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IN THE HIGH COURT OF JUSTICE No. CL-2020-000546

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

**[2021] EWHC 2459 (Comm)**

 Rolls Building

Fetter Lane

London, EC4A 1NL

Thursday, 22 July 2021

Before:

MR JUSTICE JACOBS

BETWEEN:

 IRIS HELICOPTER LEASING LIMITED Claimant

- and -

(1) ELITALIANA SRL

 (2) POINT HOLDING SpA Defendants

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MR P. SHEPHERD QC (instructed by Hausfeld & Co. LLP) appeared on behalf of the Claimant.

MR A. SHAH QC (instructed by Pini Franco LLP) appeared on behalf of Defendants.

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**JUDGMENT**

**(Via Microsoft TEAMs)**

MR JUSTICE JACOBS:

1. This is an application for summary judgment by the claimant, Iris Helicopter Leasing Limited, which was the lessor of a specialist helicopter which was leased to the first defendant, Elitaliana SRL, with the liabilities of that company being guaranteed by an associated company, Point Holding SpA Limited, the second defendant. The claim is for substantial sums alleged to be unpaid by way of (principally) rent and interest, together with various elements of ancillary relief which are claimed.
2. The sole issue before me on the summary judgment application is whether or not, applying the relevant principles in the authorities to which both parties have referred, there is a sufficiently arguable case with a realistic prospect of success to warrant permission to defend being granted and this matter being sent to trial.
3. The question which needs to be asked is whether there is a realistic as opposed to a fanciful prospect of success, and that must mean a defence which carries some degree of conviction and is not one that is merely arguable. I was referred to various cases in which that principle was set out.
4. I have to bear in mind of course that the evidence before me on a summary judgment application is not complete and it is possible that in due course there will be additional evidence which might be available at trial were I to order that to take place.
5. The only defence which is advanced is a case of frustration. The frustration is alleged to have occurred when the specialist helicopter was arrested and seized by the Italian authorities in November 2019. By that stage, the helicopter had been in service for a number of years, but there was still a reasonable period of time to run before the six-year lease came to an end.
6. I can take the background to the contract, and the events with which I am concerned, from the defendant’s written argument. On 17 December 2014, the first defendant entered into an agreement to purchase the helicopter (or “aircraft”) from its Swiss owner whilst the aircraft was in Switzerland and registered as a Swiss aircraft. It then entered into a sale and leaseback transaction with the claimant. The aircraft was sold to the claimant (which became the Owner) and the claimant then became the Lessor of the aircraft under the terms of a Lease Agreement to which I will refer in due course. The Lease Agreement was what is colloquially known as “a dry lease” which in practice meant that the aircraft was given to the defendant without anything more so that, for example, there was no crew that was provided by the Lessor.
7. The aircraft was deregistered from the Swiss Civil Aircraft Registry on 9 February 2014, and on 11 February 2014 the first defendant completed its purchase of the aircraft from the Swiss owner. The first defendant completed its sale of the aircraft to the claimant, and the first defendant accepted delivery of the aircraft under the Lease Agreement.
8. At one point in the proceedings, there was an argument which concerned the time at which delivery had taken place. That issue is no longer live, and I have been provided with a copy of the Certificate of Acceptance which indicates clearly that delivery took place in Switzerland on 11 February 2015. I say, “in Switzerland” because that was consistent with the terms of the Lease which identified in the Definitions provisions the Delivery Location as being:

“...the facilities of Air Engiadina AG at Zurich Airport, Switzerland or such other location as shall be mutually agreed between Lessee and Lessor.”

The aircraft was in fact delivered at Lodrino Airport in Switzerland.

1. The position under the Lease was that the contract identified in clause 9.3 the principal purpose for which the aircraft was being supplied. That clause provided as follows:

“Lessee will:

1. use the Aircraft solely for helicopter emergency and medical services in accordance with the terms of the HEMS Contract, unless otherwise agreed in writing by Lessor, and in any case only for operations for which the Lessee is duly authorised by the Aviation Authority and applicable law.”

There was also a further provision in clause 9.3(b) that the Lessee was not to:

“...operate the Aircraft outside Italy without the prior written consent of Lessor.”

Both of those provisions did not contain an absolute limit on the purposes for which the helicopter could be used, or the location where it could be used, because it permitted agreement to be reached with the Lessor which would derogate from what was there set out. However, there is no substantial dispute that the purpose of the defendant was indeed to provide medical services in accordance with the terms of the “HEMS” Contract. That was defined earlier in the contract to refer to a multi-year procurement contract relating to the administrative region of Lazio, Italy.

