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Case No: LM-2023-000084

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

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

Date: 07/03/2024

Before :

Paul Stanley KC
(sitting as a Deputy High Court Judge)

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Between :

CARGOLOGICAIR LTD **Claimant**

- and -

WWTAI AIROPCO 1 BERMUDA LTD **Defendant**

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- -

Mr Max Kasriel (instructed by **PCB Byrne LLP**) for the **Claimant**
Mr Steven Thompson KC (instructed by **Alius Law**) for the **Defendant**
Hearing dates: 1 March 2024

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 7th March 2024.

PAUL STANLEY KC:

Introduction

1. The applications before me include an application by the claimant to strike out the counterclaim, and an application by the defendant for permission to amend it. The central issue that I must decide is whether to give the defendant permission, under paragraph 43 of Schedule B1 to the Insolvency Act 1986, to advance its counterclaims. And, if permission is to be given, on what terms it should be given?

2. I have decided that the counterclaim should not be struck out, because I will grant retrospective permission to proceed with it. That permission, however, will be conditional upon the defendant: (a) not executing or enforcing any money judgment obtained in the counterclaim without the court's permission or the administrator's consent, (b) providing its best current estimate of the market rent obtainable for the aircraft in the condition that it was when returned (including as to its documentation). I shall also require the defendant to disclose the sale contract by which it sold the aircraft to a third party. I have decided that there should be no order as to costs on the defendant's application for further information.

The claim and counterclaim

3. In 2016 the claimant ("CLA") agreed to lease a Boeing 747-400 from its then-owner. As a result of novation and amendment, the lease was ultimately one between CLA and the defendant, which I shall refer to as the "Lessor". Had it run its full course it would have come to an end in April 2027. Following the imposition of a flight ban on Russian-owned or controlled aircraft in February 2022, the Lessor gave notice of events of default in March 2022, and purported to terminate the lease by notice dated 4 April 2022. CLA did not accept that those notices were justified. It maintains that they were repudiatory breaches, which it claims to have accepted on 24 May 2022. On either party's case, therefore, the lease terminated in 2022.

4. The Lessor took possession of the aircraft in 2022, and has since sold it to a third party. It is not disputed that CLA should also have returned the extensive documentation (log books, certificates, maintenance records and so forth) belonging with the aircraft, but that it did not originally do so. It may not have done so yet. The reasons do not matter for present purposes. What matters is that the Lessor has an arguable claim that CLA was, in any event, in breach of its obligations in that respect, and possibly remains so.

5. Based on these events, the parties advance various claims. CLA claims to be entitled to the return of the security deposit of USD 2 million, and to unquantified damages for having been deprived of the chance to restructure the ownership of its business to avoid the effect of sanctions. The Lessor resists those claims. It claims to be entitled to indemnities or damages including (a) a claim for indemnity and damages for failure to redeliver the aircraft's documents if it is liable for that to its own buyer, (b) damages for loss of rent for the unexpired part of the lease, and (c) delivery up of the aircraft's documents. The Lessor maintains that its damages claims can be set off or deducted from any obligation to return the security deposit.

6. The claim was originally issued in May 2022, but became stalled as a result of sanctions: see the judgment of HHJ Pelling KC [2023] EWHC 1172 (Comm). On 16 November 2022, CLA was placed into administration by order of Michael Green J, and it remains in administration. Particulars of claim were served in July 2023. The defence and counterclaim were served in September 2023. Neither the administrators' consent nor the court's permission to make the counterclaim was obtained.

7. After correspondence between the parties, the applications that are now before me were issued by CLA on 27 October 2023 and by the Lessor on 15 December 2023 and 22 December 2023. CLA's application contends that the counterclaim should be struck out because permission required under the Insolvency Act 1986 has not been given. The Lessor's application contends that permission should be given to amend it. The Lessor took the stance that permission was not needed, but its application of 22 December 2023 sought it, if required.

Is permission required?

8. Paragraph 43 of Schedule B1 to the Insolvency Act 1986 provides, in relation to any company in administration, that "(6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except—(a) with the consent of the administrator, or (b) with the permission of the court". The administrator has not given consent to the counterclaim. It is common ground that permission can be given by this court (it does not require a separate application in the administration: *Fabric Sales v Eratex* [1984] 1 WLR 863 (CA), a case which concerned liquidation under the Companies Act 1948, but the parties agree that the principle applies here). It is also common ground that permission can be given retrospectively: *Bank of Ireland v Colliers International UK plc* [2012] EWHC 2942 (Ch), [2013] Ch 422, 430.

