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Case No: CL-2020-000126

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2021

Before :

Mrs Justice Cockerill DBE

Between :

(1) WILMINGTON TRUST SP SERVICES (DUBLIN) LIMITED **Claimants**
(2) SABARMATI AVIATION LEASING LIMITED (FORMERLY KNOWN AS SKY AIRCRAFT CASSIA TWO LIMITED)
(3) FALGU AVIATION LEASING LIMITED (FORMERLY KNOWN AS SKY AIRCRAFT CASSIA ONE LIMITED)
- and -

SPICEJET LIMITED **Defendants**

Akhil Shah QC (instructed by **Clifford Chance LLP**) for the **Claimants**
Tim Young QC (instructed by **Reed Smith LLP**) for the **Defendants**

Hearing dates: 9th July 2021

JUDGMENT

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(Official Shorthand Writers to the Court)

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Mrs Justice Cockerill :

1. Having listened carefully to what has been said, I am not going to continue the stays of execution.
2. The salient backdrop is that in her judgment Ms Dias QC granted summary judgment to the Claimants on the claim, save as to one element. Having considered the test for a stay, which it was common ground before her, and is common ground before me is a test of exceptionality, she then ordered a stay of execution of the judgments.
3. The Claimants' position is that the stay of execution should not be continued in essence because: (a) the stay has served its purpose in preserving the status quo for a mediation; (b) the Claimants have the benefit of a no set off clause and the stay of execution requires the Court to rewrite the bargain made by the parties; and (c) this is not a case where the Defendants can show exceptional circumstances to justify the Court ordering the continuation of a stay of execution. In writing the Claimants urged me to find that the deputy judge's reasoning was wrong. However orally the argument was sensibly focused rather on the question of whether as circumstances now exist, that test was satisfied.
4. The Defendants' position is that the stay should be continued until trial or further order with liberty to apply. They submit that I must start my consideration of the issue from the assumption that the decision to grant a stay was correct, and that the question therefore becomes one of: what has changed? To that, they says, the answer is nothing, or so little that it would not be a permissible exercise of the discretion to reach the conclusion that the stay should not be continued. In essence it was said that:
 - a. Continuing the stay would encourage mediation: the mediation having terminated suddenly and recently there is some prospect of it being resuscitated and that the Claimants should not be rewarded for what could be inferred to be a tactical termination;
 - b. There is now evidence that there is prospect of an Indian government loan which will be lost if the stay is not continued and that the Defendants have not had time to put together full information on this;
 - c. The fact of the grounding of the Boeing Max jets would itself be an exceptional circumstance;
 - d. At worst there were circumstances which should be investigated, and the stay should be continued to enable that to happen;
 - e. Because of the potential for enforcement to be more difficult if the stay is not granted and financial help falls though, the policy in favour of enforcement indicates that the stay should be maintained.
5. Having carefully considered the skilled arguments of Mr Young QC for the Defendants, I am not persuaded by them.
6. When one looks at what the judgment of the learned deputy judge said, it is plain that she acknowledged the test. The test is a very high one in a case such as the present

where it is common ground that there is a "no set off" clause. The purpose of the 'no set-off' clause is to ensure immediate payment and to ensure that the Claimants are not forced to wait for payment whilst no doubt protracted litigation of the counterclaim takes its course. As noted by Parker LJ in *Continental Illinois National Bank & Trust Company of Chicago v John Paul Papanicolaou* [1986] 2 Lloyd's Rep 441 at 445 it is generally accepted that to grant a stay would be to defeat the whole purpose of the commercial agreement entered into by the parties. This leads to the test which the parties accept is relevant here, which is found in *Credit Suisse v Ramot Plana* [2010] EWHC 2759 (Comm) at [15] "*It is clear that the Court will usually give effect to the bargain made by the parties and enforce a no set-off clause. Although it retains a discretion to grant a stay strong reason for doing so needs to be shown and this is likely to require proof of "exceptional" circumstances*".

