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Case No: A4/2021/0598

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
SIR MICHAEL BURTON GBE
[2021] EWHC 362 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 December 2021

Before:
LORD JUSTICE PHILLIPS
and
LORD JUSTICE NUGEE

Between:

SPICEJET LIMITED

Appellant

- and -

DE HAVILLAND AIRCRAFT OF CANADA LIMITED

Respondent

Akhil Shah QC and Laurentia De Bruyn (instructed by K&L Gates LLP) for the Appellant
Jasbir Dhillon QC and Tom Wood (instructed by Pinsent Masons LLP) for the Respondent

Hearing date: 21 July 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be
Tuesday 7 December 2021 at 10:30am

Lord Justice Phillips:

1. By application notice dated 23 March 2021 the respondent (“De Havilland”) applied for (i) an order that this appeal be struck out pursuant to CPR 52.18(1)(a) unless the appellant (“SpiceJet”) paid US\$42,950,000 (or such other sum as this Court might determine) into court and/or (ii) an order that SpiceJet provide security for costs of the appeal.
2. At the end of the hearing of the application on 21 July 2021 we made an order that (i) unless SpiceJet paid the sum of £5,000,000 into the Court Funds Office by 4pm on 18 August, its Appellant’s Notice was to stand struck out without further order and (ii) there be no order for security for costs of the appeal. We indicated that the reasons for our decision would follow in writing.
3. On 16 August 2021 SpiceJet applied for an extension of time in which to make the payment into court, seeking an additional 60 days. Nugee LJ and I refused that application on the papers, with reasons to follow.
4. This judgment sets out my reasons for making the decisions referred to above.

The background

5. On 23 February 2021 Sir Michael Burton GBE (“the Judge”) granted De Havilland summary judgment on its claim in these proceedings against SpiceJet. In addition to declaring that De Havilland had been entitled to terminate the Purchase Agreement between the parties and its obligation to deliver to SpiceJet any further Q-400 aircraft thereunder, the Judge ordered SpiceJet to pay De Havilland US\$42,950,000 as liquidated damages together with accrued interest of US\$1,149,649.61 (“the Judgment”). The Judge also awarded De Havilland the costs of the claim (including an interim payment of US\$330,000 to be paid by 9 March 2021).
6. In relation to the award of liquidated damages, the Judge in his reserved judgment considered in detail SpiceJet’s case that it was arguable that the award was not a genuine pre-estimate of damages, but amounted to a penalty. He concluded at [34] as follows:

“[SpiceJet] neither in evidence nor through counsel made any attempt to cast doubt on the realistic nature of this estimate, which was agreed at the time. In all the circumstances, and for the reasons given by [De Havilland], I am satisfied that the sum per aircraft calculated and agreed as a pre-estimate of loss in Article 15.4(c) [of the Purchase Agreement] is not an irrecoverable penalty.”
7. The Judge granted SpiceJet permission to appeal on one ground, namely, whether (as a matter of contractual interpretation) the parties’ agreement of a Change Order (No. 6) suspending the scheduled delivery date for certain aircraft also had the effect of suspending or extinguishing SpiceJet’s accrued obligations to make pre-delivery payments for those aircraft, describing that ground as “just a squeaker of an argument”¹. De Havilland did not invite the Judge, in granting permission, to make the grant conditional on SpiceJet paying the Judgment sum or any part of it. It should be noted

¹ That ground related to all but US\$450,000 of the liquidated damages.

that the Judge refused SpiceJet permission to appeal on the question of whether the liquidated damages were a penalty and, what is more, SpiceJet did not renew its application for permission to appeal on that ground before this Court.

