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Case No: 2012 Folio 1167

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

The Rolls Building  
7 Rolls Buildings  
London EC4A 1NL

Date: Wednesday, 24th April 2013

**Before:**

**HIS HONOUR JUDGE MACKIE QC**  
**(Sitting as a Judge of the High Court)**

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**Between:**

<b>CREDIT SUISSE AG</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>(1) ARABIAN AIRCRAFT &amp; EQUIPMENT LEASING CO EC</b>	<b><u>Defendants</u></b>
<b>(2) MR MANSOUR IBRAHIM AL-TASSAN</b>	
<b>(3) BAHRAIN EXECUTIVE AIR SERVICES COMPANY (BEXAIR) WLL</b>	

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**Mr Andrew Lydiard QC** (instructed by **Messrs Ince & Co**)  
appeared on behalf of the **Claimant**.  
**Mr Charles Graham QC** and **Mr James Tumbridge** (instructed by  
**Messrs Gowlings (UK) LLP**) appeared on behalf of the **Defendants**.  
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**His Honour Judge Mackie QC:**

1. This is an application for summary judgment by the Claimant, Credit Suisse AG, against three Defendants: Arabian Aircraft & Equipment Leasing, Mr Mansour Ibrahim Al-Tassan and Bahrain Executive Air Services Company, known as “Bexair”.
2. The application is supported by various bundles of documents and two witness statements from a solicitor, Mr McInnes. It is opposed by a witness statement from another solicitor, Mr Harris, which is supported by that of an expert, Mr McDonald, who had some involvement in the issues which arise in the action.
3. I am grateful for the assistance of submissions from Mr Lydiard QC for the Claimant and from Mr Graham QC and Mr Tumbridge for the Defendants.
4. Although there are three Defendants, no separate issue arises in relation to the individual Defendants. The case of the other Defendants stand or fall with that as against the First Defendant. The application is for summary judgment on liability, with damages to be assessed; alternatively, a conditional order for payment of the sums in dispute into court; alternatively for a conditional order for an interim payment on account.
5. I bear in mind at all stages that this is an application for summary judgment. The Claimant has to show that the Defendants have no real prospect of success if they are going to succeed. I also bear in mind, as always, the guidance given by (the then) Mr Justice Lewison in Federal Republic of Nigeria v Santolina Investment Corporation & Ors [2007] EWHC 437 (Ch). If at any point, when expressing a view about something, I omit to say it, it can be taken to be a finding that it is to a “no real prospect” standard.
6. The background is that, by a lease agreement entered into on 15<sup>th</sup> March 2004, the First Defendant leased a Canadair Challenger aircraft from Credit Suisse. The Second Defendant guaranteed the First Defendant’s obligations. The First Defendant had agreed to buy the aircraft for some \$13 million. Credit Suisse was to fund it. The Purchase Agreement was assigned to Credit Suisse, which then paid the seller and there was a finance lease back to the First Defendant, with options to purchase. The aircraft was sublet to the Third Defendant, Bexair.
7. The lease has to be read as a whole and in context the particular clauses relied upon are as follows. Clause 6.1 provides that, in the absence of circumstances that do not arise here:  
“... on the Expiry Date the Lessee shall, at its own expense, redeliver the Aircraft Package to the Lessor at the Redelivery Location in the condition specified in clause 6.3 [that is to say in broad terms a good condition].”
8. Clause 7 has various provisions for the payment of the rent and what is to happen if a payment is not made.
9. There is a promise by the Defendant, in clause 11, not to create any security interests, which includes a lien. The Defendant was, as one would expect from a relatively

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standard form document, obliged to keep the aircraft in good repair, operating condition and so on.

10. Clause 18 provides the focus for some of the legal argument in this case. Clause 18.1 provides that non-payment of rent and breaches of other obligations are to be Events of Default. By clause 18.2(A):

“An Event of Default shall constitute a material breach of a condition of and a repudiation by the [Defendant] of its obligations ...”

11. By 18.2(B)(ii), the Claimant was to be entitled to:

“... accept such repudiation, to terminate the leasing of the Aircraft Package under this Agreement and require the Lessee to redeliver the Aircraft Package to the Lessor at the Redelivery Location.”

