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IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
COMMERCIAL COURT (QBD)  
[2022] EWHC 1718 (Comm)



No. CL-2019-000762

Rolls Building  
Fetter Lane  
London, EC4A 1NL

Thursday 16 June 2022

Before:

MR JUSTICE JACOBS

B E T W E E N :

AMRA LEASING LIMITED

Claimant

- and -

(1) DAC AVIATION (EA) LIMITED  
(2) DAC INTERNATIONAL AVIATION LIMITED  
(3) EMMANUEL ANASSIS

Defendants

CHRISTOPHER LANGLEY (instructed by K&L Gates LLP) appeared on behalf of the Claimant.

TOM STEWART COATS (instructed by Bird & Bird LLP) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE JACOBS:

**A. INTRODUCTION**

1 This is an application by the Defendants to set aside a default judgment made against them on 11 March 2020 in which they were ordered to pay the Claimant the equivalent of £8,992,980.25 (“Default Judgment”).

2 The Claimant (AMRA Leasing Limited (“AMRA”)) is a company incorporated in Ireland, whose primary purpose is the leasing of air passenger transport.

3 The First Defendant (“DAC Kenya”) is a company incorporated in Kenya, which operates aircraft on charter services and also provides aircraft maintenance services and related support systems.

4 The Second Defendant (“DAC International”) is a company incorporated in Canada. It is the parent company of the First Defendant, and its primary purpose is aircraft maintenance and logistics.

5 The Third Defendant is an individual whose address is in Canada. He is the director and chairman of both the First and Second Defendants.

**B. OVERVIEW OF THE UNDERLYING CLAIM**

6 The underlying claim in this action relates to the failure of the First Defendant to comply with its obligations under two separate lease agreements in respect of two Bombardier aircraft, and defaults on the guarantees in respect of those obligations given by the Second and Third Defendants.

7 AMRA and DAC Kenya had entered into:

(i) A lease agreement dated 6 September 2013 (“First Lease Agreement”) in respect of a Bombardier Q400 aircraft with serial number 4052 (“First Aircraft”); and

(ii) A lease agreement dated 8 July 2014 (“Second Lease Agreement”, and together with the First Lease Agreement, the “Lease Agreements”) in respect of a Bombardier Q400 aircraft with serial number 4065 (“Second Aircraft”).

8 The First Defendant’s obligations under the Lease Agreements were guaranteed by the Second and Third Defendants, by which (as co-debtors) they guaranteed the due and punctual payment and performance by the First Defendant of all the guaranteed obligations. The guarantee agreements between the Claimant and each of the Second and Third Defendants were dated 6 September 2013 in respect of the First Lease Agreement, and 21 July 2014 in respect of the Second Lease Agreement. The First Aircraft was delivered on 13 September 2013, and the Second Aircraft was delivered on 7 November 2014.

9 On 24 March 2017, the Claimant served a notice of continuing default on the First Defendant in respect of the First and Second Lease Agreements, with a copy to the Second and Third Defendants (“Default Notice”). In the Default Notice, the Claimant indicated that the First Defendant had failed to pay rent, maintenance payments, and expenses; specified the sums owing; and demanded payment of the sums within five days of receipt of the Default Notice.

- 10 The First Lease Agreement was subsequently varied by an amendment agreement between the Claimant and the First Defendant dated 19 July 2017 and a side letter dated 18 August 2017. Those agreements were intended to allow the Claimant to carry out some additional work ahead of a new lease being entered into on 24 August 2017.
- 11 On 4 October 2017, the Claimant served on the First Defendant (with a copy to the Second and Third Defendants) a notice of termination of the Second Lease Agreement (“Termination Notice”).
- 12 On 26 March 2019, the Claimant served written demands on the First Defendant (again with a copy to the Second and Third Defendants) in respect of the First and Second Aircrafts, demanding payment by the First Defendant of the sums set out in those demands.
- 13 On 26 April 2019, the Claimant served further demands on the First Defendant, claiming the debt payable under each of the First and Second Lease Agreements. It also served demands on each of the Second and Third Defendants, demanding payment from them.

