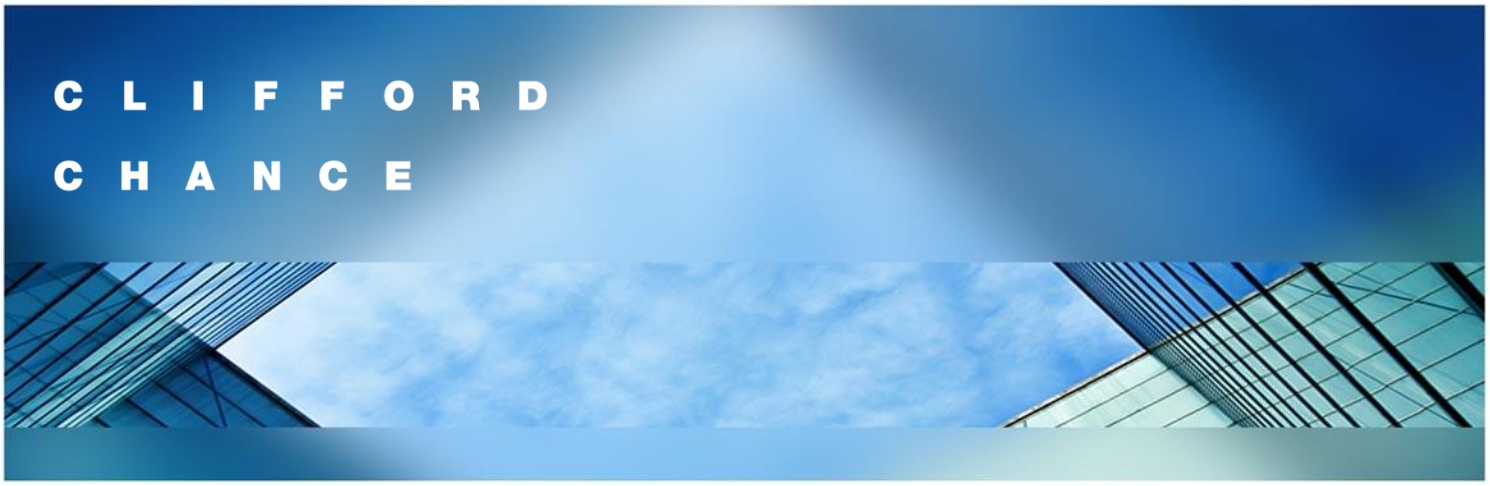

WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED AND OTHERS VS SPICEJET LTD – CASE SUMMARY

Wilmington Trust SP Services (Dublin) Ltd v SpiceJet Ltd [2021] EWHC 1117 (Comm)

The English High Court has again upheld the primacy of the "hell or high water provisions" in aviation operating leases, against the twin threats of Coronavirus and the ongoing grounding of the B737-MAX 8 by international regulators. In doing so, it clearly recognised the economics of such contracts and the express allocation of risk between lessor and lessee.

This was an application for summary judgment made by three aircraft leasing entities (the "**Claimants**") in relation to unpaid rent and other amounts due and owing under the respective leases of three Boeing aircraft, leased to SpiceJet Ltd. ("**SpiceJet**"), the Indian budget operator.

By way of background, the leases in question are all "dry leases", whereby the lessee assumed for a term of 10 years all the risk and responsibility of operation and maintenance of the aircraft. Against this backdrop, SpiceJet's use of the first aircraft ("**MSN 41397**") has been significantly restricted as a result of the Coronavirus pandemic; and the two Boeing 737-MAX 8 aircraft (the "**MAX Aircraft**") have been grounded by the Indian aviation regulator (the "**DGCA**") since early 2019, following the fatal crashes of two other such aircraft. At present, the DGCA's operational ban of the B737-MAX 8 model remains in place, with no immediate indication of when it will be lifted.

Illegality – hell or high water clause upheld

While SpiceJet did not dispute that it had not paid rent, it argued that, for MSN 41397, the Coronavirus-related travel restrictions imposed by the Indian government made it illegal to operate the aircraft and that, on a true construction of the lease, the agreement provided that rent would continue to accrue but that payment was suspended.

The court dismissed this argument, stating that (among other reasons) it was "impossible" to conclude this "even on the most expansive approach to construction". SpiceJet had assumed all the risks of operation and maintenance of the aircraft, including the full risk of loss and damage to the aircraft and of any other occurrence which shall deprive it of the use, possession or enjoyment thereof, in return for a warranty of quiet enjoyment and an assignment of manufacturers' warranties.

Further, the court upheld the "hell or high water" clause, which expressly provided that the lessee's obligation to pay rent and other payments shall be

Key issues

- Hell or high water clause in aircraft operating leases upheld, notwithstanding suspension of the use and operation of aircraft due to Coronavirus-related restrictions or due to aviation authority ban on B737-MAX 8 aircraft model
- Lessee in a "dry lease" has assumed all the risk and responsibility of operation and maintenance of the aircraft
- Frustration of aircraft leases and other commercial contracts remains a high bar under English law
- No set-off clause upheld in context of possible defence under the Supply of Goods and Services Act 1982 ("SGSA")
- Decision in *Trident Turboprop* regarding the international supply contract exclusion to the Unfair Contract Terms Act 1977 ("UCTA") confirmed for the aircraft leases
- Court orders short stay of execution in light of defendant's current parlous financial state, having suffered the consequences of Coronavirus restrictions and the B737-MAX 8 operational ban

absolute and unconditional, irrespective of, amongst other things, the unavailability of the aircraft for any reason[1].