9. On behalf of the Lessor, Mr Thompson KC submitted that permission was not required because the counterclaim was defensive. It is not any part of the purpose of the permission requirement to prevent defensive action: "defendants to proceedings where the claimant is a company in administration should be able to defend themselves without restriction" *Mortgage Debenture Ltd v Chapman* [2016] EWCA Civ 103, [2016] 1 WLR 3048, at [17] (David Richards LJ). It follows that where a counterclaim is "pleaded solely to raise a defence by way of set off", permission is not required: *Mortgage Debenture Ltd v Chapman* at [24], citing *Langley Constructions (Brixham) Ltd v Wells* [1969] 1 WLR 503 (CA), dealing with the materially analogous position of a claim by a company that is in liquidation.

10. In my view the word "solely" is critical. When a counterclaim is pleaded not "solely to raise a defence by way of set off", permission is required. That is so here. The counterclaim asserts claims which (although unquantified) the Lessor at least asserts *may* overtop any sum due to CLA. It makes a claim for delivery up of the aircraft's documents. It includes a prayer for the payment of damages and interest. It cannot credibly be said to have solely a defensive purpose, or to be incapable of having any offensive effect. For example, the claim for damages is not limited to any sum due from the Lessor, so as to limit it to set off. Such a claim required permission, which should have been sought before making it.

11. In its evidence and skeleton argument (though not, as I understood it, by the end of the hearing) the Lessor suggested that the claim for delivery up did not require permission because it did no more than assert the Lessor's proprietary rights. Even if that is all it does (a point on which I did not hear argument), I do not think that makes a difference. A claim in legal proceedings for relief in support of a proprietary right is still "legal process". Permission is required. That it may be relatively easy to obtain is a different matter.

12. It follows that the counterclaim was made in breach of the moratorium. Mr Thompson suggested that it was not clear that this was a ground on which it was said it was at risk of being struck out. I disagree. It was expressly raised in CLA's application. I have no doubt that the court would hold that a claim for which permission was required but should not be given would be an abuse of process, and liable to be struck out under CPR 3.4(2)(b).

Should permission be given? Principles

13. The moratorium is imposed to enable administration to serve its purpose. A core statutory purpose of administration is to achieve "a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)": Insolvency Act 1986, Schedule B1, para 3(1). As David Richards LJ explained in *Mortgage Debenture* at [13]:

> "An administration may be a prelude to liquidation or, once an administrator gives notice of an intention to make distributions to creditors, may be a substitute for liquidation. ... [B]efore that point is reached, the principal purpose of an administration is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable."

14. In either case, the moratorium recognises that the collective interests of the creditors and shareholders of the company may deserve priority over their individual interests: Insolvency Act 1986, Schedule B1, para 3(2). It provides breathing space, relieving the company of the need to devote its time and money to responding to the claims of the loudest and most aggressive creditors, or of "dismemberment of its assets through execution or distress".

15. However, as David Richards LJ pointed out (*Mortgage Debenture* at [13]), the "court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so". In *Sunberry Properties Ltd v Innovate Logistics Ltd* [2008] EWCA Civ 1321, [2009] 1 BCLC 145, at [21] Mummery LJ framed the test as being whether it would be "inequitable" for the prospective claimants to be prevented from pursuing proceedings, and observed that the burden lies on the claimant to persuade the court of this (citing *Re Atlantic Computer Systems plc* [1992] Ch 505). That may involve, as *Sunberry Properties Ltd*, at [22], and *Re Atlantic Computer Systems plc* noted, a "balancing exercise" of the legitimate interests of one creditor and the collective interests of the creditors as a whole.

16. It is impossible to reduce such an exercise to rules. But certain themes may be noted. Three seem to me to be relevant here.

17. First, where there is real doubt about the existence or extent of a prospective creditor's rights, it will often be necessary to find a mechanism to resolve that doubt. Understanding the company's financial obligations is not inimical to the purpose of administration. Where (as here) the administrators are considering making distributions to creditors, it may positively assist it. As in a liquidation, there may be various ways in which that can be done. Where a prospective creditor has a claim for unliquidated damages there will often be a strong argument that it is just for the claim to be resolved by the court. That does not mean that the creditor will be permitted to enforce any judgment it obtains. But it will often be in the creditors' collective interests, as well as the individual claimant's, for the parties to have a definitive decision about what the liability is and therefore understand the company's financial position.

