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Case No: CL-2022-000384

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/03/2024

Before :

CHRISTOPHER HANCOCK KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

SAUDI ARABIAN AIRLINES CORPORATION	**Claimant**
- and -	
SPRITE AVIATION NO. 6 DAC	**Defendant**

- -
- -

Steven Thompson KC and Tom Stewart Coats (instructed by **Norton Rose Fulbright LLP**) for the **Claimant**
Edward Cumming KC and Catherine Hartston (instructed by **Pillsbury Winthrop Shaw Pittman LLP**) for the **Defendant**

Hearing date: 5 December 2023

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 09:15 on Wednesday 13th March 2024.

Christopher Hancock KC:

Introduction.

1. This is the trial of a preliminary issue ("**Preliminary Issue**") as to the proper interpretation of an operating lease ("**the Lease**") of an Airbus A320-200 ("**the Aircraft**") pursuant to which the Defendant ("**Sprite**"), as lessor, made the Aircraft available to the Claimant ("**Saudia**"), as lessee.

2. The Preliminary Issue, which was directed by Foxton J on 9 June 2023, is as follows:

   "*On the proper interpretation of the CTA [the Common Terms Agreement], as defined in the Particulars of Claim, was Sprite [the Defendant] obliged to make payments in respect of maintenance work under clause 7.2 of the CTA if Saudia [the Claimant] did not ensure that Sprite received an invoice and supporting documentation reasonably satisfactory to Sprite evidencing performance of the maintenance work before the Expiry Date? This includes, for the avoidance of doubt, any issue as to whether time was of the essence for this purpose, as expressly stipulated at clause 15.6 of the CTA, or otherwise.*"

The background facts.

3. The case concerns the lease of the Aircraft. The lease was originally between Celestial Aviation Trading 8 Limited and Saudia but, by a series of assignments, amendments, supplementary agreements and novations, became a contract between Sprite, as Lessor, which leased the aircraft to Saudia.

4. In addition to the rent proper, Saudia agreed to pay, and did in fact pay, sums to the lessor of the Aircraft during the term of the Lease, described therein as "Supplemental Rent". More particularly, pursuant to clause 5.4 of the CTA (the "Common Terms Agreement" the terms of which were incorporated into the lease of the aircraft), and as set out in the ASLA (the "Aircraft Specific Lease Agreement"), as amended from time to time, Saudia agreed to pay the lessor sums by way of Supplemental Rent comprising, inter alia, APU Supplemental Rent, Engine Supplemental Rent and Landing Gear Supplemental Rent, at rates set out in Schedule C to the ASLA, calculated according to the flight operations of the Aircraft and certain agreed monthly rates. Supplemental Rent was to be aggregated in 'pots' for different sections of the Aircraft.

5. Under clause 7.2 of the CTA, the lessor was obliged to reimburse Saudia as and when Saudia incurred costs of maintaining the Aircraft, upon request and upon receipt by the lessor of satisfactory paperwork. The lessor's liability to reimburse Saudia from time to time was capped, for each pot, at the amount paid in by Saudia over the term of the Lease for each such section (less any sums already reimbursed to Saudia therefrom).

6. For the purposes of this hearing, (although I should emphasise that this is a hypothesis only, made only for the purposes of this hearing) I do not understand it to be in dispute that, before redelivery of the Aircraft, Saudia carried out (or had carried out for it) maintenance work on the APUs, Engines and Landing Gear and incurred costs in that regard.

7. Saudia sought reimbursement from Sprite for those costs, capped at the amount available in each pot. Sprite refused to reimburse Saudia.

8. The Lease contained the following principally relevant terms.

*"**7.2 Maintenance Contributions***

If, under the Lease for the Aircraft, Lessee must pay Supplemental Rent, then provided no Event of Default has occurred and is continuing, Lessor will pay the following amounts to Lessee by way of contribution to the cost of maintenance of the Aircraft, upon receipt by Lessor, within six months after commencement of such maintenance and before the Expiry Date, of an invoice and supporting documentation reasonably satisfactory to Lessor evidencing performance of the following work by the Maintenance Performer:…

*(c) **Engine Refurbishment**: With respect to any Engine, the performance, in accordance with the Lease, of Engine Refurbishment in respect of that Engine the lesser of (i) the amount of that invoice and (ii) an amount equal to the aggregate amount of the Engine Supplemental Rent paid under the Lease in respect of that Engine at the date such work starts less the aggregate amount previously paid in respect of that Engine by Lessor under this sub-clause;*

[like clauses following dealt with the APU and landing gear]

…Lessor agrees to make the contributions provided for under this Clause 7.2 on the basis that Lessee accepts full responsibility for, and is obliged to undertake, all maintenance, replacement and repair work (including the obligations under Clauses 8.10, 8.11 and Schedule 6)."…

…15.6

"The time stipulated in the Lease for all payments payable by Lessee and the prompt, punctual performance of Lessee's other obligations under the Lease are of the essence of the Lease."

