



Neutral Citation Number: [2022] EWHC 382 (Comm)

Case No: CL-2020-0000856

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2022

Before :

SIMON SALZEDO QC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

GASL IRELAND LEASING A-1 LIMITED

Claimant

- and -

SPICEJET LIMITED

Defendant

PHILIP SHEPHERD QC and ERIN HITCHENS (instructed by **Watson Farley & Williams LLP**) for the **Claimant**
TIMOTHY YOUNG QC and RUPERT HAMILTON (instructed by **Reed Smith LLP**) for the **Defendant**

Hearing dates: 17 February 2022

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIMON SALZEDO QC SITTING AS A JUDGE OF THE HIGH COURT

SIMON SALZEDO QC :

Introduction

1. SpiceJet is an airline based and registered in the Republic of India. In common with many airlines, its financial position has been weakened by the consequences of the Covid 19 pandemic. SpiceJet has not made certain rental payments which are, on the face of things, due in respect of one particular aircraft. The Aircraft is a Boeing 737 800 passenger jet, manufacturer serial number 29670, fitted with two CFM 56 7B26 engines with serial numbers 892380 and 892381 (the "Aircraft".)
2. In the course of yesterday, I heard the claimant's application for summary judgment in respect of the payments of Rent, Supplemental Rent and Default Interest which it claims are due to it in respect of the Aircraft. The total of the payments in respect of which judgment is sought is something over USD5 million. This is my judgment on that application.

Procedural history

3. The claimant filed its claim on 22 December 2020. The claim form was served on the defendant on 18 February 2021. The claimant filed and served its Particulars of Claim on 22 March 2021. The defendant filed and served its Defence on 10 June 2021.
4. On 15 October 2021, the claimant sent to the defendant an Amended Claim Form and Amended Particulars of Claim. Among other matters, the amendments to the Claim Form and the Particulars of Claim updated the sums of Rent, Supplemental Rent and Default Interest claimed as part of the unpaid rent claim, to take into account the additional rent and supplemental rent which the claimant said had accrued up to the time of the redelivery of the Aircraft and also the accrual of default interest up to 15 October 2021.
5. On 4 November 2021, the claimant sent the defendant a draft reply and requested the defendant's consent to file the reply outside the time specified in the CPR. The present summary judgment application was issued on 5 November 2021. A case management conference took place on 12 November 2021 before Mrs Justice Moulder.
6. In its case management information sheet, the defendant sought an order staying the claim in favour of mediation, which Mrs Justice Moulder did not grant. I am told that she indicated that the parties should give serious consideration to mediation, but I have not seen a transcript and the parties disagree about the context of that remark, in particular about whether it related primarily to the claim with which I am now dealing or to the remainder of the claim which is not was and is not the subject of the summary judgment application and is therefore proceeding in any event to trial. That remainder relates to the claimant's allegation that the defendant redelivered the Aircraft in non contractual condition in various detailed respects. I do not have any materials upon which I could seek to resolve the dispute about the context for Mrs Justice Moulder's comments.

7. At the case management conference on 12 November 2021, Mrs Justice Moulder made orders, including, in relation to statements of case, the following:
- “2. The Claimant has permission to file and serve Amended Particulars of Claim in the form of the draft included in the Case Management Bundle.
3. The Defendant has permission to file and serve an amended Defence to respond to the amendments in the Particulars of Claim on or before 26 November 2021.
4. The Claimant has permission to file and serve a Reply in the form of the draft included in the Case Management Bundle, as modified to respond to the Amended Defence, on or before 10 December 2021.
5. The Claimant shall (if so advised) file and serve an amended version of Appendix 2 to its Statement of Case to include further and better particulars of the claims set out therein not later than 31 January 2022.
6. The Defendant shall (if so advised) file and serve a document setting out its defence to any amended version of Appendix 2 by no later than 28 February 2022 (subject to the Defendant's liberty to apply to the Court for an extension of time).”
8. She also made orders in relation to the present summary judgment application:
- “9. Any further evidence in respect of the Summary Judgment application dated 5 November 2021 shall be filed and served:
- a) by the Defendant in answer no later than 10 December 2021; and:
- b) by the Claimant in reply no later than 23 December 2021.
10. There shall be a hearing of the Claimant's summary judgment application dated 5 November 2021 as soon as possible thereafter but not before 14 January 2022, with a time estimate of four hours.”
9. Pursuant to the order of Mrs Justice Moulder, a Re amended Particulars of Claim was filed on 31 January 2022, and I have also had regard to an Amended Defence dated 8 December 2021 and the (undated) Reply.
10. Following the hearing yesterday, in the evening of 17 February 2022 the defendant purported to file and serve a Rejoinder, about which I will say more later in this judgment.

Contracts

11. The Aircraft was leased by Airspeed UK Leasing 1 Limited to NOK Airlines Public Company Limited (“NOK”) under a lease dated 10 August 2012 (the “Head Lease”). NOK leased the aircraft under intermediate lease with Jabberjay Leasing Limited (“Jabberjay”) dated 12 May 2017 (the “Intermediate Lease”). Jabberjay sub leased the aircraft to the defendant under a sub lease dated 10 May 2017 (the “Sub lease”).
12. On 17 May 2017, Jabberjay assigned its interest under the Sub lease to NOK as security for Jabberjay's obligations to NOK under the Intermediate Lease. The Sub lease contained the following important provisions:
13. First, at clause 8.3, under the heading “Absolute obligations”, there were provisions which the claimant told me are known as “hell or high water” obligations, citing *Salam Air SAOC v Latam Airlines Groups SA* [2020] EWHC 2414 (Comm) [52], and see also *Petromec v Petroleo Brasileiro SA* [2005] EWCA Civ 891 [9]. These were as follows:

“8.3 Absolute Obligations

(a) Sub lessee's obligations to pay Rent and to perform any of its other obligations pursuant to this Agreement are absolute and unconditional. Sub lessee may not regard its obligations as terminated, suspended or altered (and waives to the greatest extent permitted by applicable Laws any rights which it may have at any time to terminate, suspend or alter such obligations) by reason of any contingency or circumstance whatsoever, including (but not limited to):

(i) any right of set off, counterclaim, recoupment, reimbursement, defence or other right which Sub lessee may have against Head Lessor, Owner Intermediate Lessor, Sub lessor, Manufacturer, any seller or any other person;

(ii) any unavailability of the Aircraft after the Delivery Date for any reason or interruption of or interference with Sub lessee's use, operation or possession of the Aircraft;

(iii) any defect in title, airworthiness, condition, design, operation of fitness for use of, registration of the Aircraft or any damage to or loss or destruction of the Aircraft;

(iv) any insolvency, bankruptcy, reorganisation, arrangement, readjustment of debt, dissolution, liquidation or similar proceedings by or against Head Lessor, Owner, Intermediate Lessor, Sub lessor or Sub lessee or Any other Person; and:

(v) any invalidity or unenforceability of or other defect in, this Agreement.

(b) The provisions of this Clause 8.3 (Absolute Obligations) shall not be construed to limit Sub lessee's right to take

independent legal proceedings against Sub lessor in the event of Sub lessor's breach of the terms of this Agreement or to limit Sub lessee's rights and remedies against any other Person.”

14. Secondly, there was provided at clause 8.7:

“Sub lessor's Determination of Amounts Due

Any certificate or determination by Sub lessor as to any rate of interest (which shall be capped at the Default Rate) or as to any other amount payable under this Agreement shall, in the absence of manifest error, be conclusive and binding on Sub lessee.”