18. Secondly, the balance is more likely to lie in favour of the determination and preservation of an individual's proprietary rights, to which the court attaches great importance: *Sunberry Properties Ltd* at [22].

19. Thirdly, even if a claim is not *solely* defensive, the fact that it is *partly* defensive, and closely connected with a claim that the company is itself making, may be important. It would never be equitable to prevent a person from deploying a defence against a claim by the company. That means that the administrators (if they choose to maintain a claim) will inevitably have to devote the resources necessary to deal with the defence. If, for instance, someone has an unliquidated claim which might be set off against the company's claim, but may exceed it, the court cannot avoid deciding the claim to the extent that it constitutes a set off. But since that means that the claim must be decided, it would serve no useful purpose not to insist that it should be only partly decided. Furthermore, there is something fundamentally questionable about a company making claims arising from a set of events but refusing to permit the target of its action to assert cross-claims arising from the very same facts. (Again, however, the court may insist that if it transpires, after taking set off into account, that a balance is due to the creditor, the court might not permit any judgment to be immediately enforced.)

20. Finally, it seems clear that the court may give permission on terms. For example, as Mr Thompson accepted, it is common to permit a claim to be determined but on terms that a money judgment, if obtained, will not be enforced by execution.

Should permission be given? Delivery up

21. CLA does not oppose permission being given for the claim so far as it seeks delivery up of documents, but the administrators have not in terms consented to it. I grant permission. Even if this claim is not entirely about proprietary rights, CLA has no interest in retaining the aircraft's documents. They have no value to it. Conversely, they have considerable potential value for the Lessor, and may be required in order to realise the full value of the aircraft to which the Lessor did have proprietary rights, and which has been repossessed. It would plainly be inequitable not to permit that claim to be pursued.

Should permission be given? Loss of rent claim

22. It seems clear to me in principle and in the abstract that the court should give permission to a properly formulated claim by the Lessor that CLA breached the lease, and that that resulted in early termination and loss of rental income. Most, if not all, the issues that

are raised by that claim will have to be decided as part of the determination of CLA's own claim. The claim is at least partly defensive. It would be in nobody's interest (and not in the collective interests of CLA's creditors as a whole) to stand in the way of all these tightly connected issues being resolved together. The Lessor accepts that it would be appropriate to impose a condition that if this results in a money judgment in its favour, that judgment should not be enforced or executed in a way that could disrupt the administration or enable the Lessor to steal a march on other creditors, and I would impose such a condition. But, in principle, it would plainly be inequitable for CLA to bring its claim without the court also being able to decide the counterclaim, in full.

23. I did not understand this to be seriously in doubt. Mr Kasriel, who appeared for CLA, raised two objections, which in each case really amounted to a proposal that the permission should be conditional. He submitted that the court should not grant such permission unless the Lessor was first willing (or required) to provide better particulars of the quantum of its damages claim than it has so far been willing to do. And he also submitted that the court should not grant such permission unless the Lessor was willing (or required) to provide details of the price for which the aircraft had been sold. I therefore turn to those questions.

Adequacy of pleading

24. I accept Mr Kasriel's submission that before granting permission to make a claim the court may insist that it is adequately pleaded and explained. That is because the court must consider and balance the respective interests of the prospective claimant and the collective interests of the creditors and the purposes of the administration. It is one thing to expose the company to the costs of litigating a coherent and comprehensible claim of known value, and quite another thing to expose it to the costs of litigating one that is vague or inadequately quantified. Whatever might be the (limited) merits of parties to ordinary litigation insisting on playing their cards close to their chest, a person who wishes to persuade the court to exercise its power to permit a claim to which the moratorium applies may be required to be appropriately forthcoming about the claim that it wishes to pursue. If the applicant for permission is unable or unwilling to say with reasonable clarity what relief it expects to obtain, it cannot reasonably ask that power to be exercised in its favour.

