

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

Wilmington Trust SP Services (Dublin) Ltd v SpiceJet Ltd [2021] EWHC 2061 (Comm)¹

The English High Court has lifted the stay of execution of the summary judgments granted in favour of three aviation leasing entities (the "**Claimants**") on 4 May 2021 against the troubled low-cost airline, SpiceJet Ltd. ("**SpiceJet**").

The Claimants applied for summary judgment in relation to unpaid rent and other amounts owing under aircraft "dry" leases. When granting the Claimants summary judgment on the claim, the Deputy High Court Judge, Ms Dias QC, unusually ordered a stay of execution on amounts claimed under the leases of two Boeing MAX aircraft, to allow the parties an opportunity to further investigate commercial resolution through mediation.

That May ruling prompted some industry participants to suggest that the English High Court had set an important precedent in the context of the pandemic-affected aviation market, which non-performing airlines could pray in aid to resist lessors seeking early and swift judgment of their legal rights to payment.

Happily, the latest ruling confirms that is not the case. Instead, the Court confirmed that the test for a stay of execution is a test of exceptionality. At a second hearing, the Court held that there were no exceptional circumstances justifying a continuation of the stay.

Advantage of a no-set off clause

The Court confirmed at the second hearing that the stay had served its purpose of allowing mediation and that a continuance would involve the Court re-writing the parties' commercial agreement. Mrs Justice Cockerill DBE, the Judge in charge of the Commercial Court, noted that the test for a stay is a very high one, particularly in circumstances where, as in the present case, the Claimants had the benefit of a "no set-off" clause in the relevant agreements, and the Court will usually give effect to the parties' bargain and enforce this kind of clause (see *Credit Suisse v Ramot Plana* [2010] EWHC 2759 (Comm)). The purpose of a no set-off clause is to ensure immediate payment under the contract, by providing that the party with the benefit of such clause is not forced to wait for payment pending protracted litigation of any counterclaim.

Key issues

- The test for a stay of execution is a test of exceptionality
- The English Court will usually give effect to the bargain of the parties and enforce a "no set-off" clause
- In the present case, the stay had served its purpose of allowing the parties to engage in mediation, notwithstanding that the mediation had terminated
- The burden of justifying a stay of execution is on the party who seeks it

¹ This case summary updates and supplements our [previous case summary](#) dated May 2021.

No exceptional circumstances; enforcement risk and MAX grounding

Mrs Justice Cockerill DBE commented that, in granting the stay to allow the "golden opportunity to mediate", the deputy judge had not reached her "conclusion easily", which had been "right on the edge of exceptional circumstances – and just tilted in the Defendants' favour," albeit that "another judge might have reached a different conclusion".

When deciding whether or not to continue the stay, the Court is not required to ask "what has changed?" but simply to revisit whether there are exceptional circumstances now. Notwithstanding this, on the facts, the Court confirmed that it would have reached the same conclusion even if it had been required to ask that question. Although the mediation had ended without success, there had been engagement by the parties in that process and thus the circumstances were materially different.

The Court was not persuaded by SpiceJet's arguments for extending the stay, including that the risk of loss of a potential loan from the Indian government was not adequately evidenced and so could not be taken into account, and that the continued grounding of the Boeing MAX model by the Indian civil aviation authority did not constitute exceptional circumstances. As to the latter, the Court considered that this factor "had been in play since well before the learned deputy judge's judgment" and notably, "it is exactly the sort of impediment which a clear contractual regime is designed to take out of the equation." As to the contention that enforcement might be more difficult if the stay were to be lifted, the Court found this was effectively the Claimants' choice.

Conclusion

Aviation lessors and other creditors seeking to claim against defaulting obligors through the English courts will be reassured by this decision. The Court emphasised that a stay of execution is "unusual anyway" and where there is a no set-off clause, exceptional; hence, the burden must be on the party who seeks to have the stay to justify it. The decision to grant the stay was one of case management, based on the deputy judge's view of the particular and exceptional facts at the time, and should not be viewed as setting a precedent for the industry or cutting across the effectiveness of market standard operating lease terms.

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