Neutral Citation Number: [2023] EWHC 2650 (Comm)

Claim No. CL-2023-000326

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 20th October 2023

Before:

MRS. JUSTICE DIAS

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Between:

(1) DJINN ISSUER DESIGNATED ACTIVITY COMPANY **(a company incorporated in Ireland)** **(2) WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED** **(as owner trustee, a company incorporated in Ireland)**	**Claimants**
- and -	
VIETJET AVIATION JOINT STOCK COMPANY **(a company incorporated under the laws of Vietnam)**	**Defendant**

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MR. AKHIL SHAH KC and **MS. LAURENTIA DE BRUYN** (instructed by **Allen & Overy LLP**) appeared for the **Claimants/Applicants.**

MR. NICHOLAS CRAIG KC (instructed by **K & L Gates LLP**) appeared for the **Defendant/Respondent.**

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Judgment

MRS JUSTICE DIAS :

1. This is the claimant's application for summary judgment for amounts allegedly due under, and other relief relating to, two aircraft leases concluded between the first claimant and the defendant in relation to aircraft 5295 and between the second claimant and defendant in relation to aircraft 6936. The leases provided for payment of basic rent and also supplemental rent, the latter being designed to provide a maintenance reserve to cover the costs of maintenance. That reserve was reimbursable as and when the defendant incurred maintenance costs, subject, of course, to the conditions of the lease.

2. The defendant, like all airlines, suffered catastrophic disruption as a result of the Covid pandemic. This particular defendant seems to have been especially hard hit, as is described in Mr. Boylan's witness statement. That led to an agreement between the parties in March 2022 for some payments which would otherwise fall due to be deferred. That agreement was reflected in two deferral letters, one for each aircraft. In very broad terms these provided, first, that any basic rent and 50% of any supplemental rent which had already accrued due and was outstanding at the date of deferral should be deferred for roughly a year and paid off in 18 instalments starting in January 2023; and, secondly, that part of the ongoing rent for 2022 should likewise be deferred to be wrapped up in the 18 instalments, in all cases with interest to run at 4%. As I understand it, the obligation to pay ongoing supplemental rent in full was not affected by the deferral letters.

3. The dispute between the parties turns on the construction of these letters, which were in materially identical terms, and in particular of the deferral validity clause contained in each letter. It is common ground that the supplemental rent which fell due under the leases on 15th December 2022 was not paid on time, although it was eventually paid by 31st January 2023. I interpolate that it also appears from the schedules before me that the supplemental rent due in February and March 2022 was not paid until very recently indeed. At all events, it is not disputed that the non-payment amounted to an event of default under the leases.

4. On 4th and 6th January respectively, the claimants served grounding letters in which they recorded that the defendant had been in default since 23rd December the previous year, and demanded immediate accelerated payment of all amounts of rent and supplemental rent that had been deferred, i.e. including not just any deferred instalments which had already fallen due, but the entire amount of the rent that had been deferred, even if it had not yet fallen due for repayment under the deferral letters. The claimants also demanded that the aircraft be grounded. The total amount claimed in these letters, including interest, was around $6.7 million for aircraft 5295 and $5.9 million for aircraft 6936.

5. The defendant submits that (1) on the true construction of the deferral letters and leases the claimants were not entitled to demand accelerated payment of all the deferred rental; moreover, (2) they have claimed more interest than they were entitled to; finally, (3) they must also give credit for admitted maintenance costs incurred by the defendant, which were reimbursable under the terms of the leases. These then are the three points of principle which I must address first. I start with the question of accelerated payment.

6. I received very helpful and persuasive submissions from both Mr. Akhil Shah KC on behalf of the claimants and Mr. Nicholas Craig KC on behalf of the defendant. It was the claimants' case, in essence, that the deferral validity clause fell into three parts, although Mr Shah submitted that the clause must be looked at as a whole. The first sentence provided that "The Rental Deferral and other agreements of the parties set forth in this Letter Agreement shall remain valid only and if and for so long as no Event of Default occurs that is continuing under the Lease." In his submission it was quite clear that the deferral ceased to be valid once and for all as soon as an event of default under the lease had occurred.

