner

that was practical and that would not cause damage to the operation and fixtures at the aerodrome. That had not been done.

13. Thereafter, after a short extension granted by me, at 10 am on 26 January 2021, Walton 5 was served, setting out the difficulties described by Mr Cloherty. The Order was about to be drawn up and sealed that day when, at 2.05 pm, I received an email from a Mr John Bennett of JSS's legal department, which was not copied to anyone else, including anyone on behalf of the Claimants, or to their own legal representatives, stating:

"*I am writing to you on behalf of Japan Sky Services KK, 8th defendant in the claim of Walton Family Estates Limited & Others and GJD Services Limited & Others. We would like to respectfully express our concern that we are not allowed to file a reply to D Walton's witness statement, which he has submitted today. It is crucial for us to be able to file an answer. Would you be so kind as to allow us to do so?*"

I replied to Counsel for the Claimants, the solicitor for the Fifth Defendant (its Counsel no longer being instructed), Counsel for JSS, Mr Tame of Commercial Court Listing Office and my clerk, by an email, timed at 3.58pm, in the following terms, I said as follows:

"*Dear all,*
*I was concerned to receive the ex parte communication below from the Eighth Defendant's legal department when they are represented by solicitors and Counsel. That must cease. In future, all communications must be by Counsel, or in the case of the Fifth Defendant, its instructing solicitors, copied to all other parties and Mr Tame of LCCC Listing.*

*Any application must be made by Mr Townsend on behalf of the Eighth Defendant. If any application is made, it will be necessary for him to address:*

*(1) Why no information was provided on the logistics of the removal of the fuselage, either in submission or evidence at the hearing on 21 January. I was expressly told there was no detail that could be given;*
*(2) Why, at that hearing on 21 January, when I ordered the Claimants provide a witness statement addressing its submission made, there was no request to file any evidence on behalf of the Eighth Defendant, nor after the hearing, until this afternoon at 14.05.*

*I await to hear from Mr Townsend. If an application is made, I will then consider it.*
*Yours sincerely,*
*Andrew Hochhauser*".

14. Thereafter, I was informed by Mr Townsend that an application was to be made. This led to the present application. The supporting evidence was to be served by noon on 29 January 2021. In the event, at JSS's request, I granted two further extensions of time, the first to 4 pm that day, and the second to 9 am on 30 January 2021, when Webber 3 was served. I was told that this further time was necessary because a signed version was still to be received and "*an unforeseen issue has arisen which requires clarification for professional reasons*".

**The Law**

15. The application is made under the provisions of CPR 3.1.7:

> "A power of the court under these rules to make an order includes a power to vary or revoke the order".

16. The material authority on the principles governing the exercise of the power under CPR 3.1.7 is the Court of Appeal decision in *Tibbles v SIG PLC (T/A Asphaltic Roofing Supplies)* [2012] EWCA Civ 518. There, Rix LJ, giving the principal judgment, with which Etherton LJ (as he then was) and Lewison LJ agreed, stating at [39]: -

"*In my judgment, this jurisprudence permits the following conclusions to be drawn:*

*(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two.* ***The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion****. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.*

*(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised,* ***namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.***

*(iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.*

*(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.*

*(v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.*

*(vi) Edwards v. Golding is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the*

*master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.*

***(vii)*** ***The cases considered above suggest that the successful invocation of the rule is rare****. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.*
[Emphasis added]

17. As I said earlier, the application is supported by Webber 3. I am willing to consider that witness statement for the purposes of the relief sought in this application, and I therefore grant permission for it to be adduced.

18. Far from challenging the evidence given by Mr Walton in Walton 5 as to the impracticability of removing the 747s by road, at paragraphs 8, 15 and 16 of Webber 3, Mr Webber agrees with him. At paragraph 15, he describes it as "*the least viable option*". It is therefore somewhat surprising that JSS was urging the Court to approve this method of a removal at the hearing on 21 January 2021. Instead, Mr Webber introduces a wholly new proposed method of removal, no mention of which was made before, namely removal of the aircraft by an airlift. The explanation for not referring to this is to be found at paragraph 5 of Webber 3, where he says: "*The Eighth Defendant was unwilling to disclose its methodology regarding removal by lifting, as it considered the Claimants would simply object to any method of removal other than dismantlement. It was for that reason that we did not instruct our counsel in respect of any detailed methodology*".