15. Thirdly, the Sub lease provided at clause 20.2(a)(iii) as follows:

“Sub lessor's Rights

(a) Sub lessor Rights and Remedies: If an Event of Default occurs, Sub lessor (unless specified below) may at its option (and without prejudice to any of its other rights or remedies under this Agreement or available under applicable law), at any time thereafter while such Event of Default is continuing (and subject to compliance with any mandatory requirement of applicable Law then in effect):

... (iii) either:

(A) take possession of the Aircraft, for which purpose Sub lessor may enter any premises belonging to or in the occupation of or under the control of Sub lessee where the Aircraft may be located, or cause the Aircraft to be redelivered to Sub lessor at the Redelivery Location (or such other location as Sub lessor may require), and Sub lessor is hereby irrevocably by way of security for Sub lessee's obligations under this Agreement appointed attorney for Sub lessee in causing the redelivery or in directing the pilots of Sub lessee or other pilots to fly the Aircraft to that airport and will have all the powers and authorisations necessary for taking that action; or:

(B) by serving notice require Sub lessee to redeliver the Aircraft to Sub lessor at the Redelivery Location (or such other location as Sub lessor may require).

Each of Sub lessor and Sub lessee acknowledges and agrees that the rights exercisable by Sub lessor under this Clause 20.2(a)(iii) shall also be exercisable by each of Head Lessor, Intermediate Lessor and Owner.”

16. On 14 January 2019, the following agreements were made:
- (a) a novation and amendment deed between Airspeed, NOK and the claimant, by which Airspeed's rights and obligations under the Head Lease were novated to the claimant.
 - (b) a lease security assignment between the claimant and NOK, under which NOK assigned its interest under the Intermediate Lease and the Sub lease to the claimant as security for its obligations under the Head Lease.
17. On the same date, there was also made the most important agreement for present purposes, which was entitled "Notice and Acknowledgement" (the "Notice and Acknowledgement") and which was made between the claimant, NOK, Jabberjay and the defendant. Clause 4 of this agreement provide as follows:

"4. Enforcement of Security

4.1 Subject to (i) paragraph 4.2 below and (ii) the terms of the Security Assignments:

- (a) the Lessee may exercise all its rights, powers and discretions under the Sub Lease without the prior written consent of the Head Lessor; and:
- (b) the Lessor may exercise all its rights, powers and discretions under the Lease without the prior written consent of the Head Lessor.

4.2 If the Head Lessor issues an Enforcement Notice to the Lessee and Sub Lessee:

- (a) all the rights, powers and discretions of the Lessee (under the Sub Lease) and the Lessor (under the Lease and the Sub Lease Security Assignment) will be exercisable by, and notices must be given to, the Head Lessor (or as it directs) to the exclusion of the Lessee and the Lessor;
- (b) all money that may be payable by (i) the Lessee under the Lessor Assigned Documents and (ii) the Sub Lessee under the Sub Lease, shall be paid to such account as the Head Lessor may from time to time direct;
- (c) the Lessee and the Sub Lessee shall ignore the purported exercise of any such rights referred to in paragraph 4.2(a) above by the Lessee and/or the Lessor (as applicable) unless countersigned by the Head Lessor; and:
- (d) such notice shall continue to apply until the Lessee and/or the Sub Lessee receive further notice to the contrary from the Head Lessor."

18. “Enforcement Notice” was defined in clause 1.2 as meaning “a notice from the head lessor stating that an event of default under the head lease has occurred and is continuing and the security created under the security assignments has become enforceable”.

Other facts

19. On 22 March 2020, the claimant purported to issue and serve an Enforcement Notice, which I will call the First Enforcement Notice, though I understand there was an earlier one that is no longer important. The First Enforcement Notice describes itself as being sent “via courier and email”. It refers to the contractual documents including the Notice and Acknowledgement which, together with other documents, is called in the First Enforcement Notice the “security assignment”.
20. The First Enforcement Notice read as follows:

“Via Courier and Email.

22 March 2020.

Spicejet Limited, 319, Udyog Vihar, Phase 4, Gurgaon 122016,
Haryana, India.

Attention: Legal Department.

Re: The Sub Lease Security Assignment dated 17 May 2017 between Jabberjay Leasing Limited (“Jabberjay”), as assignor and Nok Airlines Public Company Limited (“NOK”), as assignee, in respect of one (1) Boeing 737 800 Aircraft bearing Manufacturer's Serial Number 29670 (as amended, modified, supplemented and/or novated from time to time, the “Sub Lease Assignment”) and Lease Security Assignment, dated 14 January 2019, between GASL Ireland Leasing A 1 Limited, as assignee (“GASL Ireland”), and NOK, as assignor, together with the Notice and Acknowledgement to Security Assignment dated 14 January 2019 (the “Security Notice”) acknowledged and agreed by NOK, Jabberjay and Spicejet (collectively, the “Security Assignment”).

ENFORCEMENT NOTICE.

Dear Sir

We refer to the Sub Lease Assignment and the Security Assignment. All capitalized terms used herein shall have the meanings ascribed to such term in the Security Assignment, unless otherwise defined herein. We herewith inform you that GASL Ireland has issued a Notice of Default and Demand for Payment to NOK under the Aircraft Lease Agreement dated 10 August 2012, between GASL Ireland, as lessor, and NOK, as lessee. We are sending you this Enforcement Notice in

connection the exercise of our rights under the Security Assignment. Pursuant to Clause 4.2 of the Security Assignment, with immediate effect we (a) are exercising all of the rights, powers and directions of Jabberjay (under the Sub Lease) and NOK (under the Intermediate Lease and the Sub Lease Security Assignment) to the exclusion of NOK and Jabberjay and (b) hereby direct you to pay all money that is payable under the Sub Lease to the GASL account (defined below) until further notice. Furthermore, as agreed in the Security Notice, you shall ignore the exercise of any rights of NOK and Jabberjay unless countersigned by us. 'GASL Account' shall mean: Bank: Allied Irish Bank Plc, account Name: GASL Ireland Leasing A 1 Limited. Account No: 25177922. Sort Code: 930067. BIC: AIBKIE2D. IBAN: IE39AIBK93006725177922. This Enforcement Notice shall continue to apply until you receive further written notice to the contrary from us. Enforcement Notices have been sent to NOK and Jabberjay as well. This Enforcement Notice and GASL Ireland's actions hereunder are without prejudice to, and GASL Ireland hereby expressly reserves and does not waive, all other rights and remedies of GASL Ireland under the Security Assignment, at law and at equity, with respect to the Event of Default which is the subject of this Enforcement Notice including, but not limited to, GASL Ireland's right to repossess the aircraft and to recover all past and future damages on account of NOK's defaults. This Notice shall be governed and construed in accordance with Clause 9.1 of the Security Assignment. The omission of a reference to any Event of Default or breach which has also occurred does not and will not prejudice, nor constitute a waiver of, any rights we may have either generally, under the Security Assignment, or in respect of this Enforcement Notice.

Sincerely,

GASL IRELAND LEASING A 1 LIMITED.

Name: Karl Griffin,

Title: Director.”

21. Between May and July 2020, the defendant made four part payments of rent to the claimant's account specified in the First Enforcement Notice. It is not in dispute in the present application that these were made and their details were materially as pleaded in the Reply in a passage which I set out at paragraph 38 below:
22. On 15 October 2021, the claimant purported to issue and serve a further Enforcement Notice (the “Second Enforcement Notice”) in the following terms:

“Re: The Sub Lease Security Assignment dated 17 May 2017 between Jabberjay Leasing Limited (“Jabberjay”), as assignor

and Nok Airlines Public Company Limitée (“NOK”), as assignee, in respect of one (1) Boeing 737 800 Aircraft bearing Manufacturer's Serial Number 29670 (as amended, modified supplemented and/or novated from time to time, the “Sub Lease Assignment”) and Lease Security Assignment, dated 14 January 2019, between GASL Ireland Leasing A I Limited, as assignee (“GASL Ireland”), and NOK, as assignor, together with the Notice and Acknowledgement to Security Assignment dated 14 January 2019 (the “Security Notice”) acknowledged and agreed by NOK, Jabberjay and Spicejet (collectively, the “Security Assignment”).