Relevant principles of contractual interpretation.

9. It is common ground that the Preliminary Issue involves what are primarily issues of contractual interpretation. The appropriate principles to apply, in such a case, have been clearly laid down in a line of leading authorities from the Supreme Court, being Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, Arnold v Britton [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] AC 1173.

10. It was submitted to me, and I accept, that a convenient summary of the appropriate principles can be found in the decision of Sir Geoffrey Vos in Deutsche Trustee v Duchess & Others [2019] EWHC 778 (Ch) [29-30], which were approved on appeal at [2020] EWCA Civ 521:

"*29. The parties referred specifically to what Lord Neuberger had said at paragraphs 15 and 19 of Arnold in relation to the interpretation of a lease as follows:-*

"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have

understood them to be using the language in the contract to mean", to quote Lord Hoffmann [at paragraph 14 in Chartbrook Ltd v. Persimmon Homes Ltd [2009] 1 A.C. 1101]. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. …

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. … Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

30. Both parties also referred to the iterative process that should be engaged when interpreting documentation relating to collateral loan obligations and the like. That process involves checking each of the rival meanings against other provisions of the document and investigating its commercial consequences (see Re Sigma Finance Corp [2010] 1 All ER 571 ("Sigma") per Lord Mance at paragraph 12 and Lord Collins at paragraph 37, and Rainy Sky per Lord Clarke at paragraph 28). " ”

The parties’ respective cases.

Sprite’s contentions.

11. Sprite’s case was, it was submitted, essentially straightforward, and was that the terms of the CTA (set out above) speak for themselves, and lead to the following result:

(1) If the Lessee, Saudia, did not provide any invoice or supporting documentation to the Lessor, Sprite, so that it received the same (i) within six months of the commencement of any of the work in respect of which it seeks a contribution, or, in any event, (ii) before the Expiry Date (in August 2019), Saudia would not be entitled to the payment of the contribution.

(2) This was not only apparent from the words that the parties chose to use in their bargain, but because of the obvious need for contractual and commercial certainty in the complex and sophisticated world of aircraft leasing and finance.

(3) It made perfect commercial sense for the parties to have stipulated time limits prior to which the Lessee, Saudia, was obliged to seek a contribution from the Lessor if it was to seek one. Otherwise, there would be the prospect of (i) unedifying and unduly complex disputes (of the kind that will arise in these proceedings, if Sprite fails on the preliminary issue) regarding the scope and cost of maintenance work, potentially many years after work had taken place, and potentially after any commercial relationship between the parties had ended and the aircraft had been delivered to, and operated by, other third parties, such that it would be hard for such disputes to be effectively adjudicated, and (ii) Sprite having ongoing uncertainty, after the Expiry Date of the Lease, as to its financial obligations in respect of the Aircraft, where that uncertainty would stand to cause real challenges for Sprite in considering what approach to take to the future leasing-out of the Aircraft.

(4) In this latter regard, the requirement for Saudia to have ensured that Sprite received any invoices or other documentation before the Expiry Date can be seen as imposing, essentially, a practical 'long-stop date' by when this had to happen. The 'double-barrelled' time limit, with reference to six months of the commencement of any work and such a 'long-stop date', underscores the importance of the 'long-stop date': see Lewison, 'The Interpretation of Contracts', (7th ed., 2020) at paragraph 15.51, and Petrocapital Resources plc v Morrison & Foerster (UK) LLP [2014] 1 WLR 2365 (in which it was held that the better view was that time was of the essence in respect of a stipulation that convertible notes be redeemed "*in any event within 12 months*").

(5) To adapt the words of Longmore LJ, when giving judgment in the Court of Appeal in FG Wilson (Engineering) Limited v. John Holt & Co (Liverpool) Limited [2013] EWCA Civ. 1232 at paragraph 36, it would be a most surprising result if the time stipulations in clause 7.2 were to be given no effect. Indeed, the average businessperson who was told that time stipulations of this kind could be entirely disregarded, would hardly be able to contain his/her disbelief.

(6) Paragraph 15.6 supported this submission. This is, on its proper interpretation, an express stipulation that, insofar as Saudia is required to do anything under the Lease, including, under clause 7.2, to provide appropriate documentation, including invoices, evidencing performance of maintenance work to Sprite before the Expiry Date (if Sprite is to contribute to the cost of that maintenance work), the time stipulated is of the essence. Sprite was not obliged to make payments in respect of maintenance work if Saudia did not ensure that Sprite received appropriate documentation evidencing performance of the work before the Expiry Date.