19. Mr Townsend, this morning, was unable to tell me why, however, it was felt appropriate to advance what is now described as the least viable option as the appropriate method to take.

20. Webber 3, however, does not address why no application was made on behalf of JSS at the hearing on 21 January 2021 to serve responsive evidence to the Claimants' evidence that I had ordered. The detail of the proposed airlifting exercise is set out at paragraphs 18 to 29 of Webber 3. It is clear that this is a highly complex operation involving up to four M-26 helicopters and will require permits from at least the Civil Aviation Authority, regional emergency services and the destination airport, in order to complete the airlift in respect of both 747s. It will also require partial dismantlement. That aspect is set out in paragraph 7 of JSS's skeleton argument, by reference to Mr Webber's witness statement. It will require, in preparation of the aircraft for removal by airlift, (a) the removal of the engines, (b) the removal of the horizontal stabiliser, (c) the removal of the fin and rudder, (d) the removal of the near fuselage behind pressure bulkhead, (e) the support of the fuselage on purpose-built cradles to be used as a lifting frame, (f) the removal of the undercarriage, (g) the removal of all seats, (h) the removal of the wings' secondary structure and flying surfaces, (i) supporting and disconnecting the wings along the production joints.

21. Mr Webber relies upon a report "*which was created in October of 2020*" (see paragraph

2 of Webber 3). This is evidence that JSS had had for some two months before the hearing and three months before the handing down of the judgment on 21 January 2021. I note that, at page 11 of the report, there is the statement "*these images suggest a route based on the author's limited knowledge of the procedures needed*". I should also record that, at page 1 of the report, it states that, "*due to access and egress restriction of the Bruntingthorpe site, road movement is the least likely option, as the site was never intended for this kind of operation and development of the site, since its change of use to a storage site has made the access / egress restrictions more of an issue*".

Again, in the light of this comment, it is, to say the least, surprising that this method was being suggested by JSS on 21 January 2021, rather than the one currently proposed. Mr Townsend submits that, in the circumstances, in the light of Webber 3 and its exhibits, it is appropriate for the Order to be amended so as to permit "*removal by any viable means*" and extend the time for compliance to 15 April 2021.

22. Mr Peplow, who appears for the Claimants today, opposes the application on a number of bases, which are set out in detail in the skeleton argument served on behalf of the Claimants, to which both he and Mr Cloherty were authors.

(1) He says that given the explanation advanced at paragraph 5 of Webber 3, it appears that JSS deliberately chose not to advance the method of removal that they are currently relying upon. Applying the principles in *Tibbles*, this does not amount to a material change of circumstances, but simply a change in tactics on the part of JSS, being dissatisfied with the results obtained at the hearing on 21 January 2021. The material now relied upon was available to JSS from October 2020; it has not just come to light.
(2) Furthermore, it has to be examined against the background of what <u>was</u> being advanced by JSS at that hearing, namely a method that is now acknowledged to be "the least viable option". That is not how it was put before me, and indeed, when it was rejected, there was an unsuccessful application for permission to appeal.
(3) In those circumstances, applying the principles of *Tibbles*, referred to above, there is no basis on which the Order should be amended, as sought by JSS.
(4) That should be the end of the matter, but if the application were to be considered on the basis of the evidence relied upon, it is deficient. The witness statement is made by someone who has no formal licence aircraft engineering qualifications. The report itself is qualified - see the conclusion: "*This is not an exhaustive report but a framework of what would be required, along with the overriding caveat that Boeing would have to sign off on this before the project has begun, if the end goal is restoration to flight*". This is from an author who has "*limited knowledge of the procedures needed*".
(5) JSS has not even begun to make any enquiries as to the actual availability of the requisite helicopters, nor has it approached the owners of such helicopters to consider the viability of airlifting the 747s. They have not made any applications for the various permits which would be necessary. No consideration has been given to the level of disruption that would be caused to the operations of the aerodrome. There is no suggestion that any approaches, let alone any arrangements, have been made with any airport which would receive the 747s.