**C. THE LITIGATION HISTORY**

- 14 The litigation history of this application is as follows. The litigation which I will describe took place in England unless specified as having taken place in Kenya.
- 15 The Claimant served upon the Defendants the following pre-action correspondence, to which they received no response: Default Notices in March 2017 which I have described, demands for payment in March 2019 which I have described, and letters before action in April 2019.
- 16 On 9 December 2019, the Claimant filed and served its Particulars of Claim in the present proceedings in which it sought payment of US\$11,795,816 (the equivalent of £8,968,347.18), together with interests and costs, pursuant to the Lease Agreements and guarantees which I have described. It alleged that there had been breaches of the Lease Agreements including, in particular, that DAC Kenya had failed to pay rent on the relevant rent dates; failed to pay maintenance payments; failed to keep the First and Second Aircrafts airworthy and in good repair and condition; failed to redeliver the First and Second Aircrafts in accordance with the required return conditions; and failed to make relevant rectifications. The Claimant also alleged that each of the Second and Third Defendants failed to pay, on demand, sums owing under the respective guarantees.
- 17 By way of overview, the total of US\$11,795,816 as at 9 December 2019 comprised the following sums which the Claimant alleged are owed to it from the First Defendant.
- (i) Under the First Lease Agreement:
    - a) US\$3,276,535 by way of rent, maintenance payments, and costs incurred by the Claimant in order to put the First Aircraft in the return condition as required by the First Lease Agreement;
    - b) US\$128,125 by way of expenses to date; and
    - c) contractual interest.

(ii) Under the Second Lease Agreement:

- a) US\$7,944,543 by way of rent, maintenance payments, and costs incurred by the Claimant in order to put the Second Aircraft in the return condition as required under the Second Lease Agreement. That sum is inclusive of unpaid future rent which was claimed by the Claimant as part of that overall claim;
  - b) alternatively, US\$4,087,500 in respect of lost profits as an alternative to the above claim for unpaid future rent;
  - c) US\$186,581 by way of expenses to date; and
  - d) contractual interest.
- 18 The Defendants take issue with a number of items within the accounts and I will return to the detail of their case in due course.
- 19 The claims to which I have referred are inclusive of various repair costs which the Claimant said that it had incurred. The breakdown of this is of some relevance.
- (i) Under the First Lease Agreement, the Claimant seeks:
    - a) US\$1,868,715 paid to a company which was well-known in this jurisdiction called Flybe which owned and operated aircraft;
    - b) US\$1,283,544 paid to PWC (Pratt & Whitney Canada); and
    - c) US\$151,404 in respect of “Medavia C check and other costs required to meet Return Conditions”.
  - (ii) Under the Second Lease Agreement, the Claimant seeks:
    - a) US\$1,321,686 paid to PWC (Pratt & Whitney Canada);
    - b) US\$1,755,069 for “Medavia C check and other costs required to meet the Return Conditions”;
    - c) US\$354,721 paid to Revima (APU); and
    - d) US\$156,070 in “Other” costs.
- 20 Thus, in relation to the Second Lease Agreement, there is no claim for monies paid to Flybe.
- 21 The Defendants have various responses to aspects of the repair figures which are claimed, and I will discuss these in due course.
- 22 The claim having been served and particulars having been served, on 24 December 2019, each Defendant filed and served an Acknowledgement of Service in which it indicated that it intended to defend the claim.
- 23 In early January 2020, there was some discussion between the firms of solicitors acting for the Defendants and the Claimant respectively. By that time, Bird & Bird had been instructed by the Defendants and the Claimant’s case was being advanced by K&L Gates. An agreement was reached between them in early January 2020 for an extension of time for service of the defence for approximately four weeks until 6 February 2020. However, no

defence was served by that time or at all. No request for an extension was made of the Claimant and neither was an application for an extension made to the Commercial Court.