25. The Lessor's explanation of the quantum of its claim has, in this case, gone through three versions.

26. The first version, as originally pleaded, based the quantum on the value of the rental payments that would have been made by CLA if the lease had run to expiry. It accepted that these should be discounted for early receipt. It said, however, nothing about the obvious need to allow for the fact that the Lessor had the aircraft at its disposal during the unexpired period, and that *prima facie* it therefore had the ability to generate income from it which would need to be set against the rent it had not received from CLA. Conventionally, it would be the *difference* between the rent that would have been paid by CLA and the rent that could have been obtained in the market that constitutes the basic measure of the Lessor's loss. In so far as CLA submits that there is a rule of law that this is the measure of loss, I would not agree. Rules such as this are rules of thumb, which generally allow one to arrive at the sum required to put the claimant in the position they would have been had the contract been performed. It is always possible that in a particular case some other approach may be justified. Still, what is at least clear

is that to assess loss without taking any account of the fact that the Lessor had available a profit-earning asset during the unexpired period would require very unusual facts, which I would expect to be clearly alleged.

27. In its original formulation, the Lessor's claim offered to give credit only for "the expected depreciation in the net present value of the aircraft which it would otherwise have suffered during that period". It is not altogether easy to understand that plea, though the Lessor maintained that it was consistent with the approach that Diplock LJ took to early termination of a contract for the hire of chattels in *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1444. It seems to me as a matter of first impression that that approach, directed at a case where supply exceeds demand so that the hirer's ability to re-hire the goods that are returned does not increase its ability to obtain rent (see 1444), and would be unlikely to apply here. However, I did not hear argument on the point, and it is not necessary to explore the justification of the plea, since it is no longer maintained.

28. In its second formulation, besides amending the amount of rent that was said to have been lost, the Lessor deleted that offer to give credit for depreciation, and substituted a claim for damages measured by:

> "loss of Base Rent ... from 4 April 2022 until 22 April 2027 ... less the market rent which would have been obtained in relation to the Aircraft in the same period for which sum WWTAI would give credit. WWTAI will seek to adduce and rely upon expert evidence as to the market for the Aircraft and the rent which would have been achievable. WWTAI claims on a present value basis."

29. This version therefore accepted the principle of giving value for the rental that could have been earned during the period for which damages are claimed, but offered no indication of what it might be.

30. A third version was provided on 25 January 2024. It:

    i) accepts the principle that credit should be given for the market rent, but "(taking account of when the Aircraft was available to WWTAI, its condition, the availability of the Aircraft Documentation and the state of the market, including the likely time required to find a new lessee)".

    ii) continues to contain a reservation of the right to rely on expert evidence, but also offers that "Pending the service of such expert evidence (and subject to revision upon such service) WWTAI's understanding is that the market rent for an aircraft of the age and type of the Aircraft would have been in the region of USD $310,000 [sic] per month provided the Aircraft Documentation had been available".

31. Mr Kasriel maintained two objections to this formulation. First, he rather tentatively said that it was impermissible to reserve a power to amend when expert evidence is available. I do not think this is a weighty point. It is, of course, trite that a party has no ability to "reserve a right" to amend a pleading, frequent as the practice is. But it is acceptable practice for a party to provide particulars to the best of its current ability, and it will often be just and convenient (even if it is never a matter of "right") to permit

those to be supplemented or changed as a case develops. Particularly with quantum, which often depends on many assumptions, facts, and matters of opinion which will not be clear at the outset of the case, it would be pointless to demand precision that will necessarily depend on future developments in the case. If particulars *are* the best that can be provided, they are sufficient.

32. I think the essential yardstick is shown by the time-honoured phrase "the best particulars that the claimant can currently provide". A party may always be required to state its reasonable best current estimate of the financial value of its claim, if one can be made. There may be circumstances in which it is genuinely impossible to provide even that, and even more common circumstances in which the estimate will be provided on the clear understanding that it is provisional, subject to change, and not a commitment that is set in stone. But it is not consistent with the efficient conduct of litigation for a party simply to decline to provide any concrete information about the amount it is claiming until it feels able to provide a completely informed and definitive statement.

33. Mr Kasriel's second objection to the revised plea is that there is a "mismatch" in the way that it proceeds. On the one hand, it makes it clear that the Lessor's case will be that the market rent for which credit is to be given is the rent achievable for an aircraft in the condition that it was in, and with the documentation that was available. On the other hand, it offers an estimate of the market rent for an aircraft with full documentation. And it does so in the certain knowledge (because it is common ground) that for much of the period of loss the aircraft will not have had full documentation, since it is common ground that the documentation was not provided until recently, and disputed whether it has even now been provided. That means that one can be confident that, at least for much of the period, the Lessor has no intention of giving credit for rent at USD 310,000 per month, but will maintain that the relevant credit is lower. But the pleading does not say how much lower. So CLA still has no way of knowing, even approximately, what the actual claim is, and the plea offers information only about a case that the Lessor does not expect to make.

