



Neutral Citation Number: [2024] EWHC 3194 (Comm)

Case no: CL-2024-000228

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KDB)

The Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 15 November 2024

Before:

MR JUSTICE BUTCHER

Between:

AWAS NETHERLANDS A320-1 BV
(a company incorporated under the laws of the Netherlands)

Claimant

- and -

PACIFIC AIRLINES AVIATION JOINT STOCK COMPANY
(a company incorporated under the laws of Vietnam)

Defendant

MR ORESTIS SHERMAN (instructed by **Allen Overy Shearman Sterling LLP**)
appeared for the **Claimant**

The **Defendant** did not appear and was not represented

Approved Judgment

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MR JUSTICE BUTCHER:

1. This is an application by the Claimant for summary judgment in respect of amounts which it contends are owed pursuant to a settlement of a claim for sums due from the Defendant as lessee under a lease agreement in respect of one Airbus A320-200 bearing manufacturer's serial number 4459, and which has been called, and which I will call, "the Aircraft".
2. The Claimant says that it has received only \$100,000 pursuant to that settlement, whereas \$10,053,276.09 is currently due. For the purposes of this hearing, I have read the first and second witness statements of Helen Biggin and I have heard counsel for the Claimant who has taken me through the relevant documents.

THE FACTUAL BACKGROUND

3. On 18 May 2022, the Claimant made a demand that the Defendant should return the Aircraft as a result of failures on the Defendant's part to make rental payments under the lease agreement in respect of the Aircraft. The Defendant failed to comply and, accordingly, the Claimant issued proceedings in this court on 22 May 2022. Those proceedings were subsequently discontinued on 19 December 2022 following the execution of the Settlement Agreement, embodying the settlement to which I have already referred, on 15 November 2022. At the time of execution of the Settlement Agreement, the leasing of the Aircraft had not been terminated and the Aircraft had not been re-delivered.
4. Accordingly, the sums which were to be paid by the Defendant pursuant to the Settlement Agreement, which were compendiously defined as the Instalment Balance Amount comprised, firstly, the Initial Balance Amount which, pursuant to clause 1.10 and annexe A of the Settlement Agreement, was the sum of US\$18,267,542.82. That sum, which as I have said, was fixed by the Settlement Agreement, represented the Claimant's losses based upon an assumed termination date of 20 October 2022.
5. The Instalment Balance Amount also included what was called the final Reconciliation Amount which would be an additional amount and was to be calculated pursuant to clause 3.3 which provided:

"The Lessor shall, within thirty (30) days of the Redelivery Date (or such later date as the Lessor may request, acting reasonably), (i) reconcile the Initial Balance Amount as appropriate (and using the same methodology reflected in the calculations set out in Annex A) to reflect that the Redelivery Date is the final date of the leasing of the Aircraft and notify such reconciliation to the Lessee; and (ii) notify the Lessee of the amount of the Lessor's final third party expenses incurred in respect of the subject matter of [the Settlement Agreement] which has not been included in the Upfront Amount or the Initial Balance Amount (including legal and technical expenses) and shall provide invoices or other supporting evidence for such expenses (the sum of such reconciled amounts in (i) and (ii) being the Final Reconciliation Amount).

Provided that the Lessee (acting reasonably with reference to the Lessor's calculations and such invoices or other supporting evidence and in consultation with the Lessor) has satisfactorily verified the Initial Balance Amount and the Final Reconciliation Amount, the Lessee shall, within five (5) days of receiving such notice by the Lessor, execute and deliver to the Lessor a letter confirming the full and final Instalment Balance Amount which shall include the Final Reconciliation Amount."