7. The first part of the second sentence of the clause provided that any default in performance of the defendant's obligations under the deferral letter should constitute an event of default under the lease. I can pass over that relatively speedily, because I do not understand it to be said that there had been any failure to pay the deferred instalments as at the date of the grounding letters.

8. The second part of the second sentence, Mr. Shah submitted, was quite unambiguous in requiring payment “in full” of “all amounts of Rental and Supplemental Rental which have been deferred and not paid as at [the date of default]”. He submitted that this sentence did what it said on the tin, and entitled the claimants to accelerate the entire amounts of basic rent and supplemental rent that had been deferred. In Mr. Shah's submission this was commercially sensible and indeed a commonplace type of provision. The claimants had agreed to forbear to exercise their strict rights as far as payment of rent was concerned, but only subject to strict compliance with the lease and the repayment obligations set out in the deferral letters. If the defendant did not comply with those obligations, there was nothing objectionable in the creditor saying that the forbearance had come to an end. The claimants had an obvious commercial interest in seeing that they were not exposed to further debt.

9. Mr. Craig's case on the other hand was that, on the true construction of this clause, deferral was only suspended for the duration of any default, otherwise he said no sensible meaning could be ascribed to the words "that is continuing". They would be pure surplusage. Failure to pay on the due date necessarily continues, he says, because you can never retrospectively cure a failure to pay on a date in the past. Therefore these words must have been inserted for some purpose. In his submission the objective intention of the parties was that the deferral should revive when the relevant event of default was cured. Meanwhile, upon the occurrence of an event of default, the lessor was entitled to claim immediate payment of any deferred rent or supplemental rent which had fallen due under the deferral letter at the date of default.

10. In answer to Mr. Shah's objection that this gave the claimants nothing to which they were not in any event already entitled, he pointed out that the amount of the repayment instalments included an element of advance interest on sums which had not yet fallen due under the letters. However, it seems to me that that argument works against him. If the claimants were not entitled to claim even the full amount of the repayment instalments which had fallen due, then on his case they would actually be getting less than they were strictly entitled to under the deferral letters.

11. Mr. Craig further drew attention to the provisions in the deferral letters amending the date for payment of basic rent under the lease and extending the lease term. He submitted that if the entire deferral letter came to an end upon the mere occurrence of

event of default, this would nullify both these changes. Yet the claimants had continued to invoice the defendant on the basis of the amended payment date and extended term.

12. Mr. Craig also pointed out that the deferral letter expressly provided that it took precedence over the lease. The context of the agreement, as recorded in the recital, was the business disruption caused by the Covid pandemic. He submitted that it would be a commercial nonsense to accelerate all payments against the background of such accepted disruption. It cannot have been intended that what might be a relatively trivial default should have such catastrophic consequences. He pointed out that under clause 24 of the lease the claimants in any event had the option to terminate the leases or accept a repudiatory breach or else to ground the aircraft without terminating. If they had decided not to terminate because, presumably, they wanted the lease to continue, then it made little sense to saddle the defendant with a $10 million debt.

13. In response, Mr. Shah said that it was necessary to look at the matter also from the lessor's point of view. If defendant was in a parlous state already, hence the need for the deferral, and if its position was deteriorating, there was really no sense in prolonging the agony.

14. These were powerful submissions from Mr. Craig, advanced with commendable concision. But while I can accept some of his submissions, ultimately I find they do not assist him.

15. In my judgment, applying the usual canons of construction in accordance with well-established authority and looking for the objective deemed intention of the parties, the true construction of the deferral validity clauses is as follows. The words "Rental Deferral" and "other agreements of the parties" cannot be taken absolutely literally, otherwise even the parts of the letter containing the claimants' entitlements on default would fall away. That cannot be right. Conversely, however, they must go further than simply Rental Deferral, which is a defined term covering only basic rent and must, on any view, cover the deferral of supplemental rent as well. In the event, therefore, there is no need for me to decide whether they would also include the change of payment date and extension.