18.2(D) provides that:

“... termination of the leasing of the Aircraft Package under this Agreement shall not relieve the Lessee from any of its obligations under any of the Operative Documents which remain unsatisfied.”

There is then clause 18.4, under which the claim, if not brought at the outset, is brought now. It provides, in relevant part, that:

“... whether or not the Lessor shall have exercised ... any of its rights under clause 18.2 ... the Lessor may ... following a default or Event of Default, require the Lessee to pay to the Lessor on the demand of the Lessor by way of agreed further compensation and not as a penalty an amount equal to the aggregate of:

(A) all arrears of Rent ...;

(B) any loss, damage, expense, cost or liability ...;

(C) all amounts of Rent which would have fallen to be paid under this Agreement from the date of such termination up until the Initial Expiry Date ... but for the early termination of the leasing of the Aircraft Package, calculated at the same rate for the notional balance of the Term as at the date of such termination, discounted over the notional balance of the Term at the Discount Rate applicable on the date of such termination.”

(D) relates to the Residual Book Value and from that is deducted “the aggregate of the Fair Market Value of the Aircraft on the date of such termination”, a definition to which I will return.

12. By June 2008, the aircraft was in the possession of Bombardier. In the course of that month, if not before, it is common ground that it asserted a lien which extended, on its

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account, to some \$1.1 million. The aircraft was with Bombardier and remained so until a contract for its sale was entered into in December 2011.

13. On 3<sup>rd</sup> June 2009, following what are conceded to be failures to pay money, Credit Suisse served Notice of Default on the First Defendant and on the Guarantor. In October 2009, Credit Suisse served notice to terminate the lease under clause 18.2(B)(ii), together with a demand for payment of the sums then due.
14. There is a dispute between the parties about the operation of clause 18 in the context of the other clauses in the agreement.
15. As the demand for payment initially stated, the claim in this case is for amounts payable under clause 18.4 of the lease. It is true that the Particulars of Claim do not identify 18.4 specifically, but what is being claimed is by reference to the elements in that clause. The way that worked is that the Claimant says that the amount due at the end of the leasing was \$835,546.58 and there are various components to that. Credit was given for the proceeds of an additional security required at the time of the deal, of \$2.742 million and also the proceeds of sale of the aircraft when it was sold at the end of 2011 for \$4.996 million.
16. A considerable period of time has elapsed since the demand in October 2009, during which Credit Suisse has been seeking to obtain the benefit of its security in various ways. There is a chain of correspondence to which I have been taken. There was a letter agreement, dated 6<sup>th</sup> January 2010. Settlement discussions were still taking place in May 2010. In August 2010, Credit Suisse complained to Bombardier about Bombardier's refusal to release the aircraft and its deterioration. The aircraft was, it seems, deteriorating because it was being kept in unsatisfactory conditions by Bombardier and Bombardier were doing nothing about it. The Third Defendants had some knowledge of what was going on, although they had no control. Eventually, a settlement agreement between Credit Suisse and Bombardier was entered into on 11<sup>th</sup> February 2011. Credit Suisse now claim for payment.
17. The Defendants, while conceding that repudiation took place, submit that the Claimant cannot show that they have no real prospects of defending the claim and that this matter must go to trial. They rely upon a number of matters.
18. Firstly, they say that they have a real prospect of defending the claim because they can show that Credit Suisse, not the Defendants, was responsible for the deterioration in the condition and value of the aircraft from the end of October 2009 to February 2012. They submit that the available evidence suggests that the aircraft could have been returned to Credit Suisse in an airworthy condition in early 2010 at a cost of some \$700,000 and then been sold for \$7.5 million. That is a submission based on the valuation by Mr McDonald of what an aircraft in similar condition might have fetched at around that time, together with an extrapolation of what the costs would have been of putting the aircraft in a position when it could have been sold at that time. They submit that, had that happened, the Defendants would have compensated Credit Suisse in full for all the loss it was entitled to claim and, indeed, there would have been some recovery for it. They point to Mr McDonald's conclusion that, had the aircraft been ready and airworthy, it could have been sold for approximately \$7.6 million in late 2009.