34. Mr Thompson confirmed that Mr Kasriel has correctly anticipated how the Lessor intends to proceed. It follows that the amended pleading gives only a rough approximation of the *minimum* amount that the Lessor may claim. The Lessor submits, however, that this is a reasonable approach to take under the circumstances, and that it would be excessively burdensome to require the Lessor to commit itself, however provisionally, to a view of the financial significance of the missing documentation.

35. I do not accept that submission. The Lessor is in the business of leasing aircraft, and must have given consideration to how best to mitigate its loss when it repossessed this one. It knows already that when the aircraft was returned it was without the full documentation, and what physical condition it was in. It (successfully) marketed the aircraft for sale in that state. Although I accept that any estimate the Lessor makes will necessarily be provisional and subject to refinement in the light of further expert advice, I see no reason why it should not at least provide its best present estimate of the value of the claim that it wants to make, or a considered range of values. It is important for CLA's administrators to be able to form some view of the size and strength of that claim, and likely to be useful to the parties and to the court to be able to see whether the absence of documentation is likely to be a major point (as it might be if, for example, the Lessor maintained that the aircraft was simply unusable without it) or a minor one

(as it might be if, for example, it was the Lessor's case that a small percentage reduction would be required).

36. I see no impediment to requiring this now. The original counterclaim as it stands is no longer maintained. The Lessor requires both permission to amend, and permission to bring or continue the counterclaim as amended. I am prepared to give that permission only on condition that the Lessor pleads the figure (or range of figures) that it currently maintains constituted the market rent of the aircraft in the condition that it was (which the Lessor knows) including as to its documentation—its current best estimate. It is likely that as the case develops the Lessor will wish to amend that estimate. But "wait and see" is not, in my judgment, a reasonable or responsible approach, and if that is the best that the Lessor can currently do, it should not have permission to make the claim until it can manage to do better.

Information about the sale price

37. CLA also submits that permission should not be given until the Lessor provides information about the sale of the aircraft, especially the price and key terms.

38. It is common ground that there was such a sale, and the Lessor relies on an alleged potential liability to the buyer under the sale contract as the basis for a claim to be indemnified. Paragraph 65 of the defence and counterclaim alleges:

> "As WWTAI has been unable to provide the buyer with the Aircraft Documentation, it is exposed to a claim from the buyer for breach of contract. WWTAI is entitled to and claims an indemnity from CLA in respect of that exposure."

Whether the Lessor is "exposed to a claim from the buyer for breach" must depend on the terms of the contract between the Lessor and its buyer. Although the defence and counterclaim does not in terms say that the sale contract was written, it is obvious that it will have been.

39. It is highly likely that the terms of that sale will also be material to the assessment of quantum if the Lessor's damages claim succeeds. Although sale and lease are different ways of realising value from an aircraft, sale prices and market rents are economically related, as Mr Thompson pointed out. It seems, therefore, inevitable that in due course this information, and related documents, will be disclosed. And, as Mr Kasriel pointed out, it seems unlikely that it would be either expensive or prejudicial to the Lessor to provide it now.

40. However, subject to the point I address below concerning initial disclosure, this is not in itself a good enough reason to require its disclosure immediately. Orderly litigation proceeds in stages. One does not need to be unduly cynical to suspect that what is happening here, on both sides, is essentially strategic. CLA believes that the sale price will show that the market was buoyant, and that the Lessor could have exploited a rising market to benefit from the early return of the aircraft. One might speculate that the Lessor thinks there may be something in this guess. Why else would it be cagey about the price? But, unless the information is required *now* in order either to decide whether permission should be given for the counterclaim or to enable CLA to plead its defence to counterclaim, the right course is to wait until the information emerges in the ordinary

course, through disclosure. It is not conducive to efficient or fair litigation for one party to cherry pick particular documents for early disclosure.

41. Information about the sale price is therefore not required to decide whether permission should be given. I have no doubt that the merits of a claim may be relevant to whether permission should be given, in the sense that the court would not give permission to make a hopeless claim. But it would not generally be sensible for the court to engage in a detailed analysis of a properly arguable case. CLA does not contend that the Lessor's case is hopeless. Nor is it realistically likely that any information to be gleaned from the sale contract could be sufficiently clear cut to demonstrate that it is.