ENFORCEMENT NOTICE

Dear Sir: We refer to the Sub Lease Assignment and the Security Assignment. All capitalized terms used herein shall have the meanings ascribed to such term in the Security Assignment, unless otherwise defined herein. We also refer to the Enforcement Notice dated 22 March 2020. We herewith inform you that GASL Ireland has issued a Notice of Default and Demand for Payment to NOK under the Aircraft Lease Agreement dated 10 August 2012, between GASL Ireland, as lessor, and NOK, as lessee. We are sending you this Enforcement Notice in connection with the exercise of our rights under the Security Assignment. For the avoidance of doubt, this Enforcement Notice is sent without prejudice to the Enforcement Notice dated 22 March 2020. We reserve the right to rely on the Enforcement Notice dated 22 March 2020 and reiterate that any and all actions taken pursuant to the Enforcement Notice dated 22 March 2020 were and remain valid. Pursuant to Clause 4.2 of the Security Assignment and to the extent required, with immediate effect, we (a) are exercising all of the rights, powers and directions of Jabberjay (under the Sub Lease) and NOK (under the Intermediate Lease and the Sub Lease Security Assignment) to the exclusion of NOK and Jabberjay and (b) hereby direct you to pay all money that is payable under the Sub Lease to the GASL account (defined below) until further notice, including those amounts due and payable and not paid to date. For the avoidance of doubt, this includes unpaid Rent at the Delayed Rent Rate (as those terms are defined in the Sub Lease), and interest on unpaid Rent and Supplemental Rent at the Default Rate. Furthermore, as agreed in the Security Notice, you shall ignore the exercise of any rights of NOK and Jabberjay unless countersigned by us. GASL Account” shall mean: Bank, Allied Irish Bank Plc. Account Name, GASL Ireland Leasing A I Limited. Account No, 25177922. Sort Code: 930067. BIC: IBKIE2D. IBAN: AIBK93006725177922. This Enforcement Notice shall continue to apply until you receive further written notice to the contrary from us. Enforcement Notices have been

sent to NOK and Jabberjay as well. This Enforcement Notice and GASL Ireland's actions hereunder are without prejudice to, and GASL Ireland hereby expressly reserves and does not waive, all other rights and remedies of GASL Ireland under the security Assignment, at law and at equity, with respect to the Event of Default which is the subject of this Enforcement Notice including, but not limited to, GASL Ireland's right to repossess the aircraft and to recover all past and future damages on account of NOK's defaults. This Notice shall be governed and construed in accordance with Clause 9.1 of the Security Assignment. The omission of a reference to any Event of Default or breach which has also occurred does not and will not prejudice, nor constitute a waiver of, any rights we may have either generally, under the Security Assignment, or in respect of this Enforcement Notice.

Sincerely

GASL IRELAND LEASING A 1 LIMITED.”

23. On 2 November 2020, the claimant's solicitors served on the defendant a letter of demand for payment of unpaid Rent and Supplemental Rent which the claimant says was a lessor determination under clause 8.7 of the sub lease.
24. On 8 March 2021, the claimant instructed the defendant, pursuant to sub lease clause 20.2(a)(iii), to redeliver the Aircraft at Shannon in the Republic of Ireland.
25. On 18 June 2021, the claimant's solicitors wrote to the defendant's solicitors in the following terms:

“By Email.

Reed Smith LLP, The Broadgate Tower, 20 Primrose Street,
London EC2A 2RS.

FAO: Alexander Sandiforth; Richard Hakes.

Dear Sirs/Madams,

GASL Ireland Leasing A 1 Limited (“Claimant”) v SpiceJet Limited (“Defendant”).

1. We refer to your email dated 16 June 2021. Terms used in this letter have the same meaning as those used in the Particulars of Claim filed and served on behalf of our client dated 22 March 2021.

2. As noted in your email, the parties have been engaged in ongoing without prejudice discussions in relation to the Aircraft since prior to the Scheduled Expiry date of 27 November 2020.

3. Those negotiations have not resolved the dispute between the parties.
4. The Aircraft, in our client's view wrongfully, remains in your client's possession. In the Defence filed on behalf of your client on 10 June 2021, your client has not put forward any defence to the claims for (inter alia) unpaid Rent, Supplemental Rent and Default Interest or to the claims set out in Appendix 2 to the Particulars of Claim.
5. In the circumstances, our client sees that there is nothing to be gained from engaging in any further form of Alternative Dispute Resolution, in addition to the lengthy negotiations between the parties which have to date proved fruitless.
6. However, if your client demonstrates some new good faith commitment resolution of the dispute and is willing to assist our client in the exercise of its rights to repossession the Aircraft and in the provision of all necessary documentation, our client is prepared to consider ADR.
7. Our client requests that your client, as a sign of the good faith required for any successful ADR provides the following documents to our client by 5pm (London) on Thursday 24 June 2020:
 - (a) a completed GR Waiver form;
 - (b) a copy of your client's latest Goods and Services Tax returns evidencing payment of Integrated Goods and Services tax (IGST) against the Aircraft;
 - (c) a completed application for an IGST No Dues Letter from the Central Board of Indirect Taxes and Customs for the Aircraft;
 - (d) a letter from a chartered accountant confirming that IGST has been paid against the Aircraft.
 - (e) a Letter undertaking to pay any taxes, if any, that remain unpaid in respect of the Aircraft prior to export;
 - (f) evidence of payment of all airport charges in respect of the Aircraft to date; and:
 - (g) a Letter confirming that the Aircraft has been used for scheduled services as required for import.
8. If all of the above documents are not received by the time stated above, our client is minded to take such steps as are necessary to exercise its Irrevocable De Registration and Export Request Authorisation rights without further notice.

9. Our client reserves all its rights. Yours faithfully.” “Watson Farley & Williams LLP.”

26. The defendant's solicitors replied by email on 24 June 2021 as follows:

“Dear Sirs,

We refer to your letter of 18 June.

Our clients remain willing to return the aircraft and can provide the documents requested. However, their position is that any agreement over redelivery should also take account of the claims made by your client against SpiceJet in the above captioned court proceedings, which should all be wrapped up in one overarching settlement agreement provision of the requested documents and redelivery of the aircraft should not be a precondition to mediation (or to considering mediation, as stated in your letter). The point made in your letter about demonstrating good faith commitment to the resolution of the dispute works both ways especially when there is no commitment to mediation even were the aircraft to be returned.

Therefore it seems to us that if progress is to be made, it makes far more sense for your clients to agree to mediation. Just because negotiations have not yet resulted in a commercial resolution does not mean that a Mediation could not break the impasse. The presence of a mediator may well make all the difference and the parties can of course speak to a mediator confidentially on an individual basis and be more open than they can in commercial discussions, such that the mediator may well be able to assist the parties in making progress.

Our clients remain willing to mediate and it is up to your clients to decide whether they wish to engage in that process. If not, then our clients cannot force them to do so, but we do consider mediation is in the best interests of both parties given the current state of the aviation industry. We hope your clients will be willing to reconsider their position.

Yours faithfully,

Reed Smith LLP.”

27. On 4 August 2021, the Aircraft was redelivered to the claimant at Bangalore in the Republic of India.
28. A further letter of demand was sent on 15 October 2021, which the claimant also asserts was a lessor determination within clause 8.7 of the sub lease.
29. During the hearing on 17 February 2022, I was provided with a further update of the amount said to be due in Rent, Supplemental Rent and Contractual Default Interest.

History of this application

30. The application for summary judgment was, as I have mentioned, filed and served on 5 November 2021. It was supported by the first witness statement of Ms Reimers of the claimant and the first witness statement of Mr Ward of the claimant's solicitors. In response, the defendant filed the first witness statement of Mr Sandiforth of the defendant's solicitors on 10 December 2021. A reply statement of Mr Ward was filed on 23 December 2021.
31. A second statement from Mr Sandiforth was dated 10 February 2022 and was said to be for the purpose of updating the court on the parties' attempts to mediate. The defendant also filed a statement from its company secretary, Mr Sand, dated 16 February 2022, and provided to the court during the hearing on 17 February 2022. This was primarily concerned with the defendant's financial position. I was provided with a reasonable explanation for its lateness.
32. Skeleton arguments were exchanged sequentially in the usual way, as far as I know, save that the defendant's skeleton argument was the subject of amendment on the eve of the hearing on 16 February 2022, to which I will refer further below.