- 24 On 11 March 2020, as I have described, the court entered Default Judgment and on 19 March 2020, the Default Judgment was served on the contractually appointed process agents by email.
- 25 On 6 May 2020, the Claimant made an application to register the Default Judgment in Kenya and on 29 May 2020, the Kenyan court granted registration and recognition of the Default Judgment. It is plain that by that time, the Defendants were fully aware of the proceedings and of the Default Judgment, and on 9 July 2020, they made an application to the Kenyan court to pay the judgment by instalments. Such application to the Kenyan court intimated that the Defendants reserved their right to apply to the English court to set aside the judgment.
- 26 There was a suggestion in the course of argument by Mr Stewart Coats, who appears for the Defendants, that in the course of the Kenyan proceedings, the Claimant was told that there was an intention to apply to set aside the Default Judgment and that an application had, in fact, been made to do that. The documentary evidence indicates that there was an intimation of the possibility of an application to set aside, because there was a reservation of rights on 9 July 2020. However, there is nothing in the contemporaneous written materials, at least, which shows that the Claimant was aware that any application had, in fact, been made.
- 27 The application was, in fact, made on 21 August 2020 when the Defendants lodged an application notice with the court, together with a supporting witness statement of Mr Emmanuel Anassis, seeking to set aside the Default Judgment which had been entered just over five months earlier.
- 28 Three days later, on 24 August 2020, the Kenyan court ordered that the Defendants pay the amount of the Default Judgment by way of monthly instalments, and also that in the event of the Defendants defaulting on any of the instalment payments, the entire debt should become due and owing with the Claimant being entitled to proceed with execution.
- 29 On 21 October 2020, some two months after the application to set aside had been issued, the Defendants served the set aside application on the Claimant. The explanation for the delay of two months in service is a matter to which I will return in due course.
- 30 On 1 November 2020, the Defendants failed to make the first monthly instalment that was due pursuant to the Kenyan court order of 24 August 2020, with the consequence that the entire judgment sum, together with interest, became due and owing to the Claimant.
- 31 On 18 November 2020, the Claimant served a statutory demand upon the First Defendant in Kenya.
- 32 On 8 December 2020, the Defendants applied in Kenya for a stay of execution of the Default Judgment until the set aside application is heard. That was shortly before the expiry of the 21-day deadline set out in the statutory demand.
- 33 There was then a protracted delay in this matter coming on for hearing in order to determine the Defendants' application to set aside the Default Judgment. In my view, it is not necessary to recount the history of how matters progressed, although it is fair to say that they were progressed slowly by the Defendants. In the end, however, I have decided that the delay subsequent to the application being made and served is not a matter of great

significance in relation to my overall decision. As at today, the Defendants have not filed a defence. That is somewhat unusual in the context of applications to set aside default judgments but there is no requirement that a defence should be served and, again, I do not consider that to be a particularly material matter. Such defences as exist have been articulated clearly by Mr Stewart Coats and I must consider this application in the context of the arguments which have been addressed to me.

**D. LEGAL PRINCIPLES: SETTING ASIDE A DEFAULT JUDGMENT**

34 Under CPR 13.3(1):

“...the court may set aside or vary a [default] judgment ... if –

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why –

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim.”

35 CPR 13.3(2) provides that:

“In considering whether to set aside or vary a [default] judgment ... the matters to which the court must have regard include whether the person seeking to set aside [or vary] the judgment made an application to do so promptly.”

36 The authorities indicate that the burden is on the applicant to show a good reason why a judgment regularly obtained should be set aside (see *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [9] *per* Potter LJ).

37 An important question on such an application, therefore, is whether the defendant has established that it has a “real prospect” of successfully defending the claim. This means more than a merely arguable case. The distinction between a real and fanciful prospect of success is that the defence sought to be argued “must carry some degree of conviction” (see *ED&F Man Liquid Products Ltd v Patel* at [8]). The notes to CPR 13.3 in the White Book describe the “major consideration” on an application to set aside as being whether the defendant has shown a real prospect of successfully defending the claim or some other good reason why the judgment should be set aside.

38 A frequently cited statement of the relevant principles concerning “real” or “realistic” prospect is set out in the judgment of Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) in the context of applications for summary judgment. Lewison J identified the following considerations at [15]:

“i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

- iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
- vii) ... If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

39 It is not necessarily enough, however, to show that there are real prospects of defending the claim. The decision as to whether a judgment should remain in place remains a discretionary decision. An important factor, which is given prominence by CPR 13.3(2), is the promptness of the application. The Courts have considered delay in various cases but there is no defined outer limit and what is considered ‘prompt’ depends upon the circumstances of the case.

