

Neutral Citation Number: [2012] EWHC 134 (Comm)

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 13 January 2012

BEFORE:

MR JUSTICE EDER

BETWEEN:

BANK OF SCOTLAND PLC & ANOTHER

Claimant

- and -

UNITED BREWERIES (HOLDINGS) LIMITED

Defendant

MR BAJAL SHAH QC (Instructed by Messrs Clifford Chance LLP) appeared on behalf of the Claimant

MR DANIEL WARRANTS (Instructed by Messrs Clyde & Co LLP) appeared on behalf of the Defendant

Approved Judgment
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(Official Shorthand Writers to the Court)

J U D G M E N T

MR JUSTICE EDER:

1. This claim arises out of a transaction involving the leasing of ten ATR 72-212A turboprop aircraft to a company called Kingfisher Airlines Limited ("Kingfisher") under an aircraft lease agreement dated 29 March 2007. Kingfisher carries on business as an airline from India operating scheduled domestic and international flights.
2. The structure of the transaction was as follows. A group of syndicated lenders, including the first claimant, that is the Bank of Scotland Plc, as the security trustee for certain lenders, lent sums of money to the second claimant, that is KF Turbo Leasing Limited, a special purpose vehicle incorporated in Cayman to enable the second claimant to purchase the aircraft. Each aircraft was leased then by the second claimant for a term of ten years commencing on the delivery of that aircraft to Kingfisher.
3. In accordance with clause 4.4 and paragraph 8 of schedule 2 part B of the lease, Kingfisher procured the executed guarantee from the defendant, that is United Breweries (Holdings) Limited, before the first aircraft was delivered to Kingfisher. The second claimant assigned the benefit of the lease and the guarantee by ten deeds of security assignment (one in respect of each aircraft) to the first claimant as security for the second claimant's loan obligations to the syndicated lenders and the first claimant received and holds the assigned rights as security trustee for the syndicated lenders. Notice of each of the assignments was given to the defendant and acknowledged by the defendant. As a result of the assignment all sums under the lease became payable to the first claimant as security trustee for the lenders and the first claimant acquired the right to pursue the defendant and Kingfisher for sums due under the guarantee and the lease respectively. Thus the first claimant brings these proceedings as assignee and the second claimant as assignor of the guarantee and the first claimant is suing as security trustee for the syndicated lenders.
4. It is the claimants' case that Kingfisher owes the sum of approximately \$20 million to the claimants and that the claimants are entitled to recover that sum under the guarantee from the defendant. The claimants now seek summary judgment in respect of that sum. The sum originally claimed in the claim form was a smaller sum. However, on 28 September 2011 the present application for summary judgment was issued and attached in support of that application was a witness statement of Mr Riaz Alidina dated 28 September 2011. Subsequently the claimants have served a further second and a yet further third witness statement of Mr Alidina updating the position with regard to the total amount of money said to be due under the guarantee and for which the defendant is liable. Each of those witness statements has been served on the defendant. The latest of those witness statements, that is the third witness statement, confirms that the total amount owing in rent, variable rent and default interest as of the date of that third statement, that is 6 January 2012, was US \$21,589,972.56. That is the sum which the claimants now seek summary judgment for at this hearing.
5. It is true that part of that money claim relates to amounts which fell due after the issuance of the claim form. However, that is not fatal in any way because there is no absolute rule of law or practice which precludes an amendment to rely on a cause of

action which has arisen after the commencement of the proceedings, see Maridive and Oil Services (SAE) v CNA Insurance Company (Europe) Limited [2002] 1 All ER (Comm) 653 at [54] per Chadwick LJ. The question is one of discretion to be exercised as the justice requires. In my view, there is no reason why I should not exercise the necessary discretion in favour of the claimants to permit an amendment to the Particulars of Claim to allow the claimants to claim the additional amounts which have, on the evidence before me, fallen due after the issuance of the claim form.

