

[30 November 2018]

AIRCRAFT PURCHASE FLEET LIMITED v COMPAGNIA AEREA ITALIANA SPA
[2018] EWHC 3315 (Comm)

BEFORE: MR JUSTICE PHILLIPS

CASE SUMMARY

The claimant sought damages for the defendant’s repudiation of an aircraft lease agreement. Under the agreement, the claimant was to purchase Airbus A320 aircraft from Airbus and then lease those aircraft to the defendant. Airbus terminated the sale agreement for the claimant’s breach of contract. The claimant alleged that this termination was caused by the defendant’s repudiation of the lease agreement. Phillips J found that it was not. Accordingly, the claimant would not have been able to perform the lease agreement, so it was not entitled to damages for the defendant’s repudiation. The doctrine of frustration was inapplicable, since the contractual scheme allocated the risk that performance might be rendered impossible in this way.

In 2005, the defendant’s (“CAI’s”) predecessor (“AO”) entered into an agreement with Airbus to buy a number of A320 aircraft between 2006 and 2009. CAI later acquired AO; AO’s former owners retained their interest under the Airbus agreement by transferring it to a new company, “APFL” (the claimant).. It was agreed that APFL would then lease the aircraft purchased from Airbus to CAI under a new “framework agreement”.

During 2010, disputes arose between APFL and CAI and between APFL and Airbus. The dispute with CAI, the subject of the present claim, essentially concerned CAI’s desire to lease A319 rather than A320 aircraft. These were smaller aircraft within the A320 family, which had lower fuel and other running costs than A320 aircraft, but also had lower seating capacity- causing them to be less profitable to most airlines and therefore had a smaller market. Accordingly, APFL perceived greater difficulty in obtaining financing for the purchase of A319s. IN correspondence CAI asserted a right under the framework agreement to lease only A319 aircraft. APFL disputed that contention, and relied upon the correspondence as a renunciation of the framework agreement by CAI.

The dispute with Airbus arose out of APFL’s financial difficulties from 2010, which caused it to be unable to obtain financing to purchase the aircraft it was obliged to purchase. There followed continuing negotiations between Airbus and APFL concerning the purchase and finance of the Aircraft for 2010 and future years. The judge found (at [51]) that, in the course of those discussions, “APFL took a remarkably cynical approach to APFL’s financial covenants both to Airbus and to CAI ... [and] had no concern that it should comply with its obligations, but only with avoiding detection of its plainly regular and persistent breaches.”

In April 2012, Airbus terminated its obligation to sell aircraft to APFL in the years 2013 and 2014 as a result of APFL's breaches. APFL was therefore incapable of performing its obligations to CAI under the framework agreement. APFL sought damages for CAI’s breach of the framework agreement. A separate issue arose concerning CAI’s counter-claim for tax said to be payable by other subsidiaries of AO, now owned by CAI. This was a matter of Italian law. The counter-claim failed, and is not considered further in this summary.

CAI first argued that the framework agreement had been frustrated, since it had become impossible for either party to perform the Framework Agreement once Airbus had terminated the 2013 and 2014 aircraft deliveries. It submitted that the present case fell within the doctrine of ‘self-induced’ frustration (see *FC Shepherd & Co Ltd v Jerrom* [1987] 1 QB 301), according to which the innocent party is

entitled to rely on the doctrine of frustration, although the party who has brought about the frustrating event is not.

Phillips J held that the doctrine of frustration was not applicable on the facts of this case. At [110], he said that: “Frustration of a contract can only arise where responsibility for the matters which give rise to the impossibility of performance is not allocated in the contract, either expressly or implicitly: *National Carriers Ltd. v Panalpina (Northern) Ltd* [1981] AC 675. In the present case, APFL’s obligations under the Framework Agreement (including undertaking to exercise options under the APA as directed by CAI) were wholly dependent on the APA remaining in force, a contract to which it (and not CAI) was to become a party. It was plainly necessary, in order to give business efficacy to the Framework Agreement, to imply a term that APFL would not act so as to permit Airbus to terminate the APA or any relevant part of it.”

CAI’s second argument was that it had a defence to a claim for damages because APFL was not itself ready or willing to perform the contract (see *Acre 1127 Ltd (in liq) v De Montfort Fine Art Ltd* [2011] EWCA Civ 87). In response, APFL alleged that its inability to perform, resulting from the termination of the Airbus agreement, was itself caused by CAI’s breach. It submitted that: “CAI’s known refusal to take delivery in 2013 [...] changed the commercial calculus for Airbus; it provided positive reasons to want to terminate ‘slots’ which APFL might otherwise (contrary to Airbus’ commercial interests) try to trade to airlines other than CAI; and it removed any positive benefit to Airbus of maintaining those slots for the benefit of its Italian market share.”

The judge rejected APFL’s contention as being inconsistent with the contemporary documentation. The sole reason Airbus gave for issuing the notice of termination was that APFL failed to accept, pay for and take delivery of certain aircraft after being given formal notice under the contract that it must do so. Further, the judge held that, by early 2012, “it was inevitable that Airbus would terminate the [agreement] in the circumstances of APFL’s further blatant default, regardless of any stance CAI was adopting in relation to A319s... CAI’s stance as to A319s played no part whatsoever in Airbus’ refusal to reinstate the 2013 and 2014 deliveries.”

Phillips J therefore concluded that APFL was responsible for rendering itself unable to perform its obligations under the Framework Agreement. Its claim against CAI therefore failed.

NOTE: This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>