7. Taking that starting point, one can see the things which the deputy judge brought into the equation and one can see particularly at [74] that her decision was that, bearing in mind all of these things - but particularly this golden opportunity to mediate, which was just down the road, she considered that the exceptional circumstances test was met. It is quite apparent that she did not come to that conclusion easily. I conclude that her decision was one which was right on the edge of exceptional circumstances – and just tilted in the Defendants' favour.
8. Mr Young has urged me to the view that the conclusion which follows from the result which Ms Dias reached is that this establishes there were exceptional circumstances as at the time of her judgment. What I prefer to say, as I said to him in argument, and which he accepted, is: as at that point, the conclusion that there were exceptional circumstances was one which was open to the judge and that is the conclusion which she reached. In other words, another judge might have reached a different conclusion in relation to that, but the conclusion that there were exceptional circumstances was within the range of conclusions reasonably open to her.
9. It follows that I am not bound to start from the proposition that there were exceptional circumstances and hence I do not think I need to ask the question "what has changed", which Mr Young poses as the key question. I simply need to revisit, bearing in mind that I accept that all of these things were within the range of a conclusion of exceptional circumstances, whether I now, looking at the circumstances as a whole, come to the conclusion that there are exceptional circumstances.
10. On that basis I do not, now that the mediation has taken place, consider that the test is met. However, I have considered the other possibility namely that the question posed is the right one. But even so I would reach the same conclusion.
11. On one level that conclusion could be a very simple one. If the question were "what has changed?", I would conclude that the fact that the mediation has taken place would itself be enough to tip the balance back. If it were the case that the mediation had not meaningfully taken place, or that there had been no real attempt to mediate, things might be different. However here you do have a situation where there plainly has been a mediation, it has been ongoing for some little time – with enough taking place that one side at least felt that progress was being made, which indicates real engagement. While Mr Young says that it has been brought to a precipitate conclusion, there obviously has been an engagement with it; and a mediation which ends without success always has to

end - to some extent a conclusion is inevitably quite sharp. It is accepted that it cannot be said that there has been bad faith in terminating the mediation.

12. So I do conclude that the fact that there has been the mediation and it has not borne fruit puts us in any event in a situation which is materially different to that which confronted the deputy judge at a point when no mediation had taken place.
13. Nor do I consider that the other points relied on tilt the balance back. I do not consider that the evidence that we have on the Indian government loan, which is, with the best will in the world, thin, is enough to then take matters back to just teetering over into exceptional circumstances. What we have is a statement which has no granularity and which gives no source for information which patently cannot be that of the deponent. It is at best unattributed hearsay – and as I say hearsay with no real substance to it. I therefore cannot properly give it any real weight.
14. In any event there would be, as Mr Shah QC submitted, real questions over whether such arguments should be permitted to justify a stay on this basis in circumstances where to do so might well be said to undercut formal regimes for court imposed moratoria where there are solvency issues, which regimes tend to have inbuilt protections for creditors.
15. I do not accept the submission that the right way of going about it is effectively for there to be an opportunity for more evidence to be put in and for the burden of the balance to be in favour of stay of execution with more evidence to be provided. This was grounded in a submission that it was for the Claimants to justify there not being a stay and also in the arguments as to lack of time to prepare. I do not agree with either of these arguments. As to the first, because a stay of execution is exceptional in circumstances where you have an anti set off clause like this and because a stay of execution is to an extent not the default position and hence unusual anyway, the burden must be on the person who seeks to have the stay of execution to justify it. It would be wrong, in circumstances where the balance is not in favour of a stay of execution, to keep the stay in place in order that a burden which has not been discharged should be given an opportunity of being discharged in future.
16. As to the second, this date has, as I noted in the context of the adjournment application, been in the diary since May. The Defendants have been well aware that if they wanted to maintain the stay and the mediation had not by then been successful they needed evidence. Whatever difficulties there are in getting evidence, that was ample time to prepare.
17. So far as the question of the potential for things to be worse if I remove the stay and that that affects the chances of recovery of the debts, there are two answers. The first is that this effectively reprises the argument as to the potential loan, which I have already concluded cannot be given any real weight. The second is that this falls into the category of, so be it; that is effectively the claimants' choice. They have heard the submission loud and clear. They understand that that is the position that is being put forward by the Defendants. They choose to ask for the stay to be lifted and my assessment is that, when looking at whether the test is met for continuing the stay, I conclude that that high hurdle is not, as matters stand at the moment, surmounted.

18. I should add for completeness that nor do I consider the situation as regards the grounding of the Boeing Max jets to be a factor which itself gives rise to a factor which can tilt the balance. The factor has been in play since well before the learned deputy judge's judgment. It adds nothing new to the balance. Further it is exactly the sort of impediment which a clear contractual regime is designed to take out of the equation. This was a factor which ultimately was redolent of an attempt to wrap together a number of small points in the hope that together they might persuade a judge to waver.
19. I am accordingly quite clear that:
 - a. Looking at the matter in the round on the basis that the deputy judge's decision was an available one and nothing she counted can be discounted (as I consider is correct) the hurdle of establishing exceptional circumstances to justify a stay is not met.
 - b. Looking at the matter on the basis that it could be said to be right (as the Defendants submitted) to ask the question "What has changed?", there has been a material change in the occurrence of the mediation, that that change would tilt the balance away from a stay and that nothing else provides sufficient weight to tilt it back.
20. I therefore decline to exercise the discretion to continue the stay of execution.
21. Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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