8. At the same hearing SpiceJet applied to the Judge for a stay of execution pending appeal, contending that it was in a precarious financial situation and should not be exposed to execution (and likely insolvency proceedings) until it had had a chance to overturn the Judgment. The Judge refused a stay and ordered that SpiceJet pay £12,000 in costs in respect of that application, also by 9 March 2021. The Judge took the view that a stay was not necessary because it was unlikely that De Havilland would be able to enforce the Judgment against SpiceJet in India before the appeal was heard. He further expressed the view that SpiceJet's chairman and majority shareholder², Ajay Singh, "is going to think it worthwhile putting some money in" to SpiceJet, despite evidence from SpiceJet's senior vice president (legal) and company secretary, Chandan Sand, that "Mr Singh is not in a position to invest more into SpiceJet at this stage".
9. SpiceJet duly made the interim payment on account of costs and paid the costs of the stay application by 9 March 2021, but paid no part of the Judgment sum. As already indicated, De Havilland issued its application on 23 March 2021³.
10. On 3 June 2021 De Havilland issued a Petition in the High Court of Delhi seeking to enforce the Judgment. The following day an order was made by Justice Midha requiring SpiceJet to file its Objection and Reply within four weeks. A further order that SpiceJet file an affidavit of its assets within 30 days was subsequently overturned by SpiceJet on appeal.
11. SpiceJet's Objection and Reply was dated 2 July 2021 and extended to 44 pages. Among the points taken in opposition to the enforcement of the Judgment was that the Judgment was unenforceable in India as it was founded on a breach of the law in force in India and/or had not been given on the merits of the case. The basis for that contention was that the sum awarded as damages "is in the nature of a penalty" and had been awarded "without undertaking the investigation of the loss suffered by [De Havilland]. Thus the [Judgment] of damages has not been given on the merits of the case".
12. In the meantime, on 5 June 2021, an article appeared in the Financial Times reporting that Mr Singh had prospered financially during the pandemic by branching out into Covid-19 testing and genomic sequencing. The article concluded by stating that, despite SpiceJet's financial problems, Mr Singh had been shortlisted as a bidder for Air India, an acquisition that would require him to take on US\$3.3 billion of debt.

² After the hearing SpiceJet's solicitor wrote to the Court to confirm that Mr Singh and his immediate family together owned 59.54% of the share capital of SpiceJet. Almost all of that shareholding was either charged to banks or the subject of non-disposal undertakings.

³ In its witness statements in response, SpiceJet indicated that it was renewing its application for a stay of execution, but in my judgment that application added nothing to SpiceJet's opposition to the unless order sought by De Havilland and it was rightly not separately pursued by Mr Shah QC, on behalf of SpiceJet, at the hearing before us.

The application for an unless order

The applicable rules and principles

13. CPR 52.18 provides as follows:

“(1) The appeal court may –

(a) strike out the whole or part of an appeal notice;

(b) set aside permission to appeal in whole or in part;

(c) impose or vary conditions upon which an appeal may be brought.

(2) The court will only exercise its powers under paragraph (1) where there is a compelling reason for doing so.

(3) Where a party was present at the hearing at which permission was given, that party may not subsequently apply for an order that the court exercise its powers under subparagraphs (1)(b) or (1)(c).”

14. As De Havilland was present and represented at the hearing on 23 February 2021 when the Judge granted permission to appeal (and did not ask that conditions be imposed), it was clearly debarred by CPR 52.18(3) from asking this Court to impose a condition under CPR 52.18(1)(c). Nevertheless, De Haviland invited the Court to strike out the appeal under CPR 52.18(1)(a) if SpiceJet did not comply with a requirement to pay the Judgment sum into court: this was plainly asking for the imposition of a condition by another route.

15. It is nevertheless clear that the Court has jurisdiction to make such an order. In *Contract Facilities Limited v The Estate of Rees* [2003] EWCA Civ 1105 Waller LJ, giving the judgment of the court, stated at [21]-[22]:

“The court of appeal has the power to manage its own cases. It would be very strange if CPR [52.18] prevented the court of appeal imposing conditions under its case management power where circumstances during the currency of the appeal made it appropriate either to stay the appeal or stay the appeal subject to conditions. ...

It seems clear that the court of appeal has case management powers in addition to those that it may have under CPR 52. Furthermore it seems to us that the application that is now before us is an application made during the currency of an appeal where the court is being asked to consider whether to exercise its case management powers by reference to conduct while the appeal is pending. That is totally different from the application before His Honour Judge Weeks. In our view the court of appeal has jurisdiction to deal with this application and it is not inappropriate to consider the making of the order asked even though the respondents did seek to impose conditions on the permission to appeal before His Honour Judge Weeks.”