Legal test

33. Both parties reminded me of the test for summary judgment as articulated by Mr Justice Lewison in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) [15]. The test is familiar, of course, to the court and I have it in mind even where not explicitly referred to in what follows.

Issues for determination

(i) *Is the defendant estopped from relying on any ineffectiveness of the First Enforcement Notice?*

34. The defendant made several arguments that the First Enforcement Notice was ineffective to transfer the relevant rights to the claimant. The claimant says that I can find to the summary judgment standard that the defendant is estopped from making these arguments. That is logically the prior issue before considering the arguments themselves. The matter arises as follows:
35. In the Particulars of Claim at paragraph 19 the claimant pleaded the First Enforcement Notice as the basis for its taking over the rights of the lessor as against the defendant. At paragraph 19A of the re amended Particulars of Claim the claimant pleaded the second Enforcement Notice without prejudice to its reliance on the First Enforcement Notice.
36. In the Defence at paragraph 9 the defendant admitted the First Enforcement Notice but made no admission as to its validity or effects. In the Amended Defence at paragraph 9A the defendant pleads as follows:

“9A. It is admitted that what purported to be an Enforcement Notice dated 15 October 2021 was sent by courier and by email to the Defendant, but no admission is made as to whether it was

sent by facsimile or to the facsimile number designated as pleaded above, or as to its validity or effects or the correctness of the assertions made therein. To that extent, but that extent only, paragraph 19A of the Amended Particulars of Claim is admitted but it is otherwise denied. For the avoidance of doubt, it is denied that it was a contractual notice as alleged or at all.”

37. The denial that the First Enforcement Notice was “a contractual notice” was not explained. In the Reply the defendant pleaded as follows at paragraph 9:

“As to paragraph 9 in respect of the Enforcement Notice and paragraph 9A the Defendant in respect of the Further Enforcement Notice purports to plead a denial that it neither 'was a contractual notice as alleged or at all'. Neither is a proper pleading because in neither case does the Defendant state its reasons for the denials contrary to the mandatory provisions of CPR 16.1 and 16.2 that states that:

'16.5 (1) In his defence, the defendant must state:

(a) which of the allegations in the particulars of claim he denies;

(b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and (c) which allegations he admits.

(2) Where the defendant denies an allegation:

(a) he must state his reasons for doing so ...'

The Claimant will contend that such a defective pleading debars the Defendant from putting forward any case as regards the Enforcement Notice or the further Enforcement Notice. The Claimant does not know because the Defendant has failed to plead the case that the Claimant has to meet in this respect. The Claimant repeats paragraphs 19 and 19A of the Amended Particulars of Claim.”

38. The claimant also pleaded in the Reply the following at paragraph 3:

“The Defendant is estopped from alleging that the Enforcement Notice referred to in Paragraph 19 was not effective as a contractual notice, notwithstanding any deficiency (which are all denied) in its method of delivery or otherwise, by reason of the following:

PARTICULARS OF CONDUCT RAISING ESTOPPEL:

(a) On 19 March 2019, the Claimant sent an enforcement notice to the Defendant ('2019 Enforcement Notice'), requiring it to pay Rent and Supplemental Rent directly to the Claimant. Prior

to 19 March 2019 the Defendant made no payments of Rent or Supplemental Rent directly to the Claimant and made all such payments to JLL or Nok. Between 19 March 2019 and 8 November 2019, the Defendant paid Rent and Supplemental Rent directly to the Claimant.

(b) On 13 November 2019, the Claimant revoked the 2019 Enforcement Notice directing the Defendant to resume paying Rent and Supplemental Rent in accordance with the terms of the sublease. On and after that date, and until the payment referred to in sub paragraph (e) below, the Defendant did not pay Rent and Supplemental Rent to the Claimant and made all such payments to JLL or Nok.

(c) On 22 March 2020, the Enforcement Notice was delivered by the Claimant to the Defendant.

(d) The Defendant raised no question as to whether the Enforcement Notice was intended to have contractual effect and/or the effects pleaded in Paragraph 19, until the Defence was filed on 11 June 2021.

(e) On 27 May 2020, the Defendant paid directly to the Claimant \$US50,000 in Rent in relation to the Aircraft to account number 25177922 Sort code 93 00 67, IBAN IE39 AIBK 9300 6725 1779 22. Confirmation of that payment was provided in an email from Ms Ashima Arora on behalf of the Defendant to Mr Pat Madigan on behalf of the Claimant dated 27 May 2020 with the subject 'Rent payment'.

(f) On 29 May 2020, the Defendant paid directly to the Claimant \$US30,000 in Rent in relation to the Aircraft to account number 25177922 Sort code 93 00 67, IBAN IE39 AIBK 9300 6725 1779 22. Confirmation of that payment was provided in an email from Ms Ashima Arora on behalf of the Defendant to Mr Pat Madigan on behalf of the Claimant Dated 1 June 2020 with the subject 'Re: Rent payment'.

(g) On 18 June 2020, the Defendant paid directly to the Claimant \$US133,875 in Rent in relation to the Aircraft to account number 25177922, sort code 93 00 67, IBAN IE39 AIBK 9300 6725 1779 22. Confirmation of the intention to make that payment was provided in an email from Ms Ashima Arora on behalf of the Defendant to the Claimant dated 18 June 2020 with the subject 'Re: Rent & Maintenance Payment MSN 29670'.

(h) On 23 July 2020, the Defendant paid directly to the Claimant \$US101,085 in 'Rent' in relation to the Aircraft to account number 25177922, sort code 93 00 67, IBAN IE39 AIBK 9300 6725 1779 22. Confirmation of the payment was

provided in an email from Ms Ashima Arora on behalf of the Defendant to Mr Pat Madigan on behalf of the Claimant dated 23 July 2020 with the subject 'Re: Rent & Maintenance Payment MSN 29670'. In that email, Ms Arora stated that the Defendant had 'released another rent payment as per utilization [sic]'. (Emphasis added).”

(i) In reliance on the above pleaded words and conduct, the Claimant:

(i) believed that the Defendant had accepted that the enforcement Notice had the effects set out in paragraph 19 of the Amended Particulars of Claim; and:

(ii) did not re deliver the Enforcement Notice or issue a further Enforcement Notice at any time prior to the Defendant taking issue with the Enforcement Notice in the Defence filed and served on 10 June 2021.

(iii) Had the Defendant raised any point as to the validity of the Enforcement Notice at about the time of service the Claimant would have investigated the issue at that time and if necessary have re served the same but did not do so until the Defendant did not admit the validity of the method of service in the Defence.”

39. As I have noted above, that pleading was provided in draft before the case management conference on 12 November 2021. In the case management conference bundle index the draft is given a date of 4 November 2021.
40. In the first witness statement of Ms Reimers served in support of the summary judgment application on 5 November 2021 she set out the following matters:

“5. On 22 March 2020, the Claimant issued and served an Enforcement Notice on the Defendant. [JLR1/1]. The Enforcement Notice was sent by me. The Enforcement Notice was issued by the Claimant in order to trigger the Defendant's obligation to pay rent in respect of the Aircraft directly to the Claimant, as a result of the Sub Lease Assignment Deed, the Security Assignment Deed and the Notice and Acknowledgement.

6. I emailed the Enforcement Notice to the Defendant on 22 March 2020 [JLR1/3]. My team has been unable to find any evidence that the Enforcement Notice was faxed or couriered to the Defendant at the same time and, for the purposes of this summary judgment application, the Claimant is prepared to progress on the basis that it was neither faxed nor couriered.