6. Under the Settlement Agreement, the Instalment Balance Amount was to be payable in 24 monthly instalments commencing on the Instalment Commencement Date. The Claimant proceeds, for the purposes of this application, on the basis that that date is 15 November 2023. That may be a concession to the Defendant. On any view, it does not appear that taking the Instalment Commencement Date as being 15 November 2023 can be said to be unduly adverse to the Defendant.
7. The Settlement Agreement also contained provisions which have the following effect. Firstly, that to the extent that the Claimant re-leased the Aircraft at a monthly rate in excess of US\$120,000 the surplus that the Claimant would earn under that new lease until what would have been the expiry of the lease agreement was to be deducted from the monthly Instalment Balance Amount payments in inverse order of maturity (see clauses 1.3 and 3.4). The evidence before me is that the Aircraft was re-leased on 28 March 2023 and that there is a surplus but given that that surplus is less than one monthly instalment of the Instalment Balance Amount, the Claimant will not need to give credit for it until the final monthly instalment which will fall due on 15 October 2025. Accordingly, that issue does not concern the amount which is currently payable.
8. Secondly, that upon a failure to pay any part of the Instalment Balance Amount within three business days of that part falling due, the Claimant was entitled to initiate a claim to enforce the Defendant's payment obligations (see clause 4.1).
9. Thirdly, that if any amount payable under the Settlement Agreement was not paid when due, default interest on that amount at the Citibank, N.A., New York prime or base commercial lending rate, plus 2%, which was called the Default Rate, was payable on demand (see clauses 1.9 and 4.2).
10. Fourthly, that 50% of the cost of the ferry flight fell to be deducted from the final Reconciliation Amount (see clause 6.4).
11. The evidence shows that the re-delivery date, being the date on which the re-delivery certificate was executed following the return of the Aircraft, was 7 December 2022. That was the date on which the leasing of the Aircraft terminated with the result that save for certain obligations preserved by clause 3.8, the sole source of the parties' rights and obligations became the Settlement Agreement.

EVENTS FOLLOWING THE SETTLEMENT AGREEMENT

12. The evidence is that the parties were unable to agree what the final Reconciliation Amount was prior to the Instalment Commencement Date of 15 November 2023. However, there was correspondence between the Claimant's servicer and the Defendant leading on 7 December 2023 to the servicer providing the Defendant with a

reconciliation summary notifying it of what the servicer on behalf of the Claimant considered to be the Instalment Balance Amount. The Defendant responded on 14 December 2023. It made one substantive adjustment to the reconciliation summary and suggested that the figure of US\$19,064,540.46 for the Instalment Balance Amount “seems okay for [the Defendant’s] working level” and that “there is no further enquiries”, albeit stating that there would be an internal approval process before the figure was finally confirmed.

13. There was then chasing correspondence from the Claimant’s servicer on 17 December 2023 and on 8 January 2024. Nevertheless, by 10 January 2024, the Defendant had still not been able to confirm that the internal approval process had concluded. That remained the case as at 22 January 2024 notwithstanding further chasing emails from the Claimant, and on that date, apparently, an official instruction was expected “before lunar New Year holiday if possible”. Nevertheless, that approval did not materialise.
14. Thus, the current position on the evidence is that, firstly, the Defendant has failed to provide any further confirmation of what it considers the Instalment Balance Amount or, more specifically, the final Reconciliation Amount, to be. Secondly, the Defendant has failed to pay every monthly instalment of the Instalment Balance Amount that has fallen due and payable since 15 November 2023. Thirdly, as I will further refer to below, the Instalment Balance Amount is US\$19,064,534.17, and each monthly instalment is US\$794,355.59. That is only slightly less than the figure which the Defendant said it considered to be “okay” on 14 December 2023.