(7) In response to Saudia's argument that clause 7.2 imposed no obligation, Sprite contended that Saudia's case seems to be that (i) clause 15.6 only refers to time being of the essence for "*obligations*" of Saudia under the CTA, (ii) Saudia characterises the requirement for it to provide the necessary invoices and supporting documents to Sprite before the Expiry Date, if Sprite were to be obliged to contribute to the relevant maintenance costs, as a "*right*", and not as an "*obligation*", and (iii) accordingly, time is not of the essence in respect of the requirement for Saudia to provide the necessary invoices and supporting

documents. However, on any natural reading of clause 15.6, the word "*obligation*" encompassed the requirement for Saudia to provide Sprite with the necessary invoices and supporting documents in order to become entitled to a payment from Sprite. Any other reading would be deeply artificial – both with an eye to the terms of the clause and with an eye to the sorts of distinctions to which commercial counterparties might be likely to agree – and would subvert a common-sensical and commercial interpretation of the clause.

(8) In any event, even if the court were to take another view, Saudia's pre-emptive reliance on clause 15.6 overlooks that <u>Sprite does not need to rely on clause 15.6</u> to succeed on the Preliminary Issue, given the express terms of clause 7.2, and its wider context, as addressed above. Consequently, even if Saudia is right as to how clause 15.6 should be interpreted, it is, at the absolute most, neutral for Sprite's position on the Preliminary Issue. Even if the need for Saudia to provide the necessary invoices and supporting documents to Sprite before the Expiry Date, if Sprite were to be obliged to contribute to the relevant maintenance costs, were not to be characterised as an obligation of Saudia, then it would – at the very least – be a <u>condition precedent</u> to any obligation on the part of Sprite to contribute to the maintenance costs. It is well-established that strict compliance with a condition precedent is generally required: see Lewison at ¶16.105 to ¶16.108.

(9) Sprite also emphasised the undesirability of a full trial of the claim, which is what would result from Saudia's construction. Such a trial would involve, *inter alia*, (a) disclosure in respect of (i) issues relating to the adequacy of the invoices and documents that Saudia belatedly provided to Sprite more than two years after the Expiry Date, and (ii) the work that was allegedly carried out by or for Saudia, (b) witness evidence on each of those matters, and (c) expert evidence in respect of the complex world of aircraft maintenance and the reasonableness of sums allegedly incurred by Saudia or the extent to which the work carried out tallied to the categories of work in respect of which Sprite could ever be entitled to make a contribution to Saudia's costs under clause 7.2 of the CTA.

Saudia's contentions.

12. Saudia started by accepting that it had agreed to pay the lessor sums by way of Supplemental Rent comprising, inter alia, APU Supplemental Rent, Engine Supplemental Rent and Landing Gear Supplemental Rent, at rates set out in Schedule C to the ASLA, calculated according to the flight operations of the Aircraft and certain agreed monthly rates. Supplemental Rent was to be aggregated in 'pots' for different sections[1] of the Aircraft.

13. Under clause 7.2 of the CTA, Saudia contended, the lessor was obliged to reimburse Saudia as and when it incurred costs of maintaining the Aircraft, upon request and upon receipt by the lessor of satisfactory paperwork. The lessor's liability to reimburse Saudia from time to time was capped, for each pot, at the amount paid in by Saudia over the term of the Lease for each such section (less any sums already reimbursed to Saudia therefrom).

[1] Airframe, Engines (LLPs and refurbishment), Auxiliary Power Unit ("**APU**") and Landing Gear.

14. Saudia also drew my attention to what was not in issue at this hearing.

    (1) First, Sprite says that Saudia failed to provide documentation which was "*reasonably satisfactory*" to it. Here, it was agreed that there is a factual dispute which the parties accept should go to a full trial so that the court can evaluate the quality of the paperwork.

    (2) Second, Sprite says that various Events of Default had occurred and were continuing at the relevant time so as to bar Saudia's claim under clause 7.2. However, Saudia had never disputed its liability to pay the outstanding rent, or to pay the US$200,000 agreed between the parties upon redelivery of the Aircraft. Furthermore, Saudia has now paid all outstanding rent sought under Sprite's counterclaim, which was paid promptly following the Order of Foxton J dated 16 June 2023.

    (3) Third, Sprite says that the effect of a Transfer Certificate made by the parties on 17 January 2019 extinguished its obligation to reimburse Saudia under clause 7.2 in respect of any work before that date, i.e. before Sprite became the lessor under the Lease. Again, Saudia said, this was not before me at this hearing.

15. The issue which does fall to be determined at this preliminary trial is whether Sprite is obliged to reimburse Saudia for the costs of maintenance work it incurred (even if the paperwork was all in order) if the paperwork was provided after the Expiry Date. Saudia's position is that the parties cannot be taken, on an objective reading of the contract, to have agreed that it would be deprived of its right to reimbursement for work it carried out (or had carried out at its expense) on the Aircraft before redelivery merely because of some, potentially *de minimis*, delay in handing over the paperwork.