16. However, in *Spar Shipping v Grand China Logistics Holding (Group) Co Limited* [2016] EWCA 520 Longmore LJ explained the rationale of CPR 52.18(3) at [15] as follows:

“The whole point, it seems to me, of [52.18(3)] is to avoid the enormous potential expense and time taken in applications of this kind...The whole point is that these considerations should be advanced to the judge at the time he is minded to grant permission to appeal so that he can have them in mind and so an order can be made at a time when considerable sums of money and further time is not required for consideration of these matters.”

17. Longmore LJ then cited the passages referred to above from *Contract Facilities*, noting that Waller LJ had concluded that there was jurisdiction to entertain the application. But Longmore LJ went on to say at [24]:

“It is noteworthy that [Waller LJ] refers to conduct while the appeal is pending. As I read that, that means conduct relating to the way the appeal is being conducted and not conduct which might, if there were a general power to impose conditions after permission to appeal had been granted, be relevant to take into consideration.”

18. Those decisions were considered by McCombe LJ in *Morris v The Highland Group International* [2016] EWCA Civ 1361, a case in which permission to appeal had been granted by the Court of Appeal (Lindblom LJ) at an oral hearing attended by the respondent, who had not asked for the imposition of any conditions. McCombe LJ stated at [24]:

“It seems to me that in imposing the restriction that it does in paragraph [52.18(3)] of the Rules, the rule-making body has expressly excluded the power under (a), and it seems to me it has excluded it for very good reason. Of course, at the permission stage things are fresh in the Court of Appeal and the question of imposing conditions (paragraph (c)) may well arise. But as time goes on the court must retain, in my view, a power of control over proceedings before it and if an appropriate case is brought before it...there must be a power to strike out, and a strike out power to my mind always includes...a power to order a strike-out “unless” something is done; the less draconian is obviously included in the more draconian.”

19. McCombe LJ held that there was in that case a compelling reason to make an unless order requiring payment into court of half the judgment sum, namely, the fact that the appellant had arranged its affairs in a manner that would make it difficult to enforce against any substantive assets, combined with the fact that the appellant continued to fail to pay the judgment sum (despite the refusal of a stay of execution) and that there was “object silence” from the appellant as to whether there would be compliance if the appeal was unsuccessful.

20. In my judgment, whilst the Court of Appeal undoubtedly retains jurisdiction to make an order under CPR 52.18(1)(a) which effectively imposes a condition which could not be imposed under CPR 52.18(1)(c), the discretion to make such an order must be

exercised with some care and with regard to the important policy considerations underlying the restriction imposed by CPR 52.18(3) as identified by Longmore LJ in *Spar Shipping*. It is not appropriate to attempt to define the precise circumstances in which that discretion might be exercised for obvious reasons, but I would expect that in most cases the court would require that there has been a material change in circumstances since the hearing at which permission to appeal was granted such as to justify re-opening the matter at a further hearing. Absent a material change of circumstances, the respondent seeking an unless order under CPR 52.18(1)(a) would effectively be attempting to re-litigate an issue which should have been (and may have been) determined before, contrary to well-established principles.

21. Where the Court of Appeal does decide that it is appropriate to consider exercising its discretion afresh to require the judgment sum to be paid into court as a condition of the appeal proceeding, guidance as to the approach is to be found in *Merchant International Company Limited v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2016] EWCA Civ 710 (a case considering the imposition of a condition under CPR 52.18(1)(c), not a strike-out under CPR 52.18(1)(a)). At [37] Christopher Clarke LJ stated that the following matters were clear:

- “(a) The essential question is whether or not there is a compelling reason to make payment in of the judgment sum, plus costs and interest (or some part thereof) a condition for further pursuit of the appeal– hereafter “a security payment order”;
- (b) Whether there is a compelling reason is a value judgment to be made on the particular facts of the case under consideration;
- (c) The fact that a judgment has been entered against the appellant and no stay has been sought or granted does not mean that, as a matter of course, compliance with the judgment should be made a condition of appeal nor does it, alone, afford a compelling reason for a payment order;
- (d) On the contrary the power in CPR 52.9 was not designed to be no more than an alternative means of securing enforcement and is only to be exercised with caution;
- (e) Whilst every case depends on its particular facts the court is likely to find there to be a compelling reason to make a security payment order which has that effect if the judgment debtor has in the past (*Dumford Trading*) or is likely in the future (*Wittman*) to take steps to denude itself of assets or to put its assets beyond the reach of normal enforcement processes.”