40 The authorities suggest that, since the advent of the CPR, a claimant will not be lightly deprived of a default judgment: see *Standard Bank Plc v Agrinvest International Inc* [2010] EWCA Civ 1400. At [22] of that case, Moore-Bick LJ said:

“The Civil Procedure Rules were intended to introduce a new era in civil litigation, in which both the parties and the courts were expected to pay more attention to promoting efficiency and avoiding delay. The overriding

objective expressly recognised for the first time the importance of ensuring that cases are dealt with expeditiously and fairly and it is in that context that one finds for the first time in rule 13.3(2) an explicit requirement for the court to have regard on an application of this kind to whether the application was made promptly. No other factor is specifically identified for consideration, which suggests that promptness now carries much greater weight than before. It is not a condition that must be satisfied before the court can grant relief, because other factors may carry sufficient weight to persuade the court that relief should be granted, even though the application was not made promptly. The strength of the defence may well be one. However, promptness will always be a factor of considerable significance, as the judge recognised in paragraph 27 of his judgment, and if there has been a marked failure to make the application promptly, the court may well be justified in refusing relief, notwithstanding the possibility that the defendant might succeed at trial.”

41 Paragraph 13.3.3 of the White Book discusses delay and the authorities on that topic in detail. Those authorities include a statement to the effect that a delay of 59 days in making the application was very much at the outer limit of what could possibly be acceptable.

**E. DELAY**

42 I start with the question of delay or lack of promptness because that, in my judgment, is clearly a very significant factor in this case.

43 There is no dispute in this case that this application was not made promptly. The Default Judgment was entered on 11 March 2020 and notified to the Defendants on 19 March 2020. It is clear that they were aware of it but no steps were taken at all until August 2020. In the meantime, in May 2020, the Claimant started the Kenyan proceedings and this led on 9 July 2020 to the Defendants’ application for a stay of proceedings supported by a witness statement. That witness statement of Ms Potapova reserved the right to apply to set aside but no steps were taken for a further period of around six weeks when the application was made to the Commercial Court on 21 August 2020. In the meantime, the Kenyan court had ordered payment of the Default Judgment in instalments.

44 Even after the application had been issued, steps were not promptly taken to serve it. As I have said, the application was only served on the Claimant on 21 October 2020. The court had promptly sealed the application on the same day that it was made. The Defendants’ solicitors say that the reason that there was a delay in service was that they did not receive notification by email from the Commercial Court that the application had been sealed. I am prepared to accept that that may be factually correct, but I cannot see that it is a good answer in the context of the present case or, indeed, any case. There is always a need when there is an application to set aside a Default Judgment to act promptly and it seems to me that the Defendants’ solicitors should have been taking steps to ensure that the application was monitored so as to see when the court seal had been attached. Had they done so, they would have seen, as is indeed usually the case, that it had been attached very promptly at the time that the application was issued.

45 CPR 13.3(2) speaks in terms of promptness relating to the making of the application and it seems to me that that should include and does naturally include bringing the application to the attention of the Claimant by proper service. However, that is not a critical point in the present case because the delay between March and August 2020, even leaving aside the



delay between August and October 2020, was itself very long. It was well outside the limit of what would ordinarily be considered acceptable.

46 The Defendants' reasons for failing to file and serve a defence in time and then for failing to apply to set aside a Default Judgment any sooner were as follows. As far as filing a defence is concerned, in summary, the Defendants have said in their witness evidence as follows:

(i) Due to serious difficulties in the Defendants' business, the Defendants were unable to fund the preparation of a substantive defence to the claim and were forced instead to concentrate on saving their business which had been adversely affected by various factors. Saving their business included saving the livelihoods of more than 250 people who were employed by the First and Second Defendants in Kenya, Canada, and the Democratic Republic of Congo;

(ii) The business of DAC Kenya is capital intensive and can be severely affected by disruptions to its revenue streams, and it was affected by various issues which had a cumulative negative effect; and

(iii) The First Defendant had previously been a successful revenue-generating business but by the end of 2019, when the claim was issued, it was in severe financial difficulties: DAC Kenya was forced to restructure its banking facilities with the Kenya Commercial Bank and all of DAC Kenya's assets in Kenya were now charged to the bank as security for the sums advanced.