42. Nor do I think that CLA would be seriously hampered in pleading a defence to the alleged quantum of the damages claim by not knowing the price. Its avowed position is that credit should be given for the market rent obtainable. The sale agreement will not directly show what the market rental was; its analysis would require expert assistance, and almost certainly be controversial rather than clear cut. With or without the sale price, CLA can make its own estimate of the market rent.

43. That is not the end of the matter, however. As set out above, the counterclaim also relies on a potential liability under the sale contract as the basis for an indemnity. Mr Kasriel submitted that the sale contract should have been provided by way of initial disclosure as a result of this plea. In reply, Mr Thompson said that the sale contract was not initial disclosure within PD 57AD para 5.1. That paragraph requires initial disclosure of "(1) the key documents on which it has relied (expressly or otherwise) in support of the claims ... advanced in its statement of case (and including the documents referred to in that statement of case); and (2) the key documents that are necessary to enable the other parties to understand the claim ... they have to meet."

44. There seems no doubt that the sale contract is a document on which the Lessor has relied in support of its claims, since paragraph 65 expressly asserts that the Lessor is exposed to claims under it. Is it a "key" document? It seems to me that it is. Test it this way. How could CLA decide whether to admit or deny the claim without examining the contract? Without the contract, its only possible response to paragraph 65 is a non-admission. The contract will not therefore simply be part of the overall evidential picture: its terms are decisive as to whether paragraph 65 is correct or not. Where a party relies positively on the terms and effect of a written contract for a central aspect of its case, I would normally regard that as a "key" document.

45. In any event, whether or not the sale contract is a "key" document which should have been provided by initial disclosure, CLA cannot plead fully to the allegation in paragraph 65 of the defence and counterclaim without seeing it. In case management terms, no useful purpose is served by forcing CLA to plead a non-admission which may call for revision in due course after the sale contract is disclosed, as it inevitably will be. This can only increase costs, and make the litigation more expensive than it needs to be.

46. It follows that, although I do not consider that disclosure as such of the price for which the aircraft was sold should be required, I do consider that disclosure of the sale contract itself should be, so that CLA can respond now to paragraph 65 of the defence and counterclaim.

Costs of the Lessor's application under Part 18

47. The final point I have to decide is whether the Lessor should have the costs of an application that it issued for further information.

48. The essential facts are as follows:

    i) The Lessor first made a request for further information on 19 September 2023. CLA responded to that request on 1 November 2023. Its answer provided some of the information sought, and declined to provide other parts of it.

    ii) The Lessor then issued an application to require answers on 15 December 2023. The Lessor did not, before issuing that application, comply with paragraph D14.1 of the Commercial Court Guide, which requires counsel to confer before issuing an application, because experience shows that such discussions often result in a narrowing of the issues.

    iii) Shortly after the application had been issued, there was, however belatedly, correspondence between counsel. Mr Kasriel provided a detailed commentary and raised various questions about the request. Mr Thompson did not respond substantively to that.

    iv) One aspect of that correspondence was that, in late December, Mr Kasriel was able to explain to Mr Thompson that the administrators had gained access to previously inaccessible information, and would therefore be able at least in some respects to provide additional information.

    v) CLA provided some additional information, particularly in relation to request 8, which it did on 19 January 2024. In other respects it maintained its objections to the request.

    vi) In the light of that further information, the Lessor decided not to pursue its application, but nevertheless claims its costs. CLA says that there should be no order.

49. In my view, there should be no order for costs on either side. The application was premature, because the Lessor had not complied with the obligation to engage in informal discussions before issuing it. These are not pointless formalities. When that discussion did, belatedly, take place, the Lessor did not seriously engage in it, and did not respond to the reasonable and detailed points that Mr Kasriel had raised. Finally, although the upshot was that CLA provided a small amount of further information, the Lessor in the end accepted that in large part it would not challenge the objections to several of the requests.

50. This was, therefore, a premature application, precipitously issued without proper compliance with practice, which achieved a mixture of success and failure, and where even the successful aspects cannot be said to be the result of the application itself, and might well have been achieved by informal discussion which the practice in this court requires. Leaving the costs of this application to lie where they fall fairly reflects the very limited benefit that the Lessor has derived, the respects in which it has not succeeded, and the Lessor's unreasonable failure to comply with proper practice.

Conclusion

51. I have summarised my conclusions in paragraph 2 of this judgment. I shall consider written submissions as to how those conclusions should be reflected in an order, and as to costs.