Application to the present case

22. The basis on which the application was originally made in March 2021 was that there were three compelling reasons justifying an unless order under CPR 52.18(1)(a).
23. The first was that SpiceJet had failed to pay the Judgment sum, or any part of it, as ordered by the Judge. However, it was fully anticipated by the parties when they appeared before the Judge that SpiceJet would not (and SpiceJet said it could not) pay the Judgment sum. Indeed, the Judge refused a stay precisely because of the time it would take De Havilland to enforce the (unsatisfied) Judgment in India. In my judgment the continued failure to discharge the Judgment was in no sense a change of circumstances sufficient to justify an order striking out an arguable appeal: De Havilland could have raised SpiceJet's likely failure to pay the Judgment as a ground for imposing a condition when granting permission to appeal, but chose not to do so.
24. The second was the considerable practical difficulties, expense and delay in attempting to enforce in India. But again, those were matters which could have been anticipated and deployed before the Judge.
25. The third was SpiceJet's continued funding of its own solicitors and counsel in England in this appeal and in two other sets of proceedings in the High Court, despite claiming impecuniosity. Again, I see no merit in that point. It was inherent in granting SpiceJet permission to appeal that it would instruct and pay its legal team to pursue the appeal. Further, the funding of the other two sets of proceedings was relied upon in evidence before the Judge in opposing SpiceJet's application for a stay of execution.
26. It follows that, had the application come before me on the basis it was issued and initially advanced, I would have been minded to refuse it out of hand. It was, in my judgment, no more than a blatant attempt to re-open the question of whether a condition should be imposed on the grant of permission to appeal on grounds which were available before the Judge. That would have been, in my judgment, directly contrary to the purpose of and policy behind CPR 52.18(3).
27. In my judgment, however, SpiceJet's Objections and Reply in the enforcement proceedings in Delhi, placed before the Court in further evidence served in July 2021, constituted a significant change of circumstances. It was always to be anticipated that SpiceJet might take legitimate points or objections to delay or prevent the enforcement process, whether based on its financial plight or otherwise. But the contention in the Objections and Reply that the damages awarded amount to a penalty is a flagrant attempt to re-open a point which was fully considered and rejected by the Judge after full argument. As far as this Court is concerned, taking that point, even in foreign proceedings, must be regarded as abusive and cannot be countenanced. SpiceJet is not merely requiring De Havilland to go through proper processes to enforce the Judgment, but is seeking to obstruct and prevent that process by improper means. Further, SpiceJet is seeking to challenge one aspect of the Judge's decision on appeal to this Court whilst seeking to re-open another aspect in the proceedings in Delhi in respect of which it does not have permission to appeal here and has not renewed its application for such permission.
28. I conclude that there has been a change in circumstances since the hearing before the Judge which constitutes a compelling reason to make an unless order under CPR

52.18(1)(a), subject to the question of whether any such order would stifle what is accepted to be an arguable appeal: *Goldtrail Travel Limited v Onur Air Tasimacilik AS* [2017] 1 WLR 3014 per Lord Wilson JSC at [12].

29. Given the evidence before the court as to SpiceJet's current balance sheet deficit (said to be £232.88m as at 31.12.20) and lack of profitability, the argument on the question of stifling centred on the question of whether Mr Singh could and would assist SpiceJet by providing (or financing) the funds necessary to pay into court the Judgment sum or part of that sum. As explained by the Supreme Court in *Goldtrail* at [23], the question is:

“Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition.”

30. The Supreme Court recognised at [24] that the court can expect to receive an emphatic refutation of the suggestion by both the company and the owner, but stated:

“The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms.”