16. Therefore, said Saudia, the Preliminary Issue raises two principal sub-issues:

    (1) Whether clause 15.6 of the CTA makes time of the essence for the provision of the relevant documents under clause 7.2.

    (2) Whether time is otherwise of the essence for the provision of the relevant documents under clause 7.2.

17. To put this debate into context, said Saudia, if Sprite does not reimburse Saudia for the sums sought in this claim, the economic effect, says Saudia, would be that:

    (1) Saudia would have paid US$9.7m in Supplemental Rent, which Sprite can keep.

    (2) Saudia would have spent an additional US$12.7m on improving the Aircraft.

    (3) Sprite would take, at the end of the Lease, repossession of the Aircraft in a much-improved condition, at Saudia's expense.

18. This would be surprising given the obvious commercial purpose of maintenance rent, which is to ensure that the lessee keeps up the maintenance of aircraft. The build up of financial reserves by the lessor allows it the comfort of knowing that, if the lessee returns an aircraft to it in a condition worse than required under the lease, it (the lessor) will have the financial resources immediately to hand in order to restore the aircraft to the redelivery condition. Conversely, as an incentive to the lessee, if it keeps the aircraft properly maintained, it can obtain a full reimbursement of its costs (or at least reimbursement up to sums paid over as reserves).

19. Saudia asserted that even if it succeeds in its claim, it will still suffer a shortfall of over US$3m because the cost of maintenance overtopped the maintenance reserves.

Does clause 15.6 make time of the essence for the provision of documents?

20. Sprite argues that clause 15.6 of the CTA "*stipulated*" that "*time was of the essence in respect of the need for Saudia to ensure that Sprite received an invoice and supporting documentation if Saudia was to receive payment pursuant to clause 7.2 of the CTA*". Saudia said that is wrong. Clause 15.6 of the CTA provides that:

"*The time stipulated in the Lease for all payments payable by Lessee and the prompt, punctual performance of Lessee's other obligations under the Lease are of the essence of the Lease.*"

21. Saudia argued that Clause 15.6 therefore makes time of the essence only in respect of "*payments payable by [Saudia]*" and "*Saudia's other obligations under the Lease*". The provision of documents by Saudia under clause 7.2 is not one of "*Saudia's other obligations under the Lease*". Rather, the provision of documents to Sprite is part of the machinery under clause 7.2 whereby Sprite becomes obliged to reimburse Saudia for maintenance work done by Saudia. There are no other words within clause 7.2 which indicate that the parties intended to treat time as of the essence. That might be contrasted with those cases in which a time clause stipulated the consequence of lateness, or emphasised (using words such as "but not otherwise" or "at latest") the strictness of the limit. In this regard, Saudia relied on the examples in *Lewison on the Interpretation of Contracts* at ¶15.54.

Was time "*otherwise of the essence*" for the provision of documents?

22. Sprite also argues that "*time was otherwise of the essence in respect of the need for Saudia to ensure that Sprite received an invoice and supporting documentation if Saudia was to receive payment pursuant to clause 7.2 of the CTA*".

23. Saudia argued that this requires Sprite to establish that there should be implied into clause 7.2 a term that time was of the essence such that Saudia was required to provide the relevant documentation before the "Expiry Date" in order to be entitled to reimbursement of the sums expended.

24. Saudia argued that the starting point for the court's analysis should be that that the parties expressly agreed that time would be of the essence in respect of (i) payments by

Saudia and (ii) Saudia's other obligations under the Lease but chose not to make any express provision for time to be of the essence in respect of the machinery for Saudia to be reimbursed under clause 7.2. That is unpromising terrain for the implication of a term to the effect that time is of the essence for the provision of documents to Sprite under clause 7.2.

25. Saudia further argued that in the absence of an express contractual stipulation making time of the essence of the obligation, the question, it is clear from United Scientific v Burnley Council [1978] AC 904 HL, is one which requires the court to consider the nature of the rights and obligations under clause 7.2. As clarified in Bunge v Tradax, the court must consider whether there is anything in the nature or subject matter of the contract or the surrounding circumstances which show that time should be considered to be of the essence.

26. Saudia argued that the starting point is to recognise that clause 7.2 comprises synallagmatic obligations (rather than a unilateral obligation). Saudia's right under clause 7.2 is not akin to an option. The clause does not comprise an irrevocable offer by Sprite open for acceptance by Saudia only if it complied exactly with its terms,[2] such as an option to buy land or shares, or a break clause. Such 'if contracts' by their nature impose restrictions on the rights of the offeror to deal with their property until the offer is accepted or expires. Time limits in those sorts of obligations are accordingly treated as being of the essence so the offeror knows when it can again freely deal with its own property.

27. Saudia said its right to payment under clause 7.2 is part only of a collection of rights and obligations under the Lease, and just part of a larger bilateral (or synallagmatic) scheme in which:

(1) Saudia paid Supplemental Rent.