47 As far as failing to file the application to set aside the Default Judgment sooner than August 2020 is concerned, the Defendants' reason for not doing that were, in summary, as follows. The Defendants, after notification of the Default Judgment in mid-March 2020, faced the twin difficulties of the existing business issues facing DAC Kenya which I have already described, and the effects of the global pandemic which had a profoundly negative effect on the aviation business worldwide.

48 The Defendants in their evidence also point out that they have themselves been negatively affected by the pandemic in the sense that many customers have delayed in making payments, and that DAC Kenya is owed approximately US\$200,000 in outstanding invoices for its servicing business. Ultimately, the evidence was that it sought to prioritise the settlement of payroll arrears to its employees.

49 Having set out those reasons, I am bound to say that none of these points impress me and I note that in the *Agrinvest* case, the defendant's inability to obtain sufficient funds to instruct solicitors did not impress the trial judge or Moore-Bick LJ.

50 What happened in 2019 was that proceedings were properly commenced in the Commercial Court by the Claimant seeking to use the dispute resolution mechanism under the two commercial contracts which it had concluded with the Defendants. Those proceedings were commenced against a background which I will describe. They were not commenced in a vacuum and did not come as any surprise to the Defendants. The background was that there had been demands for payment including demands in the pre-action protocol where the Claimant's claims had been explained and set out.

51 In the course of the correspondence which preceded the commencement of the proceedings, no substantive defence to any of the claims had ever been intimated. This was a point made by Mr Langley on behalf of the Claimant in his written argument and Mr Stewart Coats has fairly accepted that he could not point me to any document, prior to the time when the

application to set aside was made, where any substantive defence had been intimated, whether in correspondence, formal or informal, or otherwise.

- 52 A further feature of the present case is that the Defendants had, in fact, instructed London solicitors who had acknowledged service and agreed an extension of time. So, unlike many cases of default judgment where the defendant allows a judgment to go by default at a time when it has no legal representation, this is a case where the Defendants had very well-known, and if I might say so, high class solicitors who were acting for them already.
- 53 The effect of the evidence of the Defendants is, as Mr Langley rightly submitted, that the Defendants chose to give priority to other matters such as paying staff rather than to defending the litigation. If the Defendants choose to do that, rather than facing up to their potential legal obligations to creditors and also honouring the dispute resolution mechanism in the contracts which they had concluded, that is a matter of choice. It does not, in my judgment, provide an excuse or a good reason for allowing proceedings to go by default in the first instance or for failing to apply to do anything about the judgment with any real speed. If the position was that there were real financial constraints, such that it was not practicable for the Defendants to put in a defence explaining their position, then that could have been explained to the court by way of an application to extend time. That would not have been an enormously expensive exercise and it was one which could, in my judgment, have been done.
- 54 Furthermore, if there was, in fact, a genuine defence to the claim and this was known to the Defendants, it does not seem to me that it would have been an enormously expensive exercise for that defence to have been articulated and served in accordance with the CPR, or for that defence to have been articulated, had there been a Default Judgment, in a prompt application to set aside. In fact, none of that happened. The real problem, as it seems to me, is that the Defendants at that time did not know what their defence was. They had, as I have said, never articulated any defence in correspondence despite having known of the claim for some time. The fact that they did not know what their defence was is also borne out by the delay of approximately six weeks between the witness statement in Kenya, which intimated reservation of rights to apply to set aside the English judgment, and the application which was actually then made towards the end of August 2020. The likely reason for the further delay between those two times is that an application to set aside would have required some articulation of the Defendants' defence and nothing had hitherto been articulated or identified.
- 55 I accept that, as a matter of law, this delay was not fatal. Ultimately, as Moore-Bick LJ said in *Agrinvest* at [24], one must look at all the circumstances of the case. However, I bear in mind that I am considering a case of Defendants allowing a judgment in default to be entered for unimpressive reasons, against a background where the Claimant's case had been known for some time and there had never been a response by the Defendants. There was then a clear lack of promptness in making the application, whether one is looking at August or October 2020. In the meantime, steps had been taken to enforce the judgment in Kenya on a regular judgment properly obtained.
- 56 Against this background, I consider that the lack of promptness is, in the present case, as it was in *Agrinvest*, a matter of very considerable weight. This means, in practical terms, that unless I am persuaded that there was a defence which looked strong or which for some other reason should be explored at trial, the judgment regularly obtained should remain in place notwithstanding the possibility that there might be a defence which might possibly succeed a trial.