1. The aircraft was then, following the events in Switzerland, registered by the Italian Civil Aviation Authority whose name has been abbreviated to “ENAC”. That is the equivalent of the Civil Aviation Authority in this country. The aircraft was then put on the Italian Register for Civil Aircraft on 4 March 2015 when it was given its relevant aircraft registration mark. It appears to be common ground that usually ENAC would not issue a certificate of registration unless relevant import taxes had been paid.
2. There is a dispute to some extent between the parties as to what documents were given to ENAC for the purposes of registration. The defendant contends that certain documents were forwarded by the claimant to the first defendant and that those were passed on to ENAC. There is a suggestion that one of those documents may have related to the possible transfer of the aircraft from Ireland to Italy. However, there is no material which has been placed before me on this application which shows exactly what documents were provided by the claimant to the first defendant and what documents were in due course provided by the defendant to ENAC. For reasons which I will explain, it does not seem to me that any of this is material to the frustration issues with which I am concerned.
3. The position appears to be that the defendant did not pay any importation tax when it took the aircraft from Switzerland to Italy. The reason for that, on the defendant’s case, is that there was no reason why it should pay any such tax, because on its view Italian legislation exempts from tax all aircraft which are equivalent to state aircraft. The defendant contends that this particular aircraft, which was to be used exclusively for the provision of air ambulance and rescue activity for public authorities in Italy, therefore qualified for that exemption.
4. It seems that the Italian tax authorities take a different view, and for some years prior to the arrest of the aircraft in November 2019 there were steps taken by way of an investigation as to whether or not tax should be paid. On 21 April 2017, for example, the Public Prosecutors’ Office in the court of Rome ordered seizure of documents held by the first defendant relating to the purchase and payment of the aircraft. There also appears to have been some negotiation and discussion which took place in the period prior to November 2019 between the first defendant and the tax authorities.
5. At all events, what happened is that on 13 November 2019 the aircraft was arrested by the Italian Guardia di Finanza. The grounds for the arrest were based on the alleged failure to pay any tax when the aircraft was imported from Switzerland into Italy in March 2015. The first defendant disputes the lawfulness of the arrest and also disputes that it has any liability to pay any tax for the import of the aircraft from Italy to Switzerland.
6. There are now two sets of ongoing legal proceedings in Italy concerning the alleged tax liability, in both of which the first defendant contests its liability to pay tax. The first proceedings are civil tax proceedings in which the first defendant disputes that there is any liability to pay Italian tax. The second are criminal proceedings which led to the arrest of the aircraft. Both the claimant and the first defendant (or at least individuals who work for those companies) are parties to those criminal proceedings, where there is an allegation that the aircraft was smuggled into Italy. The first defendant says that underpinning those smuggling charges is the alleged failure to pay Italian tax when the aircraft was imported into Italy.
7. The aircraft has remained under arrest since November 2019. In a recent statement provided on behalf of the first defendant, it appears that the first defendant has come to an agreement with the tax authorities that it will make a payment of taxes effectively without prejudice to the position as to whether any taxes are due. The taxes are to be paid over a period of time by way of instalments. The evidence is not clear as to whether or not this will in fact lead to the aircraft being released. There must be a reasonable possibility that that will happen, but the evidence does not address that point in any detail.
8. During the time that the aircraft has been under arrest, the first defendant says that it has continued to perform necessary preservative maintenance on the aircraft.
9. As at the time of the arrest, the defendant was in fact behind (and significantly so) on the rent which it was supposed to pay pursuant to the Lease Agreement. The defendant paid no further rent thereafter and this led the claimant to exercise what it contended to be its rights to bring the contract to an end. It served a notice that there were events of default and that the contract was being terminated on that basis. The termination took effect, on the claimant’s case, on 15 May 2020 at which point there was service of a default notice on the first defendant. There was subsequently a letter of demand under the guarantee.
10. The claimant’s case is that the contract came to an end with service of the default notice in May 2020 and that was how the contract was terminated. The defendant’s case is that that termination was ineffective, the reason being that the contract had come to an end through frustration in November 2019. It is not disputed by Mr Shah QC, who appears for the defendant, that if his client’s argument on frustration is rejected for the purposes of this summary judgment application, then the termination which took place on 15 May 2020 was an effective termination which brought the contract to an end. That would be the case, as Mr Shah accepts, because there was non-payment of rent on the hypothesis that there was no frustration defence available.
11. There were other reasons for termination which were invoked by the claimant at the time that it served its notice of termination, but it is not necessary to explore those in any detail. The issue in the case is whether there is a sufficiently arguable defence of frustration. If there is, then the termination in May 2020 was irrelevant because the contract had already been terminated. If there is not, then the termination in May was a valid termination at least because there was unpaid rent.
12. I have been referred to a number of authorities in the context of frustration. It is not necessary for me to set out large excerpts from those cases. It is sufficient to quote what might be regarded as the currently leading judgment of Rix LJ in *Edwinton Commercial Corporation & Anor. v Tsavliris Russ (Worldwide Salvage & Towage) Limited (The Sea Angel)* [2007] 1 CLC 876 at paras.111-112. What he said there, and which has been picked up in subsequent cases including a number of cases concerned with dry aircraft leases, is as follows:

“In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as ‘the contemplation of the parties’, the application of the doctrine can often be a difficult one. In such circumstances, the test of ‘radically different’ is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.”

