

Insights

ABSOLUTE PAYMENT OBLIGATIONS, FRUSTRATION & STAY OF EXECUTION – LATEST DEVELOPMENTS

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SUMMARY

In a decision handed down at the end of April, the Commercial Court, in *Wilmington Trust SP Services (Dublin) Ltd and others v Spicejet Ltd [2021]*¹, has provided guidance on the English law doctrines of illegality and frustration. Whilst this specific dispute relates to overdue aircraft lease payments and particular government restrictions on the use of Boeing 737-Max 8 aircraft, the Court's findings will be interesting to others grappling with debtors seeking to rely on Covid-19 related restrictions in defence of a breach of contract claim.

In *Wilmington Trust*, the claimant aircraft lessors sought summary determination of their claims for outstanding amounts under three lease agreements. In its defence, Spicejet argued that it was not obliged to pay the monies sought because, amongst other reasons,

- i. the Covid-19 pandemic rendered performance of one lease illegal and suspended its payment obligations; and
- ii. the grounding of Boeing 737-Max 8 aircraft by the Indian Government had frustrated the other two lease agreements and relieved it of its obligations to make rental payments under those lease agreements.

Both of these arguments were rejected by the Court and summary judgment for c.US\$25 million was granted in favour of the Claimants. This decision reaffirms both the position that a lessee's obligation to pay rent under an industry-standard English-law aircraft lease is absolute and the narrow scope of the defences of illegality and frustration.

The Court, however, did grant a stay of execution for a period to allow the parties to undertake alternative dispute resolution (ADR) and, in the case of the First Claimant's claim, at least until trial of the remaining claims and cross-claims between the parties. In doing so, the judge took into consideration the financial position of the parties, the Defendant's request that the Claimants

engage in ADR and the overriding obligation of enabling the Court to deal with cases justly and at proportionate cost.

Background

In 2013 and 2018, Spicejet entered into three agreements with the Claimants for the 10-year lease of one Boeing 737-800 aircraft (the “**737 Aircraft**”) and two Boeing 737-Max 8 aircraft (the “**737 Max Aircraft**”).

All three lease agreements were ‘dry’ leases, meaning that Spicejet agreed to undertake all risk and responsibility for the operation and maintenance of the three aircraft.

Covid-19 pandemic and related travel restrictions meant that Spicejet’s use of the 737 Aircraft has been considerably restricted, while the 737 Max Aircraft have been grounded in India since early 2019 following the tragic fatal crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302.

The Claimants made an application for summary judgment against Spicejet for various amounts outstanding under the three lease agreements. As reiterated in the judgment, in order to succeed, the Claimants needed to demonstrate that:

- (a) Spicejet had no real prospect of successfully defending the claim or issue; and
- (b) there was no other compelling reason why the case or issue should be disposed of at a trial.

Covid-19 - Illegality

Spicejet argued that the restrictions imposed by the Indian Government in response to the Covid-19 pandemic had made it illegal for Spicejet to operate the 737 Aircraft. Further Spicejet argued that even though the terms of the lease agreement meant that such illegality did not affect the accrual of rental payments, the lease agreement nevertheless provided for the suspension of any physical payments for the duration of the relevant restrictions.

The Court rejected both parts of the argument with “*no hesitation*”. Under English law, a contract is discharged only if performance of the contract becomes illegal – circumstances that hinder performance or merely make performance more inconvenient are not sufficient.

Secondly, not only had Spicejet actually used the 737 Aircraft during the Covid-19 pandemic, but the Court found that it was “*impossible*” to interpret the lease agreement in such a way that payment of rent should be suspended for the duration of any Covid-19 related Government restrictions. The Court accepted the Claimants’ argument that under the dry lease Spicejet had exclusive possession and had agreed to undertake all the risks associated with operating and maintaining the aircraft.

Government regulation prohibiting use of aircraft - Frustration

The Court also considered Spicejet's argument that the two 737 Max Aircraft lease agreements had been frustrated. Spicejet argued that the purpose of the agreements was the provision of aircraft for commercial use and that such purpose had been frustrated by the Indian Government's grounding of the 737 Max Aircraft as a result of design defects. Spicejet urged the Court to take account of the interests of justice when making its decision.

There was no significant dispute between the parties as to the applicable test when considering whether a contract has been frustrated, being:

whether, through no fault of either party, performance of the contract has been rendered "*radically different*" from that which was undertaken at the time the contract was entered into, such that it would be "*unjust to insist on compliance with those literal terms*".

The Claimants submitted that the common purpose of the leases was simply the hire of the aircraft for rent and that the leases had not become radically different; merely commercially unprofitable.

In rejecting Spicejet's argument, the Court relied on the fact that Spicejet had assumed the entire commercial risk of operating the aircraft. Spicejet's obligation to pay rent was "*absolute, unconditional and non-refundable and irrespective of any contingency whatsoever*" including the total loss of the aircraft. If Spicejet was not absolved from paying rent by the total loss of the aircraft, the Court noted that it would be difficult to see how the temporary grounding of the 737 Max Aircraft could put it in a better position. Further, the interests of justice only come into play if the Court is minded to hold that a contract has been frustrated.

Interestingly, the Court did not say that the leases can never be frustrated. While the Court found that a suspension of use for roughly 10% of the term of the lease did not amount to a change of circumstance rendering performance "radically different", the Court suggested that if in three years' time there was still no sign of the grounding of the 737 Max Aircraft being lifted, that might amount to frustration. In doing so, the Court made it clear that it was not taking a view one way or the other, but it will be interesting to see if this line of argument is advanced in the future.

Conclusion - Stay of execution

The Court rejected Spicejet's argument that it should withhold judgment because there are compelling reasons for trial. However, the Court did grant a stay of execution on the summary judgment for sums exceeding US\$25 million because:

1. The Claimants' ability to repay should the contracts become frustrated at a future date had not been demonstrated as no evidence had been submitted; and
2. By contrast, the evidence suggests that if Spicejet was required to pay all outstanding sums now, it may well tip it over the edge into insolvency at the very time that there is some small indication that it may be able to trade its way out of difficulty if given enough time.

The Court "*robustly*" encouraged the parties to engage in mediation, ordering that execution of all judgments be stayed for a period to allow the parties to undertake alternative dispute resolution and, in the case of the First Claimant's claim, at least until trial of the remaining claims and cross-claims between the parties.

The Court's willingness to stay the execution of the judgment taking into account the parties' financial position and to encourage settlement is interesting in the broader context of various Covid-19 missives from the UK Government Cabinet Office and from BIICL. These publications have asserted that commercial parties should consider the wider socio-economic impact of Covid-19, allow "breathing space" and consider ADR, rather than insist on the enforcement of strict legal rights. Whilst the judgment makes no express reference to these missives, the reasons given for the stay seem to align with them.

1. Wilmington Trust SP Services (Dublin) Ltd and others v Spicejet Ltd [2021] EWHC 1117 (Comm.)

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