7. The Defendant made part payments of Rent directly to the Claimant in May, June and July 2020 on the dates and in the amounts set out below:

8. Confirmations of these payments are provided with this witness statement [JLR1/4]. I understand, and am informed by Mr Pat Madigan, Senior Vice President of Genesis, that the Defendant informed Genesis's commercial team at the beginning of May 2020 that it was unable to pay the full amount of Rent and Supplemental Rent due and payable to the Claimant but that these pro rata payments of Rent to the Claimant were based on its utilisation of the Aircraft. This is confirmed in emails from the Defendant to the Claimant between May 2020 and July 2020, which are provided with this witness statement [JLR1/7]. The Claimant accepted these part payments of Rent, but did not waive, and indeed maintained, its rights to full payment from the Defendant.”

41. Mr Sandiforth's first witness statement for the defendant dated 10 December 2021 stated the following at paragraphs 8 to 9:

“8. In relation to the Enforcement Notice [AJW1/561], I note that Mr Ward and Ms Reimers both acknowledge (at paragraphs 33 and 6 of their respective statements) that there is no evidence that the Enforcement Notice was faxed or couriered to SpiceJet, in accordance with the notice requirements of clause 7.2 of the Notice and Acknowledgement (assuming this was valid and effective in the first place).

9. SpiceJet does not accept that either the Enforcement Notice or the Further Enforcement Notice [AJW1/565] were properly served or entitled the Claimant to demand payment of the amounts claimed (or indeed any amounts) directly from SpiceJet. Nor does SpiceJet accept that the Letter of Demand [AJW1/563] or the further Letter of Demand [AJW1/567] took effect as Lessor Determinations of Amounts Due pursuant to clause 8.7 of the Sublease.”

42. Nothing else was said in the evidence on the estoppel issue.
43. All that the defendant said about this in its skeleton argument for the hearing was the following at paragraph 44:

“Perhaps acknowledging the technical correctness of SpiceJet's point on the purported first Enforcement Notice, the Claimant then invokes an alleged waiver or an estoppel (see paragraphs 3 5 of its Reply at Tab 7, pp.97 100). They are arguments ill adapted to a Part 24 application. They are critically factual and fact sensitive. The Claimant asserts both representation and reliance and perhaps detriment, but Ms Reimers' evidence on this issue is startlingly brief, given the factual issues involved,

and adds little to the Claimant's pleaded case. Waiver/estoppel arguments are simply not appropriate to be dealt with on the present application. Let us see if, at the hearing, the Claimant maintains these arguments as being apt for summary judgment.”

44. At the hearing, this was supplemented by a completely unheralded argument that Ms Arora, who made the payments on behalf of the defendant, did not have authority to make any representations in respect of the validity or effect of contractual notices.
45. Mr Young QC stated that he took personal responsibility for the fact that this argument was raised for the first time in his oral submissions but he stopped short of offering any apology for this conduct. He then said he would apply for permission to serve a rejoinder raising the authority issue (such permission being required under CPR 15.9), and then in reply submissions he said he would reserve the right to seek permission to file such a rejoinder.
46. After I said I would deliver judgment today (the morning after the hearing), the defendant purported to file and serve a rejoinder with a statement of truth signed by Mr Sand without making any request for permission.
47. There is no dispute that following its receipt of the First Enforcement Notice the defendant made four payments to the claimant at the account specified at that notice, to which no payments had been made before. There is also no dispute that Ms Arora, who made such payments, was authorised by the defendant to do so. That was confirmed to me orally by Mr Young QC and it is pleaded in terms in the proposed rejoinder.
48. It follows that the defendant made such payments to the claimant and that no disputed issue of authority arises in reaching that conclusion. That is further confirmed by the fact that the defendant has not sought the return of the payments as having been made under a mistake, and indeed has expressly taken credit for them in its pleadings in this action. Mr Young QC acknowledged those matters and stated that the reason for them was that Ms Arora did have the defendant's authority to make the payments.
49. The next question raised by the estoppel case is whether the making of such payments by the defendant implied an unequivocal representation as to the effect of the First Enforcement Notice. I do not see that Ms Arora's authority is relevant to that question, and I hold that there is no real prospect that Ms Arora's authority would make any difference to the outcome of the estoppel issue.
50. Mr Young QC argued orally that the making of the payments was equivocal and that it could have indicated one of three things, other than acceptance of the effectiveness of the First Enforcement Notice.
51. The first proposed inference was that the payments were made by mistake. That seems to me to be a hopeless suggestion, because the question is how a reasonable person in the position of the claimant would interpret the payments assessed objectively by reference to matters known to both parties. The claimant plainly believed that it had served an effective Enforcement Notice, and the fact that the

claimant believed that was obvious to the defendant, and so it would have seemed to a reasonable person in the claimant's position.

52. Accordingly, a reasonable person in the position of the claimant, bearing in mind the matters known to both parties, would have believed that the payments were made pursuant to the Enforcement Notice and not by mistake.
53. Secondly, Mr Young QC suggested that the payments might have been an attempt to buy time. Again, that is hopeless. The issue is not whether the payments were complete and timely, which they were not, but whether they were made to the claimant rather than to the assignees of the lessor interest, which they were.
54. Thirdly, Mr Young QC suggested that the payments might have been a mechanical operation of the payments department in response to receiving an invoice. I cannot see how this argument is distinguished from his first suggestion of mistake, and I reject it for the same reason.
55. It follows that I find to the summary judgment standard that the defendant made an unequivocal representation to the claimant that it accepted the First Enforcement Notice as having taken effect to transfer the relevant obligations to the claimant. This representation necessarily implied a further representation that if there were any technical deficiencies in the First Enforcement Notice or its service, the defendant would not insist on its strict legal rights in respect of those deficiencies. This is thus a classic representation which may found an estoppel.
56. As I have set out, the claimant has explained in evidence how it relied upon the defendant's payments in forbearing from serving a further Enforcement Notice. Mr Young QC said that he would want to cross examine Ms Reimers on that evidence, but he could point to no reasoned basis upon which he might suggest that this obviously plausible evidence was incorrect. I say "obviously plausible" because once the representation is correctly analysed as implying a representation that the defendant did not insist on its strict legal rights in respect of any deficiencies in the First Enforcement Notice, it is obvious that any reasonable officer of the claimant would have responded to the contrary situation by taking some action.
57. Even if the correct counterfactual does not involve the defendant's spelling out what the alleged deficiencies were, if no representation had been made then the claimant would plainly have had an opportunity to investigate the position, as it pleaded in the Reply, including seeking legal advice at that stage (which it had not yet done on the terms of the First Enforcement Notice). That lost opportunity is sufficient detriment to complete the requirement of reliance under the doctrine of promissory estoppel.
58. In all the circumstances, it seems to me to be obvious that it would be inequitable to permit the defendant to go back on its representation that it would not insist on the rectification of any technical defects that might exist in the First Enforcement Notice.
59. At the hearing, no doubt because of the unsatisfactory way that the issues were raised at the last possible moment, no authorities were cited to me on any of these issues.
60. For these reasons, I find that there is no real prospect of the defendant defeating at trial the claimant's promissory estoppel plea which could also be put as waiver at

common law, as in *Hartley v Hymans* [1920] 3 KB 475. Since I have found that there is no real prospect of the authority issue being relevant, it follows that if the defendant were to apply for permission to serve its proposed Rejoinder I would refuse it.