Frustration remains a high bar

SpiceJet further contended that the common purpose of the leases of the MAX Aircraft was the provision of such aircraft for commercial use and that this had been frustrated by the ongoing DGCA ban. The well-established test for frustration is whether, through no fault of either party, performance of the contract has been rendered "radically different" from the obligation undertaken. This requires a multi-factorial approach (*The Sea Angel* [2007] 2 Lloyd's Rep 517).

The court accepted that this test had not been met as these were 10 year leases under which SpiceJet had assumed the "entire commercial risk of operating the aircraft", including the general risk of the aircraft being grounded due to any prohibition on use or defect in airworthiness, which was foreseen by the parties and allocated to SpiceJet. As such, even if the leases had become commercially unprofitable as a result of the DGCA ban, they were not radically different because there was no necessary common purpose that SpiceJet should operate the aircraft at a profit. This conclusion is reassuring for aviation lessors and lenders in the current environment, not least as the court was satisfied that the multi-factorial approach did not require evidence at trial, such that Summary Judgment could be entered based on the clear allocation of risk under the leases[2].

Although, the court was careful not to say that "these leases can never be frustrated", but, on the facts before it and in the context of a 10 year lease, an operational suspension for roughly 10% of the lease term did not render performance radically different so as to constitute frustration. The decision is yet another clear affirmation by the English court that the threshold for frustration of commercial contracts, including aircraft leases, is set high.[3]

No set-off – relevance of possible defence under the Supply of Goods and Services Act 1982 ("SGSA")

For the MAX Aircraft, the court considered whether the implied condition of satisfactory quality under SGSA could be relied upon by SpiceJet both as a defence and counterclaim. This issue involved the questions (i) whether any defence was precluded by the no set-off provision in the lease terms; (ii) whether in any event each lease sufficiently excluded such statutory implied condition; and (iii) whether any contractual exclusion was subject to the requirement of reasonableness under the Unfair Contract Terms Act 1977 ("**UCTA**") or if such requirement was disapplied by the international supply contract exception to the Act.

- As to (i), the court upheld the "no set-off" provision in the subject leases, which provided that SpiceJet's obligation to pay rent "shall not be affected or reduced by any circumstances, including…any setoff, counterclaim…defence or other right which Lessee may have against Lessor." The no set-off clause thereby acted as a shield for the lessor against the lessee's defence in respect of the SGSA implied condition

[1] Refer to our February 2020 briefing "Coronavirus – Aircraft Operating Leases" where we contemplate the robustness of the "hell or high water" clause in English law aircraft leases in the context of the Coronavirus pandemic.

[2] See also our January 2021 case summary of *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm) "Salam Air SAOC v Latam Airlines Group SA"

[3] We discuss the doctrine of frustration under both English law and NY law in our afore-mentioned February 2020 briefing "Coronavirus – Aircraft Operating Leases"

argument, with the consequence that summary judgment could be entered without the need to wait for determination of the counterclaim at a subsequent trial.

- As to (ii), the court declined to find in the context of a summary judgment application that SpiceJet were precluded at trial from pursuing its counterclaim that the implied conditions under the SGSA were not excluded by the language in the leases, on the basis that they did not expressly or necessarily refer to such conditions.

  It is notable that in another leading aviation case, *Air Transworld v Bombardier Inc.*, [2012] EWHC 243 (Comm)[4], the court held that on a proper construction, an exclusion clause in an aircraft purchase agreement which did not explicitly list "conditions" was sufficient to exclude the SGA implied conditions as it referenced "all other obligations…or liabilities express or implied arising by law" and hence the necessary implication was that conditions were covered. It remains to be seen what approach the court would take at trial when the overall wording and commercial effect of the leases, including as to the allocation of risk and liability would be considered.

- While (ii) did not strictly arise (in light of the outcome of (i) above), the court helpfully confirmed that the Court of Appeal decision in *Trident Turboprop*[5] applied to the leases. The UCTA international supply contract exception is satisfied where, at the execution of the lease, the parties contemplated that the aircraft would be transported across national boundaries by the lessee *after* delivery in order to fulfil the commercial purpose of the contract.

Case management - stay of execution

While there was no compelling reason for trial such that the court should withhold judgment on the claims relating to the MAX Aircraft, it acknowledged that SpiceJet has suffered "the wholly unforeseeable "double whammy" of Covid and the MAX 8 tragedies." Accordingly, in a rare procedural departure, the court made a case management decision to order a short stay of execution of the summary judgment for the parties to undertake mediation.

The Deputy High Court Judge, Julia Dias QC, explained that the stay was appropriate in the specific circumstances of the particular case, including where the financial standing of the lessors (and therefore their ability to repay the amounts claimed, should the leases become frustrated in the future) was not clear and where SpiceJet is "currently in a parlous financial state" such that an order to pay all outstanding amounts "may well tip it over the edge into insolvency". In this regard, she noted that SpiceJet's insolvency would be "contrary to the Claimants' own interests" and that "with patience, they might recover a larger pay-out in due course."

At first glance, airlines and other distressed operators may draw comfort from at least the possibility of the English court offering them some breathing space from immediate enforcement in the ongoing and undoubtedly challenging market conditions. This, however, may prove to be no more than a brief window in which operators can engage with lessors to find a mutually acceptable alternative to the enforcement of judgment.

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4 Refer to our March 2012 briefing "Ointment for Mosquito Bites – English Court upholds exclusion clause in aircraft purchase agreement; statutory limitations do not apply"

5 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd*, [2009] EWCA Civ 290

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