(2) Saudia was responsible for maintenance, replacement and repair work to the Aircraft.[3]

(3) Saudia provided invoices and supporting documentation reasonably satisfactory to Sprite, which evidenced performance of the maintenance work done to the Aircraft.

(4) Sprite became obliged to pay Saudia contributions towards the cost of maintenance.

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2 As explained in *Lewison on the Interpretation of Contracts* at ¶16.105-108, whilst the general rule is that in the case of unilateral contracts, such as options, all conditions must be strictly performed, otherwise no binding contract comes into existence at all, there are exceptions: *"In the first place, part of a bilateral (or synallagmatic) contract which is drafted using the language of options will not necessarily be treated as an option, with the strict consequences which flow from that. Whether it does amount to an option depends on the proper interpretation of the contract as a whole"* (citing *United Scientific*).

3 The final paragraph of clause 7.2 expressly links Sprite's payment of maintenance contributions to Saudia's obligations to undertake maintenance, replacement and repair work.

(5) Sprite's contributions to the cost of maintenance were capped by reference to various factors, including the amount of Supplemental Rent paid by Saudia.

(6) The existence of a continuing Event of Default suspended Sprite's obligation to pay.

28. Saudia argued that, as with a rent review clause, the parties have agreed this clause as part of a larger contractual set of terms. It is part of the consideration under the Lease itself that the lessee, having paid Supplemental Rent to contribute to maintenance reserves, should have the opportunity to be reimbursed from those reserves if it carries out the work itself; no operator would sign up to a lease which obliged it to pay maintenance reserves but then offered no mechanism for it to obtain reimbursement.

29. Furthermore, Saudia argued that there is no substantial detriment which would fall upon a lessor in the event that the lessee delays seeking reimbursement. In orthodox language, Sprite's obligation under clause 7.2 to reimburse Saudia arises under *"a synallagmatic contract expressed to arise upon the occurrence of a described event where postponement of that event beyond the time stipulated in the contract is not so prolonged as to deprive [it] of substantially the whole benefit that it was intended [it] should obtain by accepting the obligation"*.[4]

30. As part of this scheme, Saudia had to provide invoices and supporting documentation to Sprite, and the clause required this to be done before the Expiry Date. However, Saudia said that on an objective analysis of the effect of this clause, and in the light of the way which the law treats time limits, this deadline amounts to a guideline for the operation of the contractual machinery; the lessee's delay beyond the time limit could not have been intended to deprive Saudia of its right to reimbursement given the respective prejudicial detrimental effect on the parties which would accrue depending on how that clause is applied.

31. This is indistinguishable from the position under a rent review clause in a lease as recorded in United Scientific, said Saudia, (albeit the positions of the lessor and lessee are in fact reversed – it is the landlord's right to seek a review that the law treats as available after the expiry of a time limit). In *United Scientific*, the House of Lords noted that no prejudice was caused to the tenants by the landlords' failures to engage the rent review mechanisms before the expiry of the contractually agreed time limits. They simply enjoyed occupation of the premises at the old (lower) rent until the rent review process ran its course.

32. Saudia argued that, in this case, Sprite has not been deprived of any benefit by reason of the late claim by Saudia or suffered any prejudice thereby. Sprite cannot have suffered any prejudice given that: (i) Sprite received Supplemental Rent from Saudia; (ii) Sprite had the benefit of valuable maintenance work done for the benefit of the Aircraft; and (iii) Sprite would, on the assumption required by this Preliminary Issue, have received reasonably satisfactory supporting documents evidencing performance of the relevant maintenance work.

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4 To use the phraseology of Lord Diplock at p.930F of *United Scientific*.

33. Saudia also argued that, for the avoidance of doubt, the so-called presumption, or general rule, that time is of the essence in mercantile contracts cannot help Sprite. It is certainly the case that various common time stipulations in certain types of mercantile contract are habitually treated as containing strict time limits (such as obligations to ship goods or nominate ports). The presumption, however, is of limited scope in specific, detailed and specialist contracts, such as aircraft leases (see [56] of the Spar Shipping v Grand China Logistics, "Spar Capella" [2016] EWCA Civ 982; [2016] 2 Lloyds Law Rep 447, 458).

34. Further, in any event, neither the Lease as a whole nor clause 7.2 itself comprises a simple mercantile transaction for the sale and purchase of things (such a contract for the sale of goods). Nor does the clause deal with an obligation which can only be performed once the other party has performed their obligations (such as those requiring a party to nominate a port for lading). Sprite could, if it so wished, pay out the maintenance reserves to Saudia at any time. Indeed it is too simplistic to say that, in all contracts involving any form of commercial arrangement, all obligations are to be performed strictly in accordance with any time limit. As Browne-Wilkinson VC said in British & Commonwealth Holdings v Quadrex Holdings [1989] QB 842 at 856F:

"The basic question is whether the failure to comply with a contractual provision within the time limited by the contract constitutes a repudiation of the contract i.e. is time of the essence of that contractual provision. The phrase 'time is of the essence of the contract' is capable of causing confusion since the question in each case is whether time is of the essence of the particular contractual term which has been breached."

