Cassels

Through Hell, High-Water and COVID-19 – Hell or High-Water Provision Upheld in Aircraft Lease Agreements by English and Wales High Court

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COVID-19 has created global uncertainty, including in the business of equipment and aircraft financiers. Amidst this uncertainty, a welcome decision for lessors has been rendered by the English and Wales High Court (the EWHC). While not binding on a Canadian court, it is helpful to see the "hell or high-water" clause of a lease upheld in other jurisdictions in the face of arguments surrounding the suspension of use of leased aircraft due to both the novel COVID-19 pandemic and the often discussed grounding of the B737-MAX 8 aircraft.

In the case of *Wilmington Trust SP Services (Dublin) Limited & Others v SpiceJet Limited,* [2021] EWHC 1117 (Comm), the EWHC rejected a frustration defence in respect of unpaid rent and amounts owing under three 10-year aircraft leases entered into between the Indian low cost carrier, SpiceJet, and a number of leasing entities connected to Goshawk Aviation, and granted summary judgment in favour of the lessor. The leases in question were “dry" leases, being long-term leases where the aircraft is handed over to the lessee to exploit for its own purposes and where the lessee undertakes all risk and responsibility relation to the operation and maintenance of the aircraft. Under a “dry” lease the lessor's obligations are effectively limited to warranting quiet enjoyment. The aircraft leases in question contained a variation of the “hell or high-water clause” common in Canadian aircraft and equipment leases which provided:

Lessee's obligation to pay Rent and make all other payments in accordance with this Agreement shall be *absolute, unconditional and non-refundable and irrespective* of any contingency whatsoever including (but not limited to):

(a) any *unavailability of the Aircraft* for any reason…; or

(b) the *ineligibility of the Aircraft for any particular use or trade*, or for registration or documentation under the laws of any relevant jurisdiction; or

(c) the Total Loss … of, or any damage to, the Aircraft, Airframe or any Engine; … [emphasis added]

SpiceJet advanced two key arguments. With respect to the first aircraft, SpiceJet argued that the restrictions imposed by the Indian Government in light of the COVID-19 pandemic made it illegal to operate the aircraft

and that the payments under the lease should be suspended for the duration of the illegality. The EWHC dismissed this argument, and upheld the “hell or high water clause” which specifically provided that payments were absolute and unconditional, irrespective of the unavailability of the aircraft for any reason. It is clear that the EWHC was prepared to uphold the contractual agreements between the lessee and the lessor in the aircraft leases, even in the face of novel COVID-19 restrictions.

With respect to the second and third aircrafts, an argument of frustration was advanced based on the fact that the aircrafts, being B737-MAX8 aircrafts, had been grounded since early 2019 by decree of the Indian Directorate General of Civil Aviation following fatal accidents. The Court noted that SpiceJet assumed “the entire commercial risk of operating the aircraft” under these “dry” leases. While the EWHC noted that such “dry” leases do not operate to exclude the possibility of frustration, the language of the lease made it clear that SpiceJet had assumed all the commercial risk relating to the airworthiness of the leased aircraft. It was further held that in the context of a 10-year lease the grounding of the aircraft for appropriately 10% of the term at the relevant time did not amount to a change of circumstances which rendered performance of the leases “radically different,” a requirement of the English test for frustration.

It is welcome for Canadian equipment and aircraft financiers to see Courts upholding the business and economic agreements between commercial parties, despite unusual circumstances like the COVID-19 pandemic and the grounding of the B737-MAX 8 aircrafts. While cases of the EWHC are not binding on a Canadian court, decisions such as this will be of interest to equipment and aircraft financing companies in Canada as similar issues make their way through the Canadian courts.

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