THE PROCEDURAL HISTORY

15. These proceedings were commenced on 19 April 2024. On that date, the process agent that the Defendant had appointed pursuant to clause 21.3 of the Settlement Agreement acknowledged receipt and stated that service had been accepted on behalf of the Defendant.
16. The Defendant then filed an acknowledgement of service on 26 April 2024. In that acknowledgement of service the Defendant indicated that it intended to defend only part of the claim, though it failed to specify what part, and also, the Defendant failed to provide an address for service of documents relating to the proceedings within the jurisdiction.
17. In order to proceed with the claim, the Claimant applied for and the court granted an order permitting service of documents in the proceedings by an alternative method. The relevant order, which has been called the Service Order, permitted the service of any documents required to be served by the Claimant by courier to the Defendant’s process agent and by email to various individuals at the Defendant. The service of that order has since been acknowledged by the Defendant’s process agent. The evidence is that this application was served on the Defendant consistently with the provisions of the Service Order. The Defendant has, however, failed to engage with this application. It has not appeared nor has it been represented on this application before me. I am nevertheless satisfied on the evidence that the Defendant has had every opportunity to participate in these proceedings and this hearing should it have wished to do so.

THE RELEVANT PRINCIPLES

18. CPR 24.4(1)(a) provides that a Claimant may not apply for summary judgment until the Defendant against whom the application is made has filed an acknowledgement of service or a defence unless the court gives permission. I consider that in the present case, the Defendant has filed an acknowledgement of service although it may be said that it was, in certain respects, deficient or, at any rate, unhelpful. It nevertheless appears to me that it constitutes an acknowledgement of service for the purposes of the rule. If that is wrong, I would, in any event, have given permission for the summary judgment application to be made notwithstanding no acknowledgement of service because it appears to me that there are good and proper reasons for such permission in this case, not least that the Claimant is seeking summary judgment rather than a default judgment on the basis that the Claimant anticipates that it will need to enforce any order granted by this court in the Defendant's own jurisdiction of Vietnam, and a Vietnamese court may only recognise and enforce a foreign judgment made on the merits.
19. As to the principles in relation to the grant of summary judgment, pursuant to CPR 24.3, the court may give summary judgment against a Defendant if (1) it considers that the Defendant has no real prospect of succeeding in defending the claim, and (2) there is no other compelling reason why the case should be disposed of at trial. The principles on which the court operates in relation to applications under CPR 24 are familiar and were helpfully summarised by Lewison J in the very well-known case of *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].
20. I turn therefore to consider the merits of the application against the background of those principles on which the court will operate. As to the merits, the Instalment Balance Amount is defined as the total of the Initial Balance Amount plus the final Reconciliation Amount. Those two components can be considered in turn.
21. I take first the claim for the Initial Balance Amount. As I have said, pursuant to the terms of the Settlement Agreement, the Initial Balance Amount is the sum of US\$18,267,542.82. That figure cannot be disputed and it accounts for the great majority of the sums which are currently claimed. In particular:
- (1) The Initial Balance Amount accounts for US\$761,147.62 of the monthly Instalment Balance Amount of US\$794,335.59;
 - (2) In circumstances where the Defendant has failed to pay twelve Instalment Balance Amounts, I am satisfied US\$9,133,771.40 is owing pursuant to clause 3.1(b) as unpaid Initial Balance Amount;
 - (3) US\$499,228.27 of default interest calculated at what the Settlement Agreement defines as the Default Rate is payable in respect of that unpaid Initial Balance Amount as at 6 November 2024.
22. I then turn to the final Reconciliation Amount. The final Reconciliation Amount constitutes the remainder of the Instalment Balance Amount claimed by the Claimant in the sum of US\$796,991.32. To recap, pursuant to clause 3.3, the final Reconciliation Amount is itself comprised of two components. Firstly, a reconciliation of:
- “...the Initial Balance Amount as appropriate (and using the same methodology reflected in the calculation set out in annex A) to reflect that the re-delivery date is the final date of the leasing of the aircraft.”

Secondly:

“...the amount of the lessor’s final third-party expenses incurred in respect of the subject of this agreement which has not been included in the upfront amount or the Initial Balance Amount (including legal and technical expenses).”