35. As Lord Lowry put it in Bunge v Tradax [1981] 1 WLR 711 at 719F-G:

"The treatment of time limits in mercantile contracts does not appear…to be justifiable by any presumption of fact or rule of law, but rather to be a practical expedient founded on and dictated by the experience of businessmen."

36. As pointed out in Lewison on the Interpretation of Contracts at ¶15.76:

"Indeed in many non-commercial contracts the requirement of certainty would seem to be just as important as in commercial contracts. One feature of commercial contracts to which attention is often drawn is that the particular contract may be only one of a string of contracts, so that failure in prompt performance of one contract may have repercussions along the string. However, it is not easy to see how this differs in practical effect from a contract for the sale of a house which is frequently one of a chain, and in respect of which a failure in prompt performance may also have effects down the chain. A better starting point in respect of all contracts would be to attempt to examine the potential harm which might flow from delayed performance."

37. As Lord Diplock observed in considering a business tenancy in United Scientific at 924C-D:

"*I do not think that the question of principle…can be solved by classifying the contract of tenancy as being of a commercial character. In some stipulations in commercial contracts as to the time when something must be done by one of the parties or some event must occur, time is of the essence; in others it is not. In commercial contracts for*

the sale of goods prima facie a stipulated time of delivery is of the essence, but prima facie a stipulated time of payment is not (Sale of Goods Act 1893, section 10 (1)); in a charter-party a stipulated time of payment of hire is of the essence. Moreover a contract of tenancy of business premises would not appear to be more of a commercial character than a contract for sale of those premises. Nevertheless, the latter provides a classic example of a contract in which stipulations as to the time when the various steps to complete the purchase are to be taken are not regarded as of the essence of the contract."

38. The modern approach is that a term is innominate unless a contrary intention is made clear (see Spar Shipping v Grand China Logistics, "The Spar Capella" [2016] EWCA Civ 982; [2016] 2 Lloyd's Law Rep 447 at [92] per Hamblen LJ, as he then was).

39. Saudia argued that, all in all, insofar as this comprises a presumption (as opposed to a description), it is a weak presumption easily displaced outside certain recognised categories of contract.

40. Whilst the obligation on Sprite to pay is dependent on Saudia's request and provision of documents, Saudia says that was not a precondition to the primary contractual obligation (such as in the cases concerning nomination of loading ports). Clause 7.2 does not use language associated with a condition precedent when describing the requirement to provide the relevant documents either (i) before the Expiry Date or (ii) within six months after commencement of the relevant maintenance. This is to be contrasted with the language used to refer to the requirements that: (i) Saudia pay Supplemental Rent; and (ii) no Event of Default has occurred and is continuing, which are both introduced with conditional words: "*if*" and "*provided that*". Clause 7.2 states clearly and unambiguously that Sprite "*will pay*" the relevant amounts by way of contribution to the cost of maintenance of the Aircraft once the two conditions set out above – that Saudia is required to pay Supplemental Rent and that no Event of Default has occurred and none is continuing – are met.

41. In the end, says Saudia, Sprite falls back on the weak argument that time stipulations must be read as making time of the essence because otherwise they would be given no effect. For this, they rely on FG Wilson (Engineering) v John Holt & Co (Liverpool) [2013] EWCA Civ 1232; [2014] 1 WLR 2365. However, says Saudia, that case merely pointed out that "any" in the phrase "any set-off" would operate to ensure that the phrase caught equitable as well as legal set-offs. That does not illuminate the issue before the court, which concerns a time clause, upon which there is clear and specific authority at the highest level. Sprite's rhetorical flourish is in fact a circular argument: if, as a matter of construction, on entirely orthodox principles, time is not of the essence in clause 7.2, then the deadline of the Expiry Date is not fatal to a claim for reimbursement. To say: *"it must be fatal because otherwise it would have no effect"* is to put the cart before the horse.

42. In fact, Saudia contends that Sprite's preferred interpretation of clause 7.2 would also have various perverse and commercially unreasonable results.

(1) First, on Sprite's interpretation, Saudia would lose a very valuable right to reimbursement for work actually done and paid for, merely because, for example:

(a) Saudia had not yet received the requisite invoices or underlying supporting documentation from the relevant maintenance performer by the Expiry Date.

(b) Saudia had provided invoices and supporting documents just before the Expiry Date but, for whatever reason, the documents were not reasonably satisfactory to Sprite but could easily have been supplemented albeit only after the Expiry Date.

(c) Saudia had provided the relevant documents a single day after the Expiry Date.