61. A further issue arises, which is which of these points the defendant should be permitted to take in circumstances where they were unheralded in its materials before the hearing. It seems to me that it would be quite wrong to permit the defendant to run the authority point without any evidence or any notice whatsoever prior to the defendant's own oral submissions. The omission of this point from the defendant's skeleton argument was a plain breach of Commercial Court Guide Appendix 5 paragraph 2. As Mr Shepherd QC rightly submitted on behalf of the claimant, even a defendant responding to an application for summary judgment must do so with due regard to the rules of court. That is essential ultimately so that matters can be justly determined, which is the purpose of the court, as well as the overriding objective of the CPR.
62. The way that this issue was brought forward was so far outside the rules of court and even the norms of dealing with the position if the rules have not been complied with, that I would have rejected it for this reason even if it otherwise had had realistic prospects.
63. As to the defendant's attacks on the fact that a representation was made and the claimant's reliance upon it, it was discourteous and inappropriate for these points not to have been made in the skeleton argument or notified to the claimant so that the hearing could be properly prepared. It is quite possible that authorities on the relevant concepts might have been cited to me if they had been.
64. By way of explanation, Mr Young QC told me that there was no need for his clients to respond on the estoppel issues because at the time Ms Reimers served her witness statement there was no pleaded case in the Reply.
65. That explanation was wrong, since the Reply had been approved at the case management conference and was served in draft prior to Ms Reimers' statement. Nevertheless I think the defendant would be entitled to say that issues of what representation may be inferred from the accepted facts and whether the alleged reliance amounted to sufficient reliance in law were legal issues which they should not be shut out from however late they were raised. Accordingly, I would not bar the defendant from running these issues, though I have found them to have no real prospects of success.
 - (ii) *Were the First Enforcement Notice and the Second Enforcement Notice ineffective?*
66. In their skeleton argument for the hearing, counsel for the defendant put their case in the following way:

“19. The Claimant's Skeleton criticises SpiceJet for having failed to admit various facts when the Claimant thinks SpiceJet ought to have admitted them, although they are facts of which the Claimant formally bears the onus of proof. It is not the undersigned's understanding of the law that a party is legally

obliged to admit facts simply because the party asserting those facts thinks it ought to. If a party making an allegation thinks that there are facts which should be admitted, it can always serve a Notice to Admit and in due course secure an appropriate costs Order when it is otherwise appropriate. If they are facts which are easy for the Claimant to prove, then so be it and the costs of such proof will be minimal.

20. A defendant is still entitled to require a claimant to prove its case, and many of the documents relied upon by the Claimant are agreements to which SpiceJet was not party. The relevant facts that the Claimant asserts should have been admitted in SpiceJet's Amended Defence include facts in relation to agreements to which SpiceJet was not itself a party.

21. In any case, SpiceJet now accepts that such documents accurately reflect the terms agreed between the parties to them. It also accepts that the Further Enforcement Notice (dated 15th October 2021) was properly served and that the second Letter of Demand was an effective determination under clause 8.7 of the Sublease. SpiceJet also no longer maintains any case requiring expert evidence of Indian law and the restrictions imposed by the Indian government, which speak for themselves. The issues that are still 'live' and are relevant to the Summary judgment Application are addressed below.

...

41. Until a valid Enforcement Notice was properly served in accordance with clause 7 of the Notice and Acknowledgement (Tab 18, pp.737-739), there was no legal obligation on SpiceJet to pay Rent to the Claimant at all. Until that important stage was reached, Rent and Supplemental Rent were payable only to the sub sub lessor (Jabberjay). Thus the service of a valid Enforcement Notice is critical to the Claimant being able to establish that SpiceJet owed any legally enforceable obligation to the Claimant to pay Rent. By parity of reasoning, the same applies to Default Interest – considered further below.

42. The Claimant still relies on the purported service of its first Enforcement Notice by a non contractual method. For such contractually important notices technical precision is required. Thus in *Trafigura Beheer BV v Ravennavi SpA (The Port Russel)* [2013] EWHC 490 (Comm); [2013] 2 Lloyd's Rep 57 Popplewell J (as he then was) held that a clause which stipulated that NOR 'may be given either by letter, fax, telegram, telex, radio or telephone' was an exclusive provision and that a notice given by email was invalid and laytime accordingly did not commence.

43. For reasons spelt out above, it is unsurprising in the present circumstances that SpiceJet has taken what might be characterised by the Claimant as a 'technical' point. Apparently, the Claimant is entitled to rely on technical points, but not SpiceJet. On a Part 24 application that is not appropriate.”

67. At paragraph 21 set out above, the Second Enforcement Notice was expressly accepted to have been effective. The day before the hearing, the defendant's skeleton argument was replaced by an amended skeleton argument. This was filed in marked up form indicating that the only substantive change was to paragraph 21. The marked up paragraph 21 was as follows (with mark up as it appeared, save that the added words were in red as well as being underlined):

“In any case, SpiceJet now accepts that such documents accurately reflect the terms agreed between the parties to them. It also accepts that the Further Enforcement notice (dated 15th October 2021) was properly served but SpiceJet does not accept that the second Letter of Demand was an effective determination under clause 8.7 of the Sublease. SpiceJet also no longer maintains any case requiring expert evidence of Indian law and the restrictions imposed by the Indian government which speak for themselves. The issues that are still 'live' and are relevant to the summary Judgment Application are addressed below.”

68. If only the marked up version is read, it risks giving the impression that there was a simple typographical error in the original through the omission of the words “but SpiceJet does not accept”. The mark up should have shown, but did not, the word “and” in ~~strikeout~~, which would have made clear that this paragraph contained an important change of position. I have not sought to investigate how this unfortunate situation came about. I hope that each individual who was involved in settling the amended skeleton argument will reflect on this paragraph of this judgment.
69. Regardless of that issue, the only point positively taken in the skeleton argument was what the defendant accepted was a “technical point” that the First Enforcement Notice was not served by the method required by the Notice and Acknowledgement and was therefore invalid. As I have set out above, the First Enforcement Notice stated that it was served by email and courier. Courier was one of the contractually required methods.
70. As I have also mentioned, Ms Reimers accepted in her first witness statement dated 5 November 2021 that the claimant had not been able to find evidence to confirm service by courier. However, that became a non issue when the Amended Defence was filed on 8 December 2021 which, as I have set out above, formally admitted that the Second Enforcement Notice was indeed served by courier.
71. The Amended Defence was verified by a statement of truth, and after the hearing of this application I am very confident that the defendant would not have admitted any matter which it did not find it essential to admit. Accordingly, there is no realistic prospect that compliant service of the Second Enforcement Notice would be an issue at any trial. Since, as Mr Shepherd QC submitted without demur from Mr Young QC,

the Second Enforcement Notice would have transferred all accrued rights to the claimant, if that was effective, then any defect in the First Enforcement Notice would not affect the claim.

72. Moreover, the combination of the explicit statement on the notice itself that it was served by courier, and the statement of truth on the Amended Defence, is sufficient that, even had it been in issue, I would find that there was no real prospect of the defendant succeeding on that issue.
73. Without any notice whatsoever, Mr Young QC took two further points in his oral submissions. First, he argued that both the First Enforcement Notice and the Second Enforcement Notice were ineffective because the claimant had not established that they had been sent to NOK and Jabberjay as required by the Notice and Acknowledgement. This point was withdrawn after Mr Shepherd QC pointed out the documents in the bundle which demonstrated its falsity. This wasted court time, and it is a good illustration of why it is inappropriate and unacceptable to spring surprises of this sort at a hearing.
74. The second point taken without notice was that the First Enforcement Notice and the Second Enforcement Notice did not contain the precise averments of fact that were required by the Notice and Acknowledgement. In particular, they did not contain a statement that the event of default was continuing.
75. This point is a further example of the extremely unsatisfactory way that the defendant and its legal team raised issues. The result of the way it was done is that the court had almost no citation of authority that might be relevant to this issue.
76. The claimant's team quickly produced *Mannai Investments v Eagle Star Life Assurance* [1997] AC 749 for the proposition that a notice is to be construed objectively as to its purpose and effect. However, that does not quite meet the point as to the effectiveness of the notice if it does not comply with the precise requirements laid down by the contract. As Lord Hoffmann said in that case:

“The clause does not require the tenant to use any particular form of words. He must use words which unambiguously convey a particular meaning, namely an intention to terminate the lease on 13 January.”
77. In the present case, the issue is whether the First Enforcement Notice and the Second Enforcement Notice constituted Enforcement Notices as defined at paragraph 1.2 of the Notice and Acknowledgement, which I have quoted above, even though they did not expressly state that the event of default under the head lease was continuing.
78. The defendants chose not to cite any authority on this point, despite being represented by a full team of experienced solicitors, leading and junior counsel. (The defendant did cite *Trafigura Beheer BV v Ravennavi SpA* [2013] EWHC 490 (Comm) on the importance of service by a required method, but I did not understand it to be submitted that this authority assisted on the content of the notice, and in case necessary I find that it does not).

