



AVOIDING UNNECESSARY DISRUPTION LESSORS NOT FRUSTRATED BY 'HELL OR HIGH WATER' CLAUSES

by Jody Wood & Emily Balment

Takeaways

- Recent case law upholds unconditional rent payment clauses in dry aircraft leases
- Courts have confirmed that a lease will not be frustrated as a result of the COVID-19 pandemic, an aircraft arrest, or the Boeing MAX-8 grounding
- However, judges may be willing to grant a stay of execution on a summary judgment against a lessee if there are exceptional circumstances



Under a dry aircraft lease (namely a long-term lease where the aircraft is handed over to the lessee, without crew, for its own purpose), the lessee undertakes all risks and responsibilities in relation to operation and maintenance of the aircraft, while the lessor's obligations are limited to warranting the lessee's quiet enjoyment. Such leases typically contain 'hell or high water' rent payment clauses, effectively meaning the lessee must pay rent on an unconditional basis.

Three recent High Court cases have tested the robustness of these clauses, with the lessees arguing that the COVID-19 pandemic, the arrest of an aircraft by national authorities, or the grounding of the Boeing MAX-8s frustrated the leases, bringing their rent payment obligations to an end.

To establish frustration, a party must demonstrate that, without default, its obligations are incapable of being performed, since performance of the contract has been rendered radically different from the [initial obligations undertaken \(*The Sea Angel* \[2007\] 2 Lloyd's Rep 517\)](#). Clearly, the doctrine of frustration would not apply where the issue causing performance to be radically different was captured by, say, a force majeure clause. The cases serve to illustrate that hell or high water clauses continue to be seemingly enforceable, with the court concluding in each case that frustration was not available and that the lessee remained responsible for payment of the rent.

A summary of each case is below.

Salam Air v. Latam Airlines

In this case, the lessee (Salam Air, an Oman-based company) failed to meet its rent obligations under three aircraft leases with Latam Airlines in light of the COVID-19 pandemic and the Omani authorities' decision to prohibit all air passenger flights to and from Oman in March 2020.

The lessor sought to call upon standby letters of credit (an alternative to the deposit of three months' rent). The lessee sought an injunction preventing the lessor from doing so, arguing the decision of the Omani authorities frustrated the purpose of the aircraft leases, namely, to allow the lessee to operate short-haul flights from Muscat.

In refusing to grant the injunction, the judge reasoned:

1. A six-year dry aircraft lease is a challenging environment in which to establish frustration as from the lessor's perspective, it does not matter how frequently the lessee uses the aircraft, if at all, or with what level of occupancy. The lessor was still able to perform its obligation to provide the lessee with quiet possession of the aircraft, and the lessee to perform its obligation to pay the rent.
2. Under the doctrine of "frustration of purpose", it must be demonstrated that both parties had a common purpose at the foundation of the contract which is now impossible to perform. There was nothing in the lease to suggest that the lessee's use of the aircraft for short-haul flights from Muscat was a shared purpose of both parties, as opposed to a matter with which the lessee alone was concerned. The corollary of this was that the obligation to pay rent in almost any conceivable circumstance lent support to the proposition that the lessee would not be free of its obligation to pay rent merely in light of aircraft restrictions in Oman and the COVID-19 pandemic ([2020] EWHC 2414 (Comm)).

Iris Helicopter Leasing Ltd v. Elitaliana Srl

In the context of a summary judgment application, the Commercial Court rejected the lessee's argument that a lease had been frustrated after the aircraft (a helicopter) was detained by the Italian authorities for over a year and a half as a result of unpaid import taxes. The lessee argued that the Italian authorities had been acting unlawfully as there was no basis on which the taxes were payable.

The judge, granting summary judgment, held that the lease had not been frustrated. Placing particular emphasis on the hell or high water rent provision, the judge held that finding in favor of the lessee would effectively reallocate risk to the lessor. The risk (i.e., the obligation to pay rent when the aircraft was unavailable) had clearly been assumed by the lessee. In this case, the lease also addressed the question of seizure of the aircraft and of liability in relation to import taxes (*[2021] EWHC 2459 (Comm)*).

Wilmington Trust SP Services (Dublin) Ltd v. Spicejet Ltd

The lessee (SpiceJet), represented by Reed Smith's London aviation team, who at the hearing obtained a stay of execution of the summary judgment, leased three aircraft under 10-year dry leases from the claimant lessor (one Boeing 737-800 and two Boeing 737-MAX-8s). SpiceJet defaulted under its rent obligations as a result of both the COVID-19 travel restrictions and the grounding of Boeing MAX-8s from the beginning of 2019 (following crashes of similar aircraft as a result of design defects, making it illegal to operate the MAX-8 aircraft). The claimant lessor consequently applied for summary judgment.

SpiceJet put forward a number of defenses, including title to sue, illegality, and breach of an implied term under the Supply of Goods and Services Act 1982. However, it is the defense of frustration in relation to the grounding of the MAX-8 aircraft which we examine below.

SpiceJet argued that the common purpose of the leases was the provision of the aircraft for commercial use, which had been frustrated by the grounding of the aircraft. The lessor argued, *inter alia*, that the common purpose was the hire of the aircraft in return for the payment of rent and how the lessee operated the aircraft was not relevant to the commercial purpose. The judge disagreed with the lessors, noting that the terms of the lease restricted sub-leases to commercial carriers and operators.

The judge was also prepared to assume (although not deciding the point) that the hell or high water clause did not operate to exclude the possibility of frustration in this instance. While the judge accepted the general risk of the aircraft being grounded due to any prohibition on use or defect in airworthiness was foreseen by the parties and allocated to SpiceJet, here the grounding was related to defective design of the aircraft (and not simply government regulations or matters of maintenance).

Nonetheless, the judge concluded that, given the lessee had assumed the entire commercial risk of operating the aircraft, if the total loss of the aircraft did not absolve the lessee of its obligation to pay rent, then a temporary prohibition on use (amounting to 10 percent of the term of the lease) was unlikely to do so. However, the judge explicitly noted she was not saying such leases could never be frustrated and that if the prohibition on use were permanent it "might be a different matter" (*[2021] EWHC 1117 (Comm)*).

Conclusion

As can be seen from the Wilmington judgment, the judge did not rule out the possibility of frustration. However consistent with previous authority, the judgment confirms, to quote the Court of Appeal's decision in *The Sea Angel [2007]*, "the doctrine is not to be lightly invoked".



Authors



Jody Wood

Partner
London
+44 (0)20 3116 3473
jrwood@reedsmith.com

Jody is a disputes lawyer, specialising in commercial litigation and international arbitration. Jody worked in Singapore between 2008 and 2017, and was a founding member of Reed Smith's Singapore office which opened in 2012.

Jody's practice encompasses disputes in the shipping, trade and aviation sectors and his clients include maritime owners/charterers/managers, aviation lessors/lessees, insurers, banks, funds and commodity traders. A significant aspect of Jody's practice concerns enforcement of security on behalf of lenders, including multi-jurisdictional strategies for arrest and possession of aircraft/vessels, and enforcement action against other assets.



Emily Balment

Associate
London
+44 (0)20 3116 3805
ebalment@reedsmith.com

Emily is an associate in the Transportation Industry Group, having joined the firm as a trainee in 2019. Emily advises aviation and shipping clients (P&I clubs, owners and charterers) on a wide range of contentious aviation and dry shipping matters, including charterparties, bills of lading and contractual disputes. She also has experience of LMAA and GMAA arbitration as well as High Court litigation.