**Discussion and conclusion**.

23. I have reached the firm conclusion that this application should be dismissed. I do so for the following reasons:

(1) In my view, there has been no material change of circumstances, so as to justify the amendments to the Order sought by JSS. The proposed method was one that could have been advanced at the hearing on 21 January 2021. Instead, a conscious decision was made not to do so.
(2) The evidence adduced in Webber 3 could have been put before the court on 21 January 2021, or at least an application could have been made then to adduce it. It was not.
(3) Applying the *Tibbles* principles accordingly, there is no basis or justification for amending the Order as formulated.
(4) That disposes of the application. I would, however, indicate that even were I prepared to consider the evidence contained in Webber 3 on the basis of a material change in circumstances, I do not regard it as forming a proper basis on which to grant the application and vary the order. In short, I accept the criticisms of it that have been made by Mr Peplow and Mr Cloherty on behalf of the Claimants. The witness statement is made by someone who has no formal licence aircraft engineering qualification. The report itself is qualified - see the conclusion to which I have earlier referred. This is from someone who states, at page 11 of the report, that he has "*limited knowledge of the procedures needed*". I accept that there is some ambiguity of exactly what is being referred to there, and that in paragraph 11 and 12 of Webber 3, Mr Webber makes clear that he has the experience of working with aircraft and engineering companies since 1998, but nonetheless, it is not a phrase which inspires confidence.
(5) The conclusion of the report states "*this is not an exhaustive report, but a framework of what would be required, along with the overriding caveat that Boeing would have to sign off before the project is begun if the end goal is restoration to flight*". I was informed by Mr Townsend that no enquiries have been made by JSS to Boeing to date and that a site visit yet to take place will be required.
(6) There is no evidence that JSS has determined which company will provide the helicopters, nor does it exhibit any enquiries as to the actual availability of the requisite helicopters. Paragraph 25 of Webber 3 simply lists five helicopter companies, described as "partner companies", but it does not appear that it has approached the owners of such helicopters to consider the viability of airlifting the 747s. They have not made any applications for the various permits which would be necessary. No consideration has been given to the level of disruption that would be caused to the operation at the Aerodrome. There is no suggestion that any arrangements have been made with any airport that would receive the 747s.
(7) This timetable of achieving the removal of the 747s by airlifting by 15 April 2021, seems to me to be aspirational, at best. Mr Townsend frankly admitted that there was no detail at all contained in Webber 3 to suggest that all the necessary steps, including the numerous contractual arrangements and permissions needed, could be carried out by then.
(8) Finally, Mr Townsend asked for more time, even if the option of airlifting the 747s as a method of removal was rejected. In my judgment, there is no basis for such an extension. The only change of circumstances is the delay caused by the making of

this application, and, as I have found, it was open to JSS to raise the possibility of airlifting the 747s on 21 January, but they consciously chose not to do so.

24. I therefore dismiss the application. I will hear the parties on the question of costs.

(There followed further submissions – please see separate transcript)

25. There are three consequential applications that are made by the Eighth Defendant, following my refusal to grant its application.

26. The first relates to permission to appeal and a challenge is made to the manner in which I exercised my discretion, which Mr Townsend acknowledged I had under CPR 3.1.7. I refuse that application on the grounds that, in deciding how to exercise my discretion, I applied what is accepted as common ground, namely the principles in *Tibbles v SIG PLC (T/A Asphaltic Roofing Supplies)* [2012] EWCA Civ 518. I took into account the fact that there was a conscious decision made not to rely on this ground upon the handing down of the judgment on 21 January, despite the availability of the material since October of 2020, and in those circumstances, I found that there was no material change of circumstances, properly described. I do not believe that the Court of Appeal is going to take a different view and to find that I have erred in principle in reaching that conclusion. So that will have to be a matter drawn to the attention of the Lord or Lady Justice of the Court of Appeal.