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19. I return to the definition of Fair Market Value. That means:
- “... the amount which is equal to the average of the amounts in dollars assessed by three independent valuers of recognised international reputation and experience (having specific and proven knowledge in relation to the valuation of aircraft similar to the Aircraft Package ...), appointed by the Lessor, as being the amount that could reasonably be expected to be received on a sale of the Aircraft Package or, as the case may be, the relevant part thereof, in the circumstances at the time of the determination, net of all expenses, commissions and other analogous charges and on the assumptions that the Aircraft Package or the relevant part thereof is valued for its highest and best use [and certain other conventional assumptions].”
20. The Defendants submit that, on the assumption that the value of the aircraft was \$7.5 million and that the aircraft could have been put right for about \$700,000, the Fair Market Value as at termination would have been in the order of \$6.8 million. They further submit that they have a got a real prospect of showing that against a background where the exercise of calculating the Fair Market Value has never been carried out.
21. Mr Lydiard QC submits that there is nothing in that point. He says that there was no attempt at valuation at the time. If there had been one, the Defendants could have put it in. He submits that the reason why a valuation is not put in is because of some of the realities, as it sees it, facing a sale of the aircraft at the time. At that point, the aircraft was at Bombardier, it was the subject of action for default and there would have been considerable uncertainty about its state. Of course, it was also subject to a lien estimated at \$1.1 million. In those circumstances, the Claimant submits that it is inconceivable that the Fair Market Value would produce a figure more than the sum for which the aircraft was eventually sold in 2011.
22. Subject to something that I will say at the end of this judgment, it seems to me that the Claimant’s submissions are right and that the submission based on these ingenious extrapolations does not begin to confront the realities of this distressed aircraft; the realities being shown by the fairly grim experience that Credit Suisse and, indirectly, the Defendants had over the ensuing years. That experience is, as one knows from other cases, typical.
23. The next issue is the construction of clause 18. There is, supplemented by helpful oral submissions, a case made out in paragraphs 5.5 to 5.8 of the Defendants’ skeleton argument. Mr Graham QC submits that, by not exercising their right to require Arabian Aircraft to redeliver the aircraft, a right which it sought to assert in the Default Letter but not in the subsequent letter, Credit Suisse waived its right to insist on post-termination redelivery. Only disclosure will show what the real picture is, but it may be that Credit Suisse intentionally omitted to ask for redelivery. That uncertainty of itself merits a trial.
24. It does not seem to me that resolution of that controversy, to which the Claimant has an answer, is necessary for the purposes of my decision. I am, therefore, going to make no findings about it, other than being left with the impression, given the other

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clauses in addition to 18.2(B), the structure of the agreement and the relative position of the Lessor and Lessee in any agreement, that the Claimant has the much better of that argument.

25. The next point that is raised by the Defendants is that they have a real prospect of showing that Credit Suisse owed them a duty to protect the aircraft and to prevent its condition from deteriorating. They say, therefore, that its value to Credit Suisse and the Defendants, as security for the obligations of Arabian Aircraft under the Lease Agreement, was not dissipated or reduced.
26. In support of that submission, the Defendants refer to what they say is the analogous duty of a mortgagee identified by Lord Templeman in the case of Downsview Nominees Ltd v First City Corp Ltd [1993] AC 295. I was also taken to McHugh v Union Bank of Canada [1913] AC 299 as being persuasive authority.
27. The Claimant says that there is nothing in that point. It points out that the learning upon which it relies all relates to mortgagors and mortgagees. In this case we are dealing with a Lessor and a Lessee and, once repudiation had been accepted, the Defendants had no interest whatever in the aircraft, in contrast to the position of mortgagor and mortgagee in a conventional transaction.
28. In my judgment, that is plainly right. If there was anything in that point, the law in this area would by now have taken a different course. There is no real prospect of such a fundamental point succeeding and the difficulties with it may be implicit in the brevity with which it was put. This point is one which I conclude has no real prospect of success and should go no further.
29. At the heart of the submissions of the Defendants, whether put in terms of mitigation or the breach of the chain of causation, is a claim that the Claimant failed to carry out its duty to mitigate its damage. In the action, the duty to mitigate damage is not conceded to apply, but the Claimant concedes that there is such a duty for the purpose only of this application.
30. I have been helpfully taken through the correspondence over the two years in question to the Settlement Agreement in February 2010, which it seems to me, certainly under English law, does not seem to me to be a legally concluded agreement between Bombardier and Credit Suisse. If there had been a binding deal, it would be somewhat surprising to see the parties continuing to negotiate as they did. It seems to me unnecessary for the purposes of this application for me to go into the detailed toing and froing of Credit Suisse endeavouring to reach a conclusion which would allow them to do a deal with Bombardier, to have the aircraft put in a good enough condition to be sold and to realise their security to the indirect benefit of the Defendants.
31. Attention is drawn to the way in which, over the course of time, the volume of the works grew, that, as a result of the deterioration, or for some other reason, the works which Credit Suisse were content to have done moved from routine patching up to very expensive overhauls.
32. It is my view that that debate needs to be seen against a few realities. The starting point is that, as a result entirely of the defaults of the Defendants, the access to the