**F. REAL PROSPECT OF SUCCESS**

57 Against this background, I turn to the merits of the defences which are advanced. There are a number of preliminary points to be noted.

58 First, an important starting point is that it is accepted on behalf of the Defendants that there were defaults under both leases in respect of some obligations which were owed by the First Defendant. In particular, rent was unpaid.

59 Secondly, such defences as do exist do not go to the entirety of the amounts claimed. I also note that there is no counterclaim which has been intimated.

60 Thirdly, one issue, which featured prominently in the Defendants' evidence and written argument, related to the position of repairs under the leases. There is a substantial claim by the Claimant for repair costs as I have already described. The Defendants' principal answer to that case was that the repairs themselves were the consequence of corrosion which was present at the time when the two aircraft were delivered under the leases. The Defendants rely heavily upon the existence of corrosion as an answer to the case advanced for the repair costs.

61 In the course of questions that I put to Mr Stewart Coats, it became clear, in my judgment, that this aspect of the defence was unsustainable as a matter of law and, indeed, fact. In brief, there were acceptance certificates which were provided for in the Lease Agreements, and these were, in due course, signed. The decision of the Court of Appeal in *Olympic Airlines SA v ACG Acquisition XX LLC* [2013] EWCA Civ 369 makes it clear that, in circumstances similar to the present, this will, in practice, preclude any claim based upon defects alleged to have existed at the time of delivery. The signed acceptance certificates are conclusive as to the satisfactory nature of the aircraft as delivered.

62 Mr Stewart Coats did not, as I understood it, put forward any real argument as to how the *Olympic Airlines SA* case in the Court of Appeal could be distinguished and he recognised that there were considerable difficulties in seeking to suggest that it could be distinguished. He did refer me to an earlier judgment of Hamblen J at an earlier stage in the same *Olympic Airlines* litigation. However, the judgment of the Court of Appeal, referred to above, was given after the matter had gone to trial before Teare J, and it is clear that that Hamblen J's judgment can no longer be regarded as authoritative or weighty in relation to issues as to the relevance of an acceptance certificate. In [53] of the judgment, Tomlinson LJ, with whom the other judges agreed, indicated that he did not agree with the approach of Hamblen J or at least the approach of Hamblen J as prayed in aid by Mr Shepherd QC in that case. It therefore seems to me that this is an insuperable difficulty for the Defendants in seeking to advance a case based upon alleged corrosion at the time when the aircraft were delivered and to rely upon that as a reason why the repair costs should not be paid.

63 In addition, I accept Mr Langley's points that the Defendants' argument is even more difficult than it was in *Olympic Airlines*. In the present case, the contract clearly says that subject to the matters covered in Schedule 6 to the lease agreement, the delivery of the aircraft was on an "as is" basis. None of the corrosion matters which are now relied upon are covered by Schedule 6. This provides a further reason why this aspect of the Defendants' case is not sustainable.

64 It also seems to me, in any event, that this aspect of the case lacks any factual merit. The evidence is that there were inspections by the Claimant itself before delivery and then further inspections were carried out over a period of time by the Defendants themselves.

There was, in the correspondence which I have seen, no complaint about the condition of the aircraft at the time that delivery was taken and the acceptance certificates were, as I have said, signed.

