“Seething on a jet plane” – Conditions precedent and time of the essence in commercial contracts

By Jack Spence | September 30, 2024

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Saudi Arabian Airlines (better known as “**Saudia**”) entered into an aircraft lease agreement (the “**Contract**”) with Sprite Aviation No. 6 DAC (“**Sprite**”), one of 7 apparently single purpose Irish companies incorporated in or around mid-2017 (presumably for the purpose of purchasing a number of aircraft) under which an aircraft was made available for Saudia’s use.

The Contract required that Saudia pay “*supplementary rent*” for a number of discrete components such as the engines, landing gear and auxiliary power unit (which provides electrical power to the aircraft when not connected to an external power source). When maintenance was required for the aircraft, Saudia could perform the works required and claim reimbursement from the pot of supplementary rent which it had paid for the component which had been maintained.

The Contract and the Issues

Clause 7.2 of the Common Terms Agreement (incorporated into the Contract) provided that:

> *“If, under the Lease for the Aircraft, Lessee must pay Supplemental Rent, then … 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 …”*

Clause 15.6 also provided 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.”*

It was common ground that Saudia had performed maintenance works on the aircraft so, in accordance with Clause 7.2 (all else being equal), Saudia would be entitled to reimbursement of the costs of maintenance.

However, Sprite claimed that Saudia had not provided it with “*supporting documentation reasonably satisfactory to* [Sprite]” within 6 months of the work or by the Expiry Date (which was in August 2019). As such, Sprite refused to reimburse the amounts claimed by Saudia.

As part of the dispute between Sprite and Saudia, Foxton J directed that a preliminary issue be determined as to whether Sprite was “*obliged to make payments in respect of maintenance work … if Saudia 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? [Including] any issue as to whether time was of the essence for this purpose …*”

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Was time of the essence for the provision of the supporting documentation?

Sprite argued that time was of the essence, on the basis of Clause 15.6. Saudia disputed the applicability of Clause 15.6, because (it argued) the requirement to provide supporting documentation was not an "*obligation*" but merely part of the machinery for receiving reimbursement. Saudia was not obliged to provide the documentation in the abstract (although it would be prudent to do so if it wanted to be reimbursed!).

Mr Hancock KC, expressed scepticism as to Saudia's position, but considered that he would have found that time was not of the essence, in light of the Court of Appeal's decision in *Spar Shipping v GCL* [2016] EWCA Civ 982 which emphasised that the "*modern tendency is to construe most obligations as innominate or intermediate terms*" meaning that the consequences of a failure to comply will depend on the magnitude of the breach and consequences thereof.

More importantly, however, was the consequence of time for complying with an obligation being "*of the essence*". Time being "*of the essence*" means that, if performance is not made within the relevant time period, the innocent party is entitled to terminate the contract and claim damages, but no further changes to the parties' rights occur. In circumstances where Sprite did not claim it had terminated the Contract, whether time was of the essence did not matter.

Was provision of the supporting documentation within the relevant time period a condition precedent to Saudia's right to claim reimbursement?

Sprite's position was that the terms of Clause 7.2 spoke for themselves. The obligation to reimburse maintenance costs only arose if supporting documentation was provided within six months of the repairs and, at the latest, the Expiry Date. This, it was said, was important to provide Sprite with certainty as to their liability. Otherwise claims could lie dormant, unseen, before being brought by Saudia years later. It was also argued that finding otherwise would deprive the relevant portion of Clause 7.2 of any meaning.

Saudia argued that this would result in a commercially absurd situation whereby, if it did not provide the supporting documentation in time, Sprite would both retain the supplementary rent and the benefit of an aircraft improved by sums which Saudia had expended: as it happened, Saudia had paid $9.7 million as supplemental rent and $12.7 million on maintenance. There was, it argued, no commercial justification to this outcome.

Mr Hancock KC found that he could not set out a final view, given that both parties had made diametrically opposed submissions as to usual practice in the industry which he was not in a position to determine. However, notwithstanding this, his "*current, albeit provisional view*" was that Saudia was right. It was a "*disproportionate*" result for Saudia to be capable of being deprived of its right to reimbursement, just because supporting documentation was provided late. He held 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*".