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aircraft was difficult and a mess had been created, with Bombardier in an excellent bargaining position. There is no duty upon the Claimant to justify what it did every step of the way. The Claimant has to take reasonable steps to mitigate its damage, but it is for the Defendants to show that it has not done so. I have not been taken to the case law because it is well known, but the duty to mitigate is not a high one bearing in mind, in particular, that the person claiming the breach is a wrongdoer. There are those cases that point out that it is not for a defendant to judge a claimant's conduct to a nicety. The test is recognised to be whether or not what has or has not happened is objectively reasonable for someone in the Claimant's position. There is no evidence from any bank or anyone else in that position about what they would or would not have done. We are in a situation where the Defendants were well aware of what was going on or were in a position to inform themselves of that. They could have intervened. They could, at least notionally, have paid off the debt. They could have written to the Claimant objecting to the various things that the Claimant was doing or failing to do, but there is no sign of that at all.

33. At the time when proceedings are brought, the Defendants seek to rely upon a failure to mitigate which does not seem to have occurred to them at any earlier time. It seems to me that there is no real prospect of that defence succeeding, subject to something I am going to turn to in a minute.
34. There are other aspects of the Defendants' case. First, it is contended that the amount of commission paid on the sale was excessive and that needs to be taken into account. There is, it seems to me, no real prospect sufficient to enable that argument to go any further when one sees the unchallenged evidence of Mr McInnes and the picture presented from paragraphs 136 to 140 of his witness evidence.
35. Next, as one sees from the Defendants' supplemental note, there is a claim that the sums due to the Claimant need to be reduced by at least \$187,000, for the reasons set out in that note. It is accepted by the Claimant that there is an arguable defence to that \$187,000. That has revealed flaws in the calculations of the Claimant. The Defendants identified those flaws only last night through the diligence of their Leading or, it might just possibly be, Junior Counsel. The Claimant accepts those errors but points out that the Defendants have had a long time to identify them, in fact, since October 2009.
36. The Defendants submit that there are, or may be, other implications from their discovery. Notwithstanding the points made by the Claimant, it seems to me that the Defendants are entitled to take a little time to give thought to that and to apply to the court if they wish.
37. The final point is this. It seems to me that there is very likely no real prospect of this defence succeeding, but there are two factors that, in my view, take it into the category of defences where it is possible that they might succeed, but improbable that they will do so. One is the potential uncertainties over Fair Market Value, although I have made my views on the material fairly clear. The other is that the volume of material on the mitigation points is marginally more convincing than one sees in the worst cases.
38. It seems to me that justice in this case will be done if I give permission to defend, apart from upon those issues on which I have found that there is clearly no prospect of

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success, on condition that the sums in issue be brought into court. I remind myself that that is a proposal which was very sensibly made by the Claimant at an early stage. That will have the advantage of enabling the Defendants to put these claims forward if they want to, but protecting the position of the Claimant.

39. From the amounts to be paid into court, there needs to be deducted the \$187,000, but I have not begun to get to grips with what other financial consequences there will be, about which I will hear from counsel.

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