79. It therefore seems that I am invited by the defendant to determine the matter on my own judgment without further assistance. If that should prejudice the defendant, then it is prejudice that it has brought upon itself.
80. In my judgment, any reasonable defendant would have appreciated that the documents entitled “Enforcement Notices” were intended to have the effect set out in the Notice and Acknowledgement even if they did not explicitly state that the event of default was continuing. In circumstances where the defendant well knew that the event of default was in fact continuing because it had not paid the rent that was due, and all parties knew that the defendant knew that fact, it seems to me that the omission to make this assertion cannot change what would otherwise have been an Enforcement Notice within the meaning of the Notice and Acknowledgement into a nullity or something else. In those circumstances, if I am wrong about estoppel then I would hold that there is no real prospect of a trial judge finding that the Enforcement Notice was ineffective for this reason.

(iii) *Duration of rent payments: redelivery date*

81. In his oral submissions (though not in his skeleton argument) Mr Young QC argued that the Aircraft had been made available by his clients for redelivery from no later than March 2020 and that any obligation to make rental payments ceased on that date.
82. When I asked to see the evidence relied upon for this factual case, Mr Young QC pointed me to paragraphs 11 to 13 in the first witness statement of Mr Sandiforth, which read as follows:

“11. The question of whether the Aircraft was redelivered, or should be treated as having been redelivered, on the Scheduled Expiry Date, or what date should be treated as the actual Expiry Date, is of course relevant to the question of whether SpiceJet continued to be liable to pay Rent or Supplemental Rent beyond the Scheduled Expiry Date of 27 November 2020 and is therefore relevant to all claims for rent relating to periods after that date.

12. Furthermore, in relation to the claim for Supplemental Rent (for periods both before and after the Scheduled Expiry Date) the Claimant has provided no explanation or evidence to support the amounts claimed, including (for example) of the Engine Flight Hours or Engine Cycles or APU Operating Hours during the relevant periods (which information is required to calculate the elements of Supplemental Rent payable under paragraphs 1(b), (c) and (e) of Schedule 7 to the Sublease Agreement). It is therefore not possible to assess whether the amounts of Supplemental Rent claimed have been correctly calculated or whether there is any factual dispute in relation to the figures underlying any calculations.

13. Otherwise, while the amended Appendix 1 to the Amended Particulars of Claim has corrected the obvious errors that appeared in the original version, there nevertheless appear to be

errors in relation to (at least) the interest calculations, which appear not to take into account changes in the alleged default interest rate over time so that, for example, it seems that default interest is charged on rent said to be due from 15 March 2020 at a rate of 2.61% for the whole period from that date to the date of the pleading notwithstanding the variations in Libor over this period. There is no explanation or evidence to support the interest rate figures used in the calculations.”

83. In my judgment, these paragraphs do not contain any evidence that supports the factual assertion that Mr Young QC made.
84. Mr Young QC then referred me to paragraph 15 of the Amended Defence, reminding me that (as I have already had cause to mention) it was verified by a statement of truth, which states as follows:

“15. As to paragraph 26 of the Amended Particulars of Claim, the express terms of the said Lease are admitted but that paragraph is otherwise denied. In particular it is denied that the Defendant has failed to redeliver the Aircraft in any material respect. The Aircraft is at an FAA approved location and no other location has been agreed by the defendant. The operation of Indian Covid-19 legislation has made it impossible and illegal to do more than have the Aircraft (which is based in India) ready for the taking of possession by its lawful owner (as to whose identity no admissions are made) as and when such lawful owner sees fit to do so. The Defendant has done all it lawfully can and must to permit this.”

85. This paragraph was included in the original Defence, which was dated 10 June 2021, so it made an assertion as early as that date. But I can see no basis in the evidence for Mr Young QC's assertion that the Aircraft was made available to the claimant in accordance with contractual requirements for redelivery any earlier than that date.
86. In fact, it is clear that the Aircraft was not made available for redelivery until later than the date of the Defence, because of the email from the defendant's solicitors of 24 June 2021, which I have quoted earlier in this judgment. In my judgment that email is not consistent with contractual redelivery of the Aircraft.
87. Accordingly, there was nothing in this point. It was another point which was taken with absolutely no warning to either the claimant or the court (even in the amended skeleton argument filed the day before the hearing). The taking of this bad point was conduct outside the norms of litigation in this court.

(iv) Supplemental Rent

88. In relation to Supplemental Rent, several points were taken, all relating to the effectiveness of the claimant's determinations in their letters of demand, which purported to be issued under clause 8.7 of the Sub lease. The calculations of Rent and Supplemental Rent have never been questioned by the defendant and no positive case has been pleaded or put in evidence as to why they might be incorrect.

89. In its skeleton argument the defendant argued that it was inappropriate for the claimant to seek to reverse the burden of proof as to Supplemental Rent. But that is the effect of clause 8.7, so I reject this point.
90. In oral submissions, Mr Young QC made two further, unheralded, points. First, he said that the detail provided in the letters of demand was insufficient for the defendant to establish whether or not there were any manifest errors.
91. I do not understand this point, on two levels. First, conceptually, if no error is manifest then there is no manifest error; if further workings had been required then the contract could have made that clear. Secondly, as a matter of fact, the figures were given individually for each month in a very straightforward way, which the defendant is well able to check back to its contractual obligations; if there had been an error then it would have been obvious to the defendant, who could and would have raised it.
92. The second new point on this aspect was for Mr Young QC to argue that the letters of demand were ineffective because they were sent by the claimant's solicitors rather than by the claimant itself. That point only needs to be stated to be rejected: the defendant knew that the solicitors were acting for the claimant and their authority plainly extended to communicating the claimant's determination of the rent due.
- (v) *Points not pursued*
93. It is right to record that the defendant expressly abandoned any argument that the agreements were frustrated. There was also a point taken in the defendant's skeleton argument about the calculation of Default Interest, but this was not pursued at the hearing and I say no more about it.
- (vi) *"Other compelling reasons" / adjournment / stay*
94. Finally, I have to deal with the defendant's urgings to the court not to grant judgment because the defendant is in a parlous financial state owing to the effects of the Covid 19 pandemic. The defendant goes so far as to assert and this is supported by the recent witness statement of Mr Sand that a judgment in this case may threaten its existence and force it into insolvency. The defendant further argues that the matter could and should be resolved by mediation, and I have seen a run of correspondence about the parties' attempts to agree a mediation, with which I will not further lengthen this judgment.
95. The defendant also refers to the UK government's guidance concerning relationships between commercial landlords and tenants, which encourages landlords and tenants "to do everything reasonable to enable otherwise viable ... businesses to continue operating", and the existence of draft legislation apparently presently making its way through Parliament in the form of the Commercial Rent (Coronavirus) bill to formalise a system for arbitration of such disputes, with the principal aim of such arbitrations being, the defendant submits, to preserve viable businesses.
96. The defendant contended at the hearing that I should either (a) adjourn the summary judgment application or (b) find that the defendant's financial situation was an "other

compelling reason why the case or issue should be disposed of at trial” within the meaning of CPR 24.2(b) or (c) grant a stay of enforcement of any judgment.

97. As to the defendant's parlous state, the defendant relies on the evidence of Mr Sand dated 16 February 2022. Mr Sand states that the information he provides is derived from the financial results of the defendant up to 31 December 2021, which were published on 15 February 2022. At paragraph 11, he states as follows:

“11. SpiceJet's Unaudited Standalone and Consolidated Financial Results for the quarter and nine months period ended 31 December 2021 (the 'December 2021 results') are at [CS/20 31]. Note 8 of the standalone accounts states, 'The Company has earned a net profit (after other comprehensive income) of Rs. 230.30 million for the quarter ended 31 December 2021 and incurred a net loss of Rs. 12,627.67 million for the nine months period ended 31 December 2021, and as of that date, the Company has negative retained earnings of Rs. 54,534.32 million and negative net worth of Rs. 38,307.10 million'. SpiceJet's negative net worth as at 31 December 2021 was therefore approximately £381.175 million. Not only is the negative net worth significant, so also is the lack of cash flow and the ability to service debts as they fall due. The Claimant's present claims, if enforced at the present time, are likely to cause significant potential cross defaults under other agreements, as I describe at 17 below, and thus imperil the very existence of the company.”