(2) Second, on Sprite's preferred interpretation, Sprite would obtain a substantial benefit in the form of valuable improvements to the Aircraft, for which it had provided no consideration, but Sprite would have suffered no prejudice whatsoever as a result of the late provision of the relevant documents.

43. By contrast, Saudia's interpretation would be consistent with commercial common sense since it would reflect the purpose and economic reality of the scheme whereby Sprite paid "Supplemental Rent" as maintenance reserves and Sprite would reimburse Saudia from those payments when Saudia incurred the costs of maintaining the Aircraft.

Discussion and conclusions.

44. Before turning to set out my own views and conclusions, I should note that each Counsel addressed me on the footing that market practice and commercial considerations in the aviation industry supported their case, and each took issue with the other's account of such. Since I had no evidence before me in this regard, I had no way of determining which account was in fact correct. I consider the relevance of this below.

45. In my judgment, Sprite's argument is founded on two propositions.

(1) The first is that time was of the essence for the performance of Saudia's obligation to present invoices to Sprite, as a precondition to its entitlement to reimbursement for the works that, at this hearing, I must assume were done.

(2) The second is that timely presentation of invoices was a condition precedent to Saudia's right to reimbursement, with the result that any delay in the presentation of such invoices led to the loss, once and for all, of any right to reimbursement.

46. It is my view that these two contentions require separate consideration.

Time of the essence.

47. I start with the submission that time was of the essence in relation to Saudia's obligation to present invoices. Before considering this submission further, I take the view that it

is important to be clear as to what is meant by making time of the essence. In this regard, Chitty on Contracts (35th ed) states as follows at paragraphs 28-026 to 029 and 036:

"Time "of the essence of the contract"

A number of difficulties surround the law relating to time stipulations in contracts. The first is that the phrase which is commonly employed, namely "time is of the essence of the contract", is potentially misleading in that the question in each case is whether time is of the essence of the particular term which has been broken, not whether time is of the essence of the contract as a whole. The agreement by the parties that "time is of the essence" in relation to a particular term of the contract is another way of identifying the term as a condition of the contract so that any failure to comply with it will in principle entitle the other party to terminate further performance of the contract.

Common law and equity

The second point of difficulty is that, historically, common law and equity adopted a divergent approach to time stipulations in contracts. At common law a strict approach was taken so that, as was once stated by Sir John Romilly MR:

"... at law time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for breach of it."

However, even at common law there were exceptional cases where time was held not to be of the essence of the contract. But the thrust of the approach of the courts at common law was clear: stipulations as to time were generally of the essence of the contract, so that a party was entitled to terminate further performance of the contract if the other party's performance was not completed on the date stipulated by the contract. A different set of rules, however, evolved in equity where time was not of the essence of the contract, except in the three cases considered below:

"The court of equity was accustomed to relieve against a failure to keep the date assigned ... if it could do justice between the parties";

"... relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract."

Law of Property Act 1925 s.41

Section 41 of the Law of Property Act 1925 provides that:

"Stipulations in a contract, as to time or otherwise, which according to the rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

Thus the rules at law are now the same as those in equity: the effect of s.41 is that:

"... contractual stipulations as to time ... shall not be construed as essential, except where equity would before 1875 have so construed them—i.e. only when the strict observance of the stipulated time for performance was a matter of express agreement or of necessary implication";"

or, in other words, s.41:

"... does not negative the existence of a breach of contract where one has occurred, but in certain circumstances it bars any assertion that the breach has amounted to a repudiation of the contract",

which entitles the innocent party to terminate the contract. Following the enactment of s.41, it is only in the three cases set out in the next two paragraphs that time is of the essence of a contract.

Time made expressly or implicitly "of the essence"

Time is of the essence:
(1)Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or that time is to be "of the essence".
(2)Where the circumstances of the contract or the nature of the subject matter indicate that the fixed date must be exactly complied with, e.g. the purchase of a leasehold house required for immediate occupation; the sale of business land or premises, such as a public-house as a going concern; the sale of a reversionary interest; the exercise of an option for the purchase or repurchase of property, or for determining a lease under a "break" clause or an option to acquire a leasehold interest in futuro (since in these cases, "the parties on the exercise of the option, are brought into a new legal relationship"); "mercantile contracts", such as a contract for the sale of goods where a time is fixed for delivery, or for the sale of shares liable to fluctuate in value (where the contract stipulated a time for payment). However, the mere fact that the contract can be labelled "mercantile" or "commercial" does not determine the issue. Nor does the fact that the contract confers on a party the right to terminate or withdraw from the contract on the breach of a term of the contract, such as the failure to pay hire "punctually" under a charterparty, have the consequence that the term relating to the payment of hire has the status of a condition. Whether a time limit is of the essence of a contractual provision is a question of interpretation of the provision in the context of the contract as a whole. The question is whether the time specified in the particular clause was (expressly or by necessary implication) intended by the parties to be essential, e.g. because they needed to know precisely what were their respective obligations. Thus, where the buyers were required to give 15 days' notice of readiness of the vessel so that the sellers could then nominate the port for loading, the House of Lords held time to be of the essence: performance by the buyers was a condition precedent to the sellers' ability to perform their obligation. (However, under the Sale of Goods Act 1979 s.10, unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of the contract of sale.) Similarly, a court is unlikely to be willing to infer that the parties have agreed that time is to be of the essence in the case of a contract of employment, a commercial agency contract or an analogous contract. In the latter contexts parties wishing to make time of the essence should make express provision to that effect in their contract….