6. That is so for the following reasons. First, the legal basis for these additional sums is the same as for the sums pleaded in the original Particulars of Claim. Second, because demands have been made on the defendant for these additional sums and the defendant is fully aware of them. Third, the defendant is also aware that the claimants claim these additional sums because they are clearly set out in the first, second and indeed third witness statements of Mr Alidina that I have referred to. Further, not only is the defendant aware that the claimants are seeking those additional sums, but, because they are included in the witness statements that I have just referred to, it is plain that the claimants are seeking summary judgment in relation to those sums as part of their application for summary judgment. Fourth, the defendant has not objected to these further sums. Fifth, the defendant does not have any defence to these additional sums, for the reasons which I will set out in a moment, just as it has no defence to the sums pleaded in the points of claim. Sixth, the claimants' claim for these additional sums have the same good prospects of success as the pleaded claim, which is why the claimants seek summary judgment on them. So for those reasons it seems to me that insofar as may be necessary I should give and do hereby give permission to amend the Particulars of Claim to claim the total sum that I have referred to of \$21,589,972.56.
7. Reverting to the substantive issues, under the lease Kingfisher is liable to pay rent quarterly in advance in accordance with clause 7 and schedule 8 of the lease. It is also liable to pay maintenance reserves, referred to in the lease as variable rent monthly in arrears pursuant to clause 8. By clause 8.5.2 Kingfisher has the option of providing letters of credit for six months' worth of variable rent in lieu of paying such variable rent monthly in cash. However, this option is only available if no "events of default" shall have occurred or be continuing. There are other provisions in the lease with regard to payment terms and the payment of interest. By clause 2.1 of the guarantee the defendant undertook to pay all monies expressed to be due and payable by Kingfisher under the lease within 15 business days of first written demand on the defendant. The lease, the guarantee and the security assignments are all governed by English law and subject to exclusive jurisdiction clauses in favour of England.
8. The witness statements which have been provided to the court confirm Kingfisher's failure to pay substantial amounts of money under the lease and the defendant's failure to pay under the terms of the guarantee. It does not seem to me to be necessary to recite the entire history of those matters. At the end the day it is my conclusion that, as set out in those witness statements, the total amount claimed from Kingfisher, and indeed from the defendant as guarantor (that is the sum of US \$21,589,972.56), is due and owing by both Kingfisher and by the defendant, Kingfisher under the lease and the defendant under the terms of the guarantee.
9. So far as the present proceedings are concerned, the claim form with the Particulars of Claim attached was issued on 23 September 2010. Those proceedings were duly served.

The defendant filed an acknowledgement of service on 12 October 2010 indicating an intention to defend the claim. However, no Defence has been filed or served by the defendant. However, it is right to record that, as I understand it, Messrs Clyde and Co became solicitors on the record for the defendant and continue as solicitors on the record for the defendant. Thereafter matters did not progress until September 2011 when the claimants issued the present application for summary judgment. The original hearing date for that summary judgment hearing was adjourned, as I understand it, to allow certain negotiations to take place, but in the event those negotiations did not bear any fruit and it is in those circumstances that the claimants have reinstated the present application.

10. Notwithstanding that brief summary of the underlying claim and the history of the proceedings, the present position is that the defendant has not served any Defence. The defendant has not put in any evidence in objection to the present application for summary judgment. The defendant is represented today by Mr Daniel Warrants, instructed by Messrs Clyde and Co, the solicitors on the record for the defendant. He has not put before the court any skeleton argument in objection to the claim. I have asked him for any submissions that he would wish to make. He has declined that invitation and informed me that his instructions are simply to appear in court before me today at this hearing to simply take a note.
11. Having considered the papers before me and in the absence of any indication of any possible defence by the defendant, it is my conclusion that the sum claimed is properly due and owing by the defendant to the claimants under the guarantee and that the claimants are entitled to summary judgment. In my view, the application is straightforward and the lack of defence is not altogether surprising. There are no disputed issues of fact, there are no disputed issues of law and, in my view, the defendant has no real prospect, indeed no prospect whatsoever, of defending this claim at trial and there is no other reason to let the matter proceed to trial.
12. It is right to record that in the skeleton argument put before the court by Mr Shah, instructed by Messrs Clifford Chance LLP, acting on behalf of the claimants, he identified a number of matters which he said might conceivably be raised by the defendant against the claimants by way of defence. That was at a stage when Mr Shah was uncertain as to whether or not the defendant would be represented at the hearing and, consistent with his duties to the court, if the defendant was not represented, as I say, he had identified those matters. I have considered those matters and, in my view, although Mr Shah was absolutely right to raise them given the uncertainty as to whether or not the defendant would appear, consistent with Mr Shah's duties as counsel before this court, I am satisfied that there is nothing in any of those points which could conceivably be relied upon by the defendant by way of defence. In the event it is unsurprising that Mr Warrants, who does appear before me now, acting on behalf of the defendant, has not raised any matter before me by way of defence.
13. For all those reasons it is my conclusion that there is no real prospect that the defendant has any defence to this claim. There is no other good reason why this matter should proceed to trial. I am satisfied that the amounts claimed are due and owing and that therefore in those circumstances the claimants are entitled to summary judgment in the sum claimed, that is \$21,589,972.56.