- 65 Perhaps more importantly, there is no evidence of any complaints thereafter, and no articulation of this particular defence until after the application to set aside the Default Judgment had been made. The point was then briefly identified in the witness statement of Mr Emmanuel Anassis.
- 66 Having disposed of that point, this means that there are really only two points which were in issue and which gave rise to possible defences and, in my judgment, partial defences at that. Both points related to aspects of mitigation although they were somewhat different.
- 67 The first point concerns the claim which was made under the Second Lease Agreement for the rentals which would have been paid by the First Defendant had the Second Lease Agreement run its course and not been prematurely terminated by reason of the admitted default. This point does not arise under the First Lease Agreement, since the aircraft was returned to the Claimant in mid-2017 and the Claimant's evidence was that it was possible to re-lease it. That is the reason why in relation to the First Lease Agreement there is no claim for the lost rental during the period of time that the lease would have continued.
- 68 The position under the Second Lease Agreement was, however, different. The Second Aircraft was returned, as it was explained to me, either in late 2017 or early 2018, sometime after the First Aircraft had been returned. Moreover, the evidence indicates that the condition of the Second Aircraft was different to that of the First Aircraft and that repairs more extensive than those required for the First Aircraft were required.
- 69 The question of mitigation was raised, albeit briefly, in the witness statement of Mr Emmanuel Anassis in August 2020 as part of the application to set aside. The point which was raised was that the Claimant should have leased the aircraft elsewhere and therefore that there was no basis for a continuing claim in respect of rentals which would have been received during the rest of the agreement. There is no dispute as a matter of principle that if there was a failure to mitigate, the Claimant's contractual entitlement to the additional rentals would be qualified. However, the Claimant's answer to that point, as articulated by Mr Paul Clark in his witness statement, was as follows at paragraph 4.2(b):

“As to mitigation, AMRA immediately re-leased the First Aircraft at the same rental level as had been payable by DAC, so no claim has been made for unpaid future Rent under Clause 20.3(1)(a) of the First Lease Agreement. As regards the Second Lease Agreement (terminated in October 2017), AMRA had positioned the Second Aircraft at Medavia, Malta to carry out the extensive work required in order to put the Second Aircraft back into service. The Second Aircraft was deregistered from Kenya and registered in Malta on 11 January 2018 and a workscope and budget agreed with Medavia. Although most of the work was completed in 2018, additional work was required in 2019 in order to comply with new airworthiness directives that had been issued (notably ADS-B and air worthiness directives affecting the fuel tanks). Although not yet complete, the Second Aircraft was marketed extensively during 2018 and 2019 but no acceptable offers were forthcoming. As a result of the pandemic and the collapse of several other Q400 operators (notably Flybe), marketing

effectively ceased during early 2020, although the Second Aircraft was finally sold at a substantial loss in January 2021.”

- 70 The principal argument advanced on behalf of the Defendants is that that evidence was not satisfactory and was incomplete. That evidence indicated, so the Defendants submitted, that some offers were or at least may have been received but Mr Clark had not explained why those offers were not acceptable. The primary case made by the Defendants was that the aircraft should have been re-leased.
- 71 The case was also put, but very much as an alternative argument, on the basis that the Claimant should have sold the aircraft earlier than it did. However, I could not see any basis for an argument that the Claimant should have mitigated its loss of rental by disposing completely of the asset which it owned. This is not a case where the Claimant makes any claim for the value of the asset at a later date, in which case, one could potentially see why it might be said that a failure to obtain a higher price earlier would be relevant as a matter of mitigation.
- 72 As far as the case in relation to inability to re-lease is concerned, the cases on both sides are lacking in detail. On the Defendants’ side, Mr Anassis and subsequently Mr Murphy, who have both given witness statements, say nothing about the state of the market or any potential lessees given the state of the market and the state of the aircraft. Moreover, a significant part of the period for which rentals are claimed is the period after the pandemic. The Covid pandemic began to have its impact by March 2020. It is well-known that the aviation market collapsed in light of the pandemic and this was a lease which only expired at or towards the end of 2020. So, the Defendants’ case lacks detail and can have no real substance in relation to the period after March 2020.
- 73 On the other hand, I think it can fairly be said that Mr Clark’s witness statement does not contain a great deal of detail either. He refers to acceptable offers not being forthcoming but does not explain what offers there were and why they were not acceptable. Had this been a case where the defendant had acted promptly to set aside a default judgment, I might possibly have been inclined to vary the Default Judgment to allow this point to be explored further through the disclosure process. That would have been on the basis that it is the sort of point which would be elucidated by further material which is only in the possession of the defendant, and that in accordance with the principles in *Easyair*, it might be inappropriate where an issue such as this is raised to grant summary judgment. If I were to ask myself the question whether, if I was not dealing with the case of setting aside a default judgment but was dealing with an application for summary judgment, I would be inclined to grant summary judgment in respect of the mitigation point, my inclination would have been to think that it would be inappropriate to do so at least until disclosure has been given.
- 74 On the other hand, it does seem to me that there is no particular strength in the point which has been raised by the Defendants and, to some extent, it is a speculative point. It is difficult to see, for example, why the Claimant would not have wanted to receive the benefit of an income stream if they could have had it. Mr Clark’s evidence, albeit not supported by documentary materials, is that there was extensive marketing of the aircraft in 2018 and 2019. It would be surprising for an aircraft to have been extensively marketed if there was no intention to lease it if an acceptable offer were forthcoming. As I have said, this is a potential argument but I would describe it as a somewhat speculative argument on the part of the Defendants.