Finally, this decision was said to be fortified by the House of Lord's decision in *United Scientific v Burnley Council* [1978] AC 904, where the House of Lords found that a landlord was not precluded from initiating a rent review procedure where he had not complied with the contractual timetable.

Analysis - Time being of the essence

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On the issue of time being considered "*of the essence*" Mr Hancock's reasoning appears confused. While it is certainly correct that time being considered of the essence would not have immediate consequences, given that Sprite did not actually terminate for repudiatory breach, Mr Hancock nevertheless was "*not sure* [he] *would accept* … [the] *submission*" that the requirement under Clause 7.2 to provide supporting documentation was not an "*obligation*".

If Clause 7.2 did, in fact, impose an "*obligation*"[1] then the wording of Clause 15.6 was clear – "*the prompt, punctual performance of Lessee's other obligations under the Lease are of the essence of the Lease*."

Spar Shipping v GCL authority relied on should not preclude this. Popplewell J, in the first instance, expressly stated that the clause under consideration was not "*drafted in terms that … time of payment was to be of the essence* …" and the clause contained no reference to time being "*of the essence*". Clause 15.6, on the other hand, expressly says that "*prompt, punctual performance of Lessee's other obligations under the Lease are of the essence of the Lease*". As Greer LJ held in *Harold Wood Brick Co Ltd v Ferris* [1935] 2 K.B. 198 "*Parties may say by express words that notwithstanding any rule of law or equity to the contrary, time shall be of the essence of the contract* …" A "*modern tendency*" to construe most obligations as innominate terms should not override the clear drafting chosen by the parties.

Analysis: Was provision of the supporting documentation within the relevant time period a condition precedent to Saudia's right to claim reimbursement?

The admittedly provisional decision of Mr Hancock KC does not appear to withstand scrutiny. The only reason provided for this view was that Clause 7.2 was not sufficiently clear to abrogate Saudia's right to reimbursement, because that was commercially unlikely.

While the court has emphasised that clear words are needed to forego valuable contractual rights (for example, paragraph 45 of the Supreme Court's judgment in *RTI Ltd v MUR Shipping BV* [2024] UKSC 18) this begs the question of what Saudia's contractual rights were. The point of a condition precedent is that a right does not arise until the condition precedent is satisfied. It is not held in abeyance before then, or otherwise prevented from being enforced – it is simply not in existence. If this principle is true then Clause 7.2 does not entail Saudia "*foregoing*" any rights – *nemo dat quod non habet* ("no one can give what they do not have").

In any event, the wording of the clause itself seems clear: "[Sprite] *shall pay… upon receipt by* [Sprite], *within six months after commencement of such maintenance and before the Expiry Date of any invoices and supporting documentation*". Until such documentation is provided the event upon which Sprite's payment obligation accrues has simply not occurred. If documentation is not provided within six months, or the Expiry Date, then the payment obligation is not capable of accruing.

Mr Hancock KC drew upon the commercial implications of this wording. However, as Lord Neuberger explained in *Arnold v Britton* [2015] UKSC 36 "*the reliance placed in some cases on commercial common sense … should not be invoked to undervalue the importance of the language of the provision … it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice*." *Wood v Capita* [2017] UKSC 24 is also clear that "*where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense*".

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In the present case, where the clause itself was clear, there should be no scope for considerations of "*commercial common sense*" to undermine the clear meaning of the words chosen by the parties.

Finally, the decision in *United Scientific v Burnley Council* is readily distinguishable. The clauses in consideration there were not expressed to be condition precedents, but merely stated what ought to happen. The essence of the clauses considered there was that "*The Landlord shall commence the rent review process on dates X and Y*" not "*The landlord shall be entitled to review rent, upon the rent review process being commenced by dates X and Y*". As such, this decision should not bear on the wording of Clause 7.2 in the *Saudia* case.

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[1] Although there are conceptual challenges with this, too – Clause 7.2 does not *require* Saudia to do anything *ceteris paribus* (all other things being equal). If Saudia was content to not claim reimbursement then Sprite would not have a cause of action to require them to provide supporting documentation for maintenance undertaken.

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