…Where time is not of the essence

Where none of the three exceptions mentioned in the preceding paragraphs applies, the effect of s.41 of the Law of Property Act 1925 (above) is that the breach of a stipulation as to time is not of itself a repudiatory breach which entitles the innocent party to terminate further performance of the contract. Thus, in a contract for the sale and purchase of land, if the purchaser fails to complete on the date fixed for completion, the effect of s.41 is that the purchaser does not commit a repudiatory breach of contract (entitling the vendor to terminate the contract) provided the purchaser either completes, or is ready to complete, within a reasonable time thereafter: it is not essential for the purchaser to prove that he was ready and willing to complete on the date fixed for completion. Even where time is not (or has not

subsequently been made) of the essence in a contract for the sale and purchase of land, a failure to complete the contract on or before the date stipulated for completion is still a breach leading to liability to pay damages for any loss caused by the delay in completion. A further example comes from leases. The presumption is that time is not of the essence in the timetable specified in a rent review clause in a lease, under which various steps must be taken to determine the rent payable during the period following the review date; strict adherence to the timetable will be necessary only if that is expressly stated, or if it is a "necessary implication" from the surrounding circumstances (e.g. in the inter-relation between the rent review clause and other clauses). The fact that the time specified in a rent review clause is held not to be of the essence does not itself mean that there is an implied term that the right to a review must be exercised within a reasonable time. In the case where time is not, and never has been, of the essence of the contract, a party may nevertheless be entitled to terminate further performance of the contract where the effect of the delay in performance is to frustrate the purpose of the contract."

48. Saudia submitted, as I have noted, that the clause in question imposed no obligation on it, being simply part of a contractual mechanism which had to be complied with in order to entitle Saudia to the payment of the sums contractually provided for. I am not sure that I would myself accept this submission. However, in my judgment, there are two points that would lead me to the conclusion that the terms of clause 7.2 did not impose a promissory condition and/ or that even if they did, this did not matter on the facts of this case. The first point is that, as was made clear, in particular, in the Court of Appeal's decision in The Spar Capella, *op cit*, the modern tendency is to construe most obligations as innominate or intermediate terms. The second point is then even where a term as to time is a condition (as would be the case where the parties expressly make time of the essence in relation to that term) then this means that the counterparty is entitled to terminate the contract for the failure to perform that obligation in a timeous fashion. In the current case, I would take the view that, whether or not the effect of clause 15.6 was to make compliance with clause 7.2 "of the essence", then Sprite did not terminate the contract in any event. Accordingly whether the term was a promissory condition does not matter.

Condition precedent?

49. This brings me to Sprite's second contention, namely that the provision of the necessary invoices was a condition precedent to any entitlement to claim under clause 7.2. As to this I have concluded as follows:

(1) In my judgment it is clear that unless and until such invoices were provided, there could be no entitlement to claim reimbursement. In that sense, the provision of invoices was a condition precedent to the right to claim reimbursement.

(2) However, it does not follow that if an invoice was provided late, that would lead to a loss of the right to claim reimbursement forever. In that regard:

(a) On the one hand, it may be said, as Sprite contends, that if the clause is not construed as a condition precedent, then it loses all of its content.

(b) On the other hand, as Saudia says, to hold that it should lose all rights to reimbursement, in a case where millions of dollars have been paid over, and invoices may have been provided only a few days late, is a disproportionate and unlikely result.

(3) Overall, my current, albeit provisional view, is that the parties would have had to spell this result out much more clearly than they have in this contract to lead to a result which I would regard as commercially unlikely. In this regard, I view the analogy with the rent review situation as discussed in the United Scientific case, as the closest analogy with which I have been presented.

50. However, I decline to reach any final view on these points. That is because, in my view, expert evidence as to market practice in this regard might be of relevance. I am fortified in this view by the fact that, at the hearing, as I have noted above, both Counsel made submissions based on what they submitted was justified by the requirements of cash flow in the aviation industry, but their submissions in this regard were diametrically opposed. Accordingly, in my judgment, the appropriate conclusion is to allow the matter to proceed to a trial, at which arguments of construction, informed by expert opinion if admissible, can still be pursued by both parties.