- 75 Against the background of a lack of promptness and a lack of detail in the case advanced, and the fact that evidence towards this topic has been given by Mr Clark, albeit not particularly detailed, I consider that primacy should be given to leaving the judgment in place in view of the approach which the Defendants have taken to this judgment. It seems to me that that is to accord proper weight in all the circumstances to the lack of promptness on their part in seeking to apply to set it aside. Accordingly, this is a case where, although there might possibly be a defence, the conduct of the Defendants is such that it is appropriate for the judgment to be left as it is.
- 76 Essentially for the same reasons, I reach the same conclusion in relation to the mitigation argument which was developed about the costs incurred by Flybe. The position is that Flybe carried out certain repairs to the First Aircraft. Looking at the table to the Particulars of Claim, the costs which were related to Flybe concern the First Aircraft and not the Second Aircraft. The argument that Flybe's costs were excessive was not raised in the witness statement of Mr Anassis dated 21 August 2020. He does, in particular in paragraph 28, complain about high repair costs. However, the point which he was making is that the repair costs were high because of the corrosion problems of which he was complaining. That does not seem to me to be an argument which posits that Flybe was charging too much for the work which it was carrying out. That argument was first raised in the witness statement of Mr Clark which came at a later stage in the process.
- 77 It seems to me that the arguments that Flybe's costs were too high is a point which is not consistent with the contemporaneous documents. I was referred by Mr Langley to the email from Mr Massari to Mr Murphy on 17 June 2016, which was sent in the context of the First Aircraft. Mr Murphy wrote:
- “Seems like MTD has been doing quite a bit of behind the scenes work without letting us know.”
- 78 Mr Massari said in response:
- “Martin, agreed. I just received the quotes they got and it appears they want the aircraft done in Europe. I will just speaking with Jane and don't know if fighting this battle could be worth the potential headaches it could cause. Flybe quote is competitive and we are going to work on having AMRA/MDT pay Flybe directly so it does not effect our cash flow.”
- 79 Two points emerge from that email. First, there is the point that the Flybe quote was described as competitive. This contemporaneous evidence indicates that Flybe was not overcharging for its work. Secondly, the point was raised by Mr Massari that it was advantageous for Flybe to be engaged to do the work, because it might mean that the Claimant itself would be funding the work. That would be advantageous to the Defendants' cash flow. The point that Flybe was charging too much, as I have said, only emerged in the witness statement of Mr Murphy, in particular, in paragraph 6. It seems to me, given the contemporaneous material, that that point, which only goes to one aspect of the repair costs rather than to their entirety, has even less potential merit than the other mitigation point which I have already described. It seems to me to be an entirely speculative argument and it is not one which, in my view, should be given any material weight given the lack of promptness to which I have referred in making this application.

80 For all those reasons, I consider that this is a clear case in which the exercise of the court's discretion should be in favour of leaving the judgment as it is. I therefore decline to set aside the Default Judgment and will dismiss the application.

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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.