98. At paragraphs 21 and 22, Mr Sand states:

“21. Given SpiceJet's financial position as outlined at paragraphs 8 to 17 above and the difficulties in raising additional financing, I am of the view that a commercially negotiated resolution between the parties would facilitate the best outcome for all involved and in particular the best outcome for the Claimants. Any other outcome would be negative for them as well as all other creditors of SpiceJet.

22. As I outline above, if the Claimants persist in their claims SpiceJet may have no alternative but to seek insolvency relief and that would cause potentially fatal damage to SpiceJet without benefiting the Claimants in any material or financial sense. The only realistic possibility of meeting some or all of the Claimants' claims is if SpiceJet has time to recoup its enormous losses by trading out of the hole it currently finds itself in. Trading out, if time is given, is a very real possibility, but time is all important.”

99. Any legal person is subject to the insolvency laws of its jurisdiction. If the defendant obtains the protection of an insolvency process under Indian or any other law, that will have consequences, which might well include an obstruction to claims like the present. Since the defendant has not taken any steps in that direction, those

consequences do not apply. In circumstances where the defendant has made clear that it intends to continue trading as a solvent entity rather than entering any insolvency process, it is not for this court to seek to apply some kind of piecemeal pseudo-insolvency protection which would lack any safeguards for creditors and any jurisdictional basis.

100. As to the UK government's guidance in the draft bill, which would not affect these parties even if it becomes law, these are also not reasons for this court to refrain from adjudicating on commercial claims such as the present.
101. As to “other compelling reason”, the rule refers to a compelling reason why the issue “should be disposed of at a trial”. Even if there were the most compelling reasons in favour of delay for mediation or other process, these would not be reasons to dispose of the issue at trial. Reliance on this provision in this context is therefore misplaced.
102. As to adjourning the application, if that was to be pursued it should have been taken as a preliminary question, which Mr Young QC declined to do. In any event, I see no basis for it. If the defendant has no real prospect of defending the issues in the claim, it would not be appropriate to permit those issues to continue to be litigated pending some other event.
103. In relation to mediation, noting that Mrs Justice Moulder did not order a stay at the CMC, and having read the correspondence, I will not require the claimant to mediate before obtaining the judgment to which they are otherwise entitled, especially in circumstances where the claimant's position has been to seek delay, as is frankly admitted in its own skeleton argument, where the defendant’s counsel said:

“So in one sense, it is true that SpiceJet does have a general commercial strategy of trying to get itself into a position to honour its proper obligations. Delay is a significant, but not the only, aspect of that. It is not a dishonourable delay, but rather the reverse. Sometimes creditors, who wish their due, must appreciate this and it is no use saying there is a ‘hell and high water’ obligation if there is no financial ability to satisfy it.”
104. Although not mentioned in his skeleton argument, Mr Young QC also argued that any judgment should be stayed “pending mediation”. Although no authorities or rules of court were mentioned, I take it that this was an application under CPR 83.7. I assume that the defendant contends (on the basis of Mr Sand’s evidence) that it is unable to pay the judgment and thus the condition in CPR 83.7 (4)(b) is satisfied. If so, I accept that appears to be the position and the court therefore may exercise its discretion in relation to the application for a stay. That said, I find it hard to see how a stay on this basis should be granted “pending mediation” as Mr Young QC submitted, since the basis of the jurisdiction would be the defendant’s inability to pay, rather than the desirability of a compromise being reached.
105. I accept that a stay could be appropriate relief in a case where it was justified in all the circumstances, especially if evidence showed that a short and specified delay in enforcement would be likely to result in satisfaction of the judgment. Mr Young QC referred me to the judgment of Ms Julia Dias QC in Wilmington Trust SP Services

(Dublin) Limited v SpiceJet Limited [2021] EWHC 1117 (Comm) in which he had persuaded that judge to stay certain other claims against SpiceJet.

106. I note in passing that the judgment in Wilmington Trust supports my decision that it would not be appropriate either to find a “compelling reason” for trial or to adjourn the application by way of enforcing mediation. Ms Dias QC’s reasoning on the question of stay was as follows:

“I deal first with the claims relating to MSN 64507 and MSN 64509. My conclusion is that it would be appropriate to grant a stay of execution in relation to these claims. This is for the following reasons:

i) There is no evidence before me as to the financial standing of the Second and Third Claimants. Accordingly, their ability to repay should the contracts

become frustrated at a future date cannot be assured.

ii) By contrast, the evidence suggests that the Defendant is currently in a parlous financial state and that being required to pay all outstandings now 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.

iii) As argued by the Defendant, insolvency would be contrary to the Claimants’ own interests as it would inevitably result in them only receiving a dividend when, with patience, they might recover a larger payout in due course. In other words – and somewhat counter-intuitively – the risk of prejudice to the Claimants will in fact be minimised by not permitting them to enforce any judgment.

iv) The obvious riposte to this latter argument is two-fold. First, the whole purpose of a “no set-off” clause is to assure payment to the creditor even where (or perhaps especially where) the debtor is in financial difficulties. Secondly, it is a matter for the Claimants. If they take the view that their interests are best served by seeking to enforce a judgment which they have no hope of being paid in full, it is not for the court to say otherwise. That said, I accept that this is more than simply a question of financial difficulty for the Defendant; its continued existence is at stake. Its ability to pay rent under the Lease Agreements was wholly dependent on its ability to operate the aircraft and, through no fault of its own, the wholly unforeseeable “double whammy” of Covid and the MAX 8 tragedies now renders it unable to fly MSN 64507 and MSN 64509 at all and able to operate MSN 41397 only to a very limited and unprofitable extent.”

107. As to the first of these points, there is no suggestion in the present case that the contract could be frustrated in the future and repayment be required. Accordingly, the point that Ms Dias QC put first in her reasoning is not applicable here.
108. As to the second, of course that same submission is made to me. As to time, however, I note that the Wilmington judgment was handed down in April 2021 and today, in February 2022, it does not appear that SpiceJet's position has improved. There is no basis in the evidence before me upon which I could reach a view as to how much further time is still required. This seems to me to substantially weaken the force of this point in its application to the present case.
109. As to the third, I entirely agree with the responses set out by Ms Dias QC in the second sentence of her fourth sub-paragraph. It is for the claimant, not the court, to decide what is in the claimant's interests.
110. Ms Dias QC recorded fourthly the risk to the continued existence of the defendant. I agree that that is a point that is relevant in favour of a stay. However, for it to be decisive, there would have to be at least a reasonable prospect that a stay of determinate and reasonable length would permit the defendant to survive and meet its obligations (against which could be weighed any potential prejudice to the claimant from being kept out of its money for a further period). On the evidence before me, I do not find such a prospect.
111. The defendant expresses a hope that a further moratorium might result in a negotiated solution to the claimant's claim, but it does not offer the prospect of meeting any judgment if it is given a specific further time to do so. The defendant has had ample time since the case management conference to engage the claimant in mediation or in any other way to resolve the claims. If, as it asserts, SpiceJet is not able to meet its obligations, including but not limited to those to the claimant, then it is free to take such steps in relation to insolvency as it is advised to take. Absent such steps, it is not the function of this court to grant indulgences for the purpose of pressurising a creditor to compromise a claim which meets the summary judgment test or of enabling a limited liability entity to continue to trade as if it were solvent but in fact at the expense of creditors.

Conclusions

112. Accordingly, I will grant summary judgment as sought, and I will hear counsel on the terms of the order.