16. I do, however, agree with Mr. Craig that the deferral does not come to an automatic stop on the mere occurrence of an event of default. Content must be given to the words "that is continuing", and it seems to me that that is done by construing them as meaning that the relevant default must be continuing at the date that the lessor seeks to exercise its rights under the validity clause. In other words, the defendant has a locus poenitentiae but only up to such time as the lessor decides to exercise its rights. That of course does not help the defendant on the facts of this case, because there was an admitted default which had not been cured at the date of the grounding letters. That being the case, and after some anxious consideration, I have concluded that Mr. Shah is correct that the lessor becomes entitled to accelerate payment of all deferred amounts, irrespective of whether they have yet fallen due for repayment under the deferral letter itself. In my view, there was no real answer to his submission that to hold otherwise would give the lessors nothing more, and indeed possibly even less, than they were already entitled to and that the defendant would have no incentive to comply with its obligations under the letter because it could always pay late without incurring any real adverse consequences.

17. I accept, further, Mr Shah's submission that the objective commercial rationale for the agreement was for the lessor to forebear, but only on condition of strict compliance with the terms of the letter and the lease. If that condition was not met, then to my mind there is nothing objectionable or unfair in a creditor saying that its forbearance has now ceased. I am not persuaded by Mr. Craig's argument that under clause 24 the lessors could have terminated and claimed everything in any event. As he himself pointed out, the deferral letters took precedence over the lease, so it is not at all clear to me that that would, in fact, have been an option open to the claimants.

18. Therefore I hold as a matter of principle that the claimants were entitled at the date of the grounding notices to demand accelerated payment of the entire deferred amounts, save in so far as they had already been paid.

19. The second point of principle dividing the parties relates to interest. This is a short point on which I accept Mr. Craig's submissions. In my judgment, it is clear from the wording of the deferral letters that if accelerated payment is triggered, the claimant is only entitled to claim interest on the deferred amounts at the interest rate set out in the deferral letter itself; in other words, 4% calculated in accordance with paragraphs 1 and 3 of the letters.

20. In so far as the current claim is for LIBOR plus 3% under the lease, that seems to me to be wrong so far as the deferred payments are concerned. Again, the deferral letter expressly provides that it takes precedence over the lease. However, the claimants are, of course, entitled to claim at LIBOR plus 3% in respect of any other amounts outstanding under the lease itself.

21. Turning next to maintenance payments, it does not appear to be disputed that the defendant incurred the costs which it claims to have incurred, and that, absent any event of default: (1) it would have been entitled to claim the full amount of the notional account relating to MRF 1 and 2, because it was entitled under the lease to its actual costs plus any excess in the account, and (2) its claim in respect of MRF 3 would be capped at the amount of the corresponding notional account which I understand to be about $2.6 million.

22. The only question is whether, in the circumstances as they now stand, those claims can be deployed as an offset to the claimants' claim. In my judgment, they cannot. Not only does clause 12.3(a) of the lease clearly provide that rent is payable without any set-off or withholding, but clause 9.4(c) is clear in its terms that no reimbursement is due from the lessors if there is an event of default continuing as at the date of reimbursement.

23. Clause 4 of the deferral letter, to which Mr. Craig referred, does not in my judgment assist him, because I accept Mr. Shah's submission that it only refers to an extant obligation. If there is no obligation under the lease, then the deferral letter does not bite. In this case there are admitted defaults which are still continuing and the effect, in my judgment, is that no obligation to repay arises.

24. That may seem rather harsh, but I do remind myself that the defendant was under an obligation under clause 9.4(e) of the lease to submit claims promptly, and that if it had done so when the work was carried out in 2020 and 2022 it would not have faced this difficulty. As it is, this is a problem entirely of its own making.

25. Finally, there is the question of the declaration and the injunctive relief which was sought by the claimants. In my judgment, the claimant is entitled to a declaration that it is entitled to require grounding of the aircraft in accordance with the terms of clause 24.2. Making a declaration in those terms does not, to my mind, foreclose any arguments as to whether the lessors can refuse further flying after the default has been cured, or for how long they might be able to defer giving a notice of permission. That may be said to kick the can down the road, but it is impossible to foresee what will happen in the future, and it seems to me there is no point in trying to cross this particular bridge until we come to it.

26. In view of the fact that, as I was told by Mr. Craig, both aircraft are currently grounded and that his clients are willing to give an undertaking to keep them grounded, I am not minded to grant any injunction. In those circumstances, it would not be either necessary or just or convenient to do so, particularly when the grounding may only be temporary. In my judgment, the claimants are adequately protected in this respect by an undertaking and they can, of course, always come back to court if necessary.

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