23. As to the first of those, annex A of the Settlement Agreement lists various items alongside their corresponding value. Some of those items, for example, unpaid basic rent up to 20 October 2022 would require updating depending on when the leasing agreement actually terminated. Others, for example the cost of shipping an engine that had already been incurred, would not. I consider that the direction to use the same methodology as that reflected in the calculations in annex A can only have meant updating the value of the former category of items. Annex 1 to Ms Biggin’s first witness statement illustrates the changes in value for each of those items between annex A of the Settlement Agreement and the reconciliation summary that the Defendant returned to the Claimant on 14 December 2023. As I have said, the Defendant only adjusted the cost of one item when it returned that summary. The result of that reconciliation is an increase of US\$298,151.66 to the value of the same items as set out in an annex A of the Settlement Agreement.
24. As to the second component, the final item in annex A is “additional costs and expenses incurred”. When the Settlement Agreement was executed, these were divided into, firstly, an estimate of legal expenses of US\$70,000, secondly, technical expenses of US\$524,577.82, and thirdly, estimated cost to put the Aircraft into re-delivery condition of US\$847,073.18.
25. Clause 3.3 provided that the Claimant’s final third-party expenses, which were not already reflected in those amounts, were to be included in the final Reconciliation Amount. That required an exercise of totalling up the relevant invoices. As set out in annex 2 to Ms Biggin’s second witness statement, and in further detail at annexes 4 and 5 to that witness statement by reference to the particular invoices for each category, the result of that exercise is that the Claimant’s final legal expenses are US\$92,927.38 and technical expenses are US\$1,030,514.27. Neither of those amounts was queried by the Defendant when it returned the reconciliation on 14 December 2023. That was in circumstances where the Defendant had been supplied with the invoices supporting the relevant figures. The upshot of that is an increase of US\$528,863.80 to the amount provided for in annex A to the Settlement Agreement. The final step in the calculation of the final Reconciliation Amount is then to deduct 50% of the ferry flight cost which is US\$30,024.14. That figure has not been disputed.
26. The remaining question is whether the Claimant is entitled to claim the final Reconciliation Amount in the circumstances which obtain as to attempting to get the Defendant’s agreement to that amount. The Claimant has on this application hypothesised that the Defendant might argue that there are relevant conditions precedent to the final Reconciliation Amount becoming due and payable. In my judgment, there are no conditions precedent to the final Reconciliation Amount becoming due and payable in monthly instalments from the Instalment Commencement Date pursuant to clause 3.1(b), just as there are no conditions precedent in respect of the Initial Balance Amount. I say this because clause 3.1(b) does not draw a distinction between the payment date for the Initial Balance Amount and the final Reconciliation Amount. Instead, both of those amounts, which are together the Instalment Balance Amount, are

expressed to become due and payable in monthly instalments from the Instalment Commencement Date. That date would necessarily occur without any further trigger once the Settlement Agreement was executed. Thus, it would be inconsistent with the payment regime which provided for only a single date on which the combined payment obligation would arise for the final Reconciliation Amount, whatever that happened to be, to become due and payable on any other date.

27. I conclude, therefore, that the Claimant is entitled to the payment of the portion of the Instalment Balance Amount comprising the final Reconciliation Amount.

CONCLUSION

28. Accordingly, I am satisfied that the Instalment Balance Amount is US\$19,064,534.17. In turn, each monthly instalment of the Instalment Balance Amount is US\$794,355.59. The first of those instalments fell due on 15 November 2023 and the Defendant has failed to make any payment of the 12 instalments that have fallen due since and including that date.
29. Accordingly, the Defendant owes the Claimant US\$9,534,267.08. In addition, the Defendant owes the Claimant US\$521,009.01 by way of default interest in respect of that amount. An initial demand for default interest was made in the particulars of claim and a further demand was made on 6 November 2024 for the amount that is now claimed. For those reasons, I consider that the Defendant owes the Claimant the sum of US\$10,053,276.09 and that judgment should be entered in favour of the Claimant in that amount.
30. That order does not prejudice the Claimant's claim for any monthly Instalment Balance Amounts which may fall due between 15 November 2024 and 15 October 2025.

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