Rix LJ then went on to identify the important principle that the doctrine was ultimately one of justice.

1. The particular circumstance, relied upon by the defendant as frustrating the contract in the present case, is the seizure by the Italian authorities in November 2019 of the helicopter for unpaid taxes. The defendant particularly relies on its case that, in seizing the aircraft, the Italian authorities had been acting wrongly, because there was no proper basis on which it could be said that the taxes are payable. There is a significant dispute on that point. The defendant says that those circumstances brought the contract to an end and that it is not possible at the present stage to resolve whether or not the Italian authorities were acting rightly or wrongly; that is a matter which can only be resolved at trial. It was, as it seemed to me, implicit in Mr Shah’s submissions that if the Italian authorities were acting correctly, and that the tax was in fact due, then the contract would not be frustrated. The heart of his submission therefore was: that the Italian authorities were acting wrongly, but that is not an issue which can be determined now; there is therefore a sufficiently arguable case with a real prospect of success on the question of frustration.
2. In my view, for reasons which I will now explain by reference to the terms of the contract, it seems to me that even if it were to be shown at trial that the Italian authorities were wrong in their approach, the events which have occurred do not render performance of this contract radically different so as to give rise to frustration of the contract.
3. It is important to bear in mind, in my judgment, the last sentence of the passage of Rix LJ which encapsulates the principles relating to frustration and the difficulty which a party who seeks to rely upon frustration is likely to encounter. What one is looking for is something which is akin to a break in identity between the contract as provided for and contemplated and its performance in the new circumstances. That means that it is important - albeit not determinative - to look carefully at the terms of the relevant contract. If the terms of the relevant contract explain where the risk of events such as those which have taken place is to fall, then it is unlikely that the occurrence of those events will then give rise to a defence of frustration.
4. For reasons which I will explain when I identify the relevant contract provisions, the provisions in this case, in my view, place the risk of what has happened squarely upon the first defendant. It seems to me that to accept that the doctrine of frustration has any application in the present case would result in a reversal of the clear contractual allocation of that risk which is to be found in the dry lease. That is, to my mind, the very reverse of the proper approach to frustration and it produces the unjust result which, as Rix LJ says, is a result which the doctrine of frustration should not produce.
5. With that summary of where my judgment is leading, I turn to identify the relevant clauses which have led me to that conclusion. I should say that I have been referred to a number of cases involving dry leases, and in different ways they emphasise that the doctrine of frustration is one which is unlikely to have very much application in the context of contractual terms such as the one with which I am concerned. There is a very clear analysis of aircraft leases and frustration in the judgment of Foxton J in Salam Air SAOC v Latam Airlines Groups SA [2020] 9 WLUK 516 (“*Salam Air*”), and as he says, where one has a six‑year aircraft lease it is a challenging context in which to establish frustration.
6. I turn, therefore, to the lease provisions with which I am concerned.
7. Clause 4 deals with the commencement of the contract and clause 4.1(b) is one of a number of clauses which identifies where the risk in relation to the aircraft lies once there has been delivery. That provides:

“After delivery the Aircraft and every Engine and Part will be in every respect at the sole risk of Lessee, who will bear all risk of loss, theft, damage or destruction to the Aircraft from any cause whatsoever.”

1. Clause 4.2 addresses the question of delivery which, to some extent, I have already covered. Clause 4.2(a) provides for the delivery and acceptance of the aircraft at the delivery location. That was, as I have said, in Switzerland.
2. Clause 4.2(b) provides for the completion and signature of the Certificate of Acceptance, and I was shown the relevant document in this case. Clause 4.2(c) provides that:

“Risk in the Aircraft shall pass from Lessor to Lessee on the Delivery Date.”

That reflects the previous provision as well.

1. 4.2(d) provides that:

“Immediately after delivery of the Aircraft to Lessee in accordance herewith, Lessee shall ferry the Aircraft to its home base in Italy under a ferry flight permit issued by the Aviation Authority for the sole purpose of that flight...”