27. Secondly, in relation to the extension of time in which to appeal, there are two different elements to paragraph 15 of my draft Order. The first relates to the issue of time and I am prepared to grant an extension to 1 March 2021, in relation to filing any appeal in that regard.

28. However, in relation to paragraph 15(b), I am frankly taken aback that, in the light of the way that the case has been argued on the application today, and in the light of the content of Mr Webber's third witness statement, and the report upon which he placed reliance, JSS is still seeking permission to appeal in order to employ a means which its own evidence describes as "*the least viable means*" of removing the 747s. I cannot see what possible prospect of success there could be in raising this a ground of appeal, and therefore I am not prepared to permit any further extension of time. If that is something that the Eighth Defendant seriously wishes to advance, it must do so within the time limit.

29. In relation to the appeal from today's refusal that is going to be made –

MR HOCHHAUSER: We are at 8 February, and therefore 21 days will take us to when? It is 1 March in any event, is it not? You do not need an extension to that?

MR TOWNSEND: My Lord, not in relation to today's appeal, no.

MR HOCHHAUSER: No.

30. So the answer is I will give you an extension of time in relation to paragraph 15(a), which is the time period, but I do not give you an extension of time in relation to 15(b), and as I say, if you want to advance that argument, then you must do so within the time limit.

MR TOWNSEND: Thank you, my Lord.

MR HOCHHAUSER:

31. Now, in relation to a stay, I refuse the stay of the Order. It seems to me that that would achieve the object of what you have applied for and more, because it would go well beyond the middle of April.

32. So, if you want to make an application for a stay of this Order, you are going to have to make an application to the Court of Appeal, because it seems to me that there is no basis on which it stands a real prospect of success. In my earlier judgment I have found that your client should have removed the aircraft by 31 July 2020 , from the Aerodrome. It did not do so and it has had ample time to put in place steps to effect that removal. It has chosen not to do so in terms of applying for permits and the like, although I note that you told me that they have assembled a team, they have got additional equipment and storage facilities are available, and in the light of that, it does not seem to me that this timetable is one that is impossible to meet, given the circumstances.

33. So, I am afraid that, in those circumstances, if a further stay is to be sought, then that must be made to the Court of Appeal.

(There followed further submissions – please see separate transcript)

34. There is an application before me that the costs of this application, which it is accepted should be awarded to the Claimants, should be made on an indemnity rather than a standard basis.

35. The points that are taken are, first, that this is a matter that could and should have been made at the hand-down on 21 January 2021, and therefore, it is unreasonable for it to have been left to this stage, with the additional costs that have been incurred. It is accepted by Mr Townsend, on behalf of the Eighth Defendant, that that is the case, but it is said that this was not an act of deliberate misconduct, that it was misguided, in his words.

36. It is also said that it is Mr Webber, rather than an officer of the Eighth Defendant, that makes the witness statement now relied upon, and he is a consultant, rather than an officer of the company. I have to say, I see little force in that point.

37. But what I am concerned about is that he does not address why no application was made at the conclusion of the hearing on 21 January 2021 to serve responsive evidence that was then served, and what is said, at paragraph 5 of Webber 3, is that "*the eighth defendant was unwilling to disclose its methodology regarding removing by lifting, as it considered that the claimants would simply object to any method of removal, other than dismantlement. It was for that reason that we did not instruct our counsel in respect of any detailed methodology*".

38. That, it seems to me, to be an unreasonable manner of behaving, particularly, as what was advanced was another different method of removal, which the evidence now served shows that it was the least viable option, and what I have never had a satisfactory explanation for is why an unreasonable method of removal was being advanced on 21 January, and the one that was being put forward now as a reasonable one, was held back, and when I specifically put the point to Mr Townsend, he had no answer.

39. Now, that, it seems to me, takes the matter outside the norm, and in the circumstances, it seems to me that it is appropriate to make an order for assessment on an indemnity basis. I have to say, having looked at the costs that are sought, that I would be minded to award the Claimants the sum that is sought on a standard basis, because it does not seem to me to be at all unreasonable. So I make an order that the Claimants' costs be assessed summarily on the indemnity basis in the figure of £7,111.

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*We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*

This transcript has been approved by the Judge