31. In the present case (as referred to above) Mr Sand made a statement in February 2021 (in support of the application to the Judge for a stay of execution) in which he stated at [21] that:

“The majority shareholder and promoter, [Mr Singh] is not in a position to invest more into SpiceJet at this stage. He has already assisted SpiceJet wherein his shares are either pledged with banks or are subject to non-disposal undertakings in favour of those banks for financial assistance already extended to SpiceJet. As a result the promoter is not in a position to support SpiceJet further financially”.

32. Mr Sand gave similar evidence for the purpose of opposing this application on 21 May 2021, adding that Mr Singh's investment in his daughter's medical science business was meagre compared to the Judgment sum.

33. In my judgment it is clear that Mr Singh has very significant personal wealth, with the ability to raise large sums, most recently confirmed in the Financial Times article. It is also evident that, by reason of his majority holding and financial investment in SpiceJet, he has a clear incentive to assist the company in overturning the Judgment. I am satisfied that SpiceJet can reasonably expect Mr Singh to provide some funding to pursue the appeal, at least proportionate to the reasonable prospects of success. SpiceJet has certainly failed to produce any convincing evidence to the contrary, not least

because Mr Singh himself has not produced a witness statement, let alone condescended to provide details of his situation and any basis for declining to help.

34. As indicated above, in assessing what funding SpiceJet could expect Mr Singh to provide, it is necessary to take into account the prospects of success of the appeal: it is unlikely that a competent businessman would be willing to invest US\$42million of his own funds for a small chance that his company would avoid liability in that amount, but he might well be willing to invest a much smaller sum to avoid the liability and the consequential adverse effects on the company's status and affairs. The Judge considered that the appeal had a real prospect of success, but only just (hence his reference to "a squeaker"). I agree with that assessment, and consider that it is accordingly appropriate to expect that SpiceJet, including funding from Mr Singh, could pay into court £5,000,000. I consider that is the correct sum to order as a term of an unless order.

Security for the costs of the appeal

35. In *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 the Court of Appeal explained that the justification for ordering security for costs against individuals and companies ordinarily resident abroad is that there may be substantial obstacles to or a substantial extra burden (of cost or delay) in enforcing an English judgment, greater than there would be as regards a party resident in England. Any security should be related to the probable extra burden of taking enforcement steps in a foreign jurisdiction. To award security greater than that simply because the party was abroad would be to discriminate unjustifiably and improperly against them on the grounds of their place of residence.
36. De Havilland contended that there would be a substantial extra burden in enforcing the cost of the appeal against SpiceJet due to the need to enforce them in India.
37. The difficulty with that contention, in my judgment, is that De Havilland is already engaged in the process of enforcing the Judgment in India. There is no evidence before the Court to demonstrate that enforcing the relatively small sum which will be incurred in relation to the appeal would add significantly or at all to those costs. Mr Shah informed the Court that SpiceJet would undertake not to oppose any application by De Havilland to amend its existing Petition in the High Court of Delhi to add any costs of the appeal awarded to De Havilland.
38. As there are no extra burdens or costs in enforcing any award of costs of the appeal, above and beyond those which De Havilland will incur in any event, any order for security for costs would be made solely because SpiceJet is a company resident in India. That would not be a proper order and I would refuse to grant it.

The subsequent application for an extension of time

39. Two days before the deadline for paying the Judgment sum into court, SpiceJet issued its application for an extension of time. In my judgment the evidence served in support, a further statement from Mr Sand, revealed nothing new. He referred to the company's ongoing financial difficulties, and again stated that Mr Singh was unable to inject further funds into the company in his personal capacity. However, there was still nothing directly from Mr Singh and De Havilland's solicitors sent the Court a further

article dated 15 September 2021 recording that Mr Singh was leading a consortium which had submitted a bid for Air India.

40. Mr Sand also referred to the possibility of SpiceJet raising further share capital and to the need for time to obtain Reserve Bank of India consent to make any payment or to provide any other form of security. But there was no evidence that any such matters would bear fruit or become relevant within any reasonable timescale.
41. In my judgment the application for an extension was a pure delaying tactic, advancing nothing that could conceivably justify postponing the date fixed by the Court on 21 July 2021.

Lord Justice Nugee:

42. I agree.