1. That indicates, quite clearly in my view, that it was Lessee who was to be the party that was importing the aircraft into Italy and that the route that was to be taken was from Switzerland to Italy, as in fact happened. In the light of those various provisions, one would reasonably expect that the fiscal consequences, if any, of the importation which was to take place would be a matter which would be required to be addressed by the defendant as the importer rather than by the claimant as the Lessor. As I will explain, the contract very clearly in fact provides that that is the case.
2. Clause 5.5 is an important clause which, as Mr Shah accepted, was not the easiest clause for him to reconcile with his frustration argument. The heading to that clause is “Absolute” and reflects the provisions which have been described in at least one other case as a “hell and high water” provision. The relevant terms are as follows:

“Lessee’s obligations under this Agreement are absolute and unconditional irrespective of any contingency whatsoever including (but not limited to):

1. any right of set-off, counterclaim, recoupment, defence or other right which either party to this Agreement may have against the other;
2. any unavailability of the Aircraft for any reason, including, but not limited to, a requisition of the Aircraft or any prohibition or interruption of or interference with or other restriction against Lessee’s use, operation or possession of the Aircraft...”
3. That clause, in my judgment, explains exactly where the risk, such as that which has eventuated, in the present case, is to lie. What has happened is that there has been “unavailability of the aircraft for any reason”, and those are, as Teare J said in *Acg Acquisition XX LLC v Olympic Airlines (in special liquidation)* [2012] EWHC 1070 (Comm), wide words which are unqualified. The clause then goes on to identify a number of matters which come within the concept of “any reason” and those include not only requisition - that has not happened here - but “interruption of or interference with or other restriction against the Lessee’s use, operation or possession of the aircraft”. What has happened here falls fairly and squarely within that clause.
4. Clause 6 deals with the question of taxes. I indicated earlier that one would have expected, given the provisions of clause 4, that the Lessee would be the party responsible for any importation tax and that is indeed, in my view, clearly what clause 6 provides. Clause 6.2, which is the relevant clause in the present context, is headed, “Tax indemnity”:

“Lessee will on demand pay an indemnify Lessor against all Taxes (other than Lessor Taxes) levied or imposed against or upon Lessor or Lessee and relating to or attributable to Lessee, this Agreement or the Aircraft or any part thereof, directly or indirectly in connection with its importation, exportation, registration, ownership, leasing, sub‑leasing, purchase, delivery, possession, use, operation, repair, maintenance, overhaul, transportation, landing, storage, presence or redelivery or any rent, receipts, insurance proceeds, income or other amounts arising therefrom.”

1. It would be difficult to have a more comprehensive clause. The clause is concerned with two obligations (payment and indemnification), and it includes payment in respect of taxes which are imposed against or upon the Lessor or the Lessee. There is some qualification to that provision later on in the contract in clause 9.4 which does provide in certain circumstances for the possibility that the Lessee may not be immediately in breach of contract if it does not pay a particular tax, and I will come to that in due course.
2. However, what is clear from that provision is that unless the relevant tax comes within the exclusion in brackets for “other than Lessor Taxes”, the importation taxes fall fairly and squarely on the defendant. As far as the exclusion for the Lessor Taxes are concerned, that is set out in the Definitions section, and the only relevant possible exception referred to by Mr Shah is (a). I do not need to deal with (b) and (c) because they are clearly inapplicable. The relevant provision of (a) is as follows:

“‘Lessor Taxes’ means taxes:

1. imposed as a direct result of activities of Lessor in the jurisdiction imposing the liability unrelated to Lessor’s dealings with Lessee or to the transactions contemplated by this Agreement or the operation of the Aircraft by Lessee...”
2. In other words, if that provision is applicable then there is a carve-out so that the relevant tax falls upon the Lessor. It seems to me to be quite unarguable to suggest in the present case that any import tax (which comprises in the present case VAT) which is alleged to be payable on importation in Italy comes within those provisions. The starting difficulty is that the VAT liability would not be imposed as a direct result of activities of the Lessor in the jurisdiction imposing the liability. That jurisdiction would be Italy, but the reason for the taxes are not to do with the activities of the Lessor, which is an Irish company, in Italy.
3. However, the clause goes on to say that even if that were potentially in play, the activities must be:

“...unrelated to Lessor’s dealings with Lessee or to the transactions contemplated by this Agreement or the operation of the Aircraft by Lessee...”

Those words make it clear that if one is dealing with the importation tax relating to the helicopter being taken into Italy pursuant to the terms of the contract, that would plainly be related to the Lessor’s dealings with the Lessee and indeed to the transactions contemplated by this Agreement.

1. So for all those reasons, it is quite clear that the obligation to pay any VAT and importation taxes falls upon the defendant. The significance of that, in my judgment, in the context of frustration is straight-forward. The position is that the parties contemplated that those taxes would be the responsibility of the Lessee. If a situation arises where, because of non‑payment of taxes, the relevant authorities come after the Lessee and seize the aircraft, that falls fairly and squarely within the risk allocation to the Lessee which is contained in the contract.
2. It cannot be said that there has been some supervening event which renders performance radically different in circumstances where the contract clearly places obligations on the Lessee to pay the relevant taxes. If events occur which are within the hell and high water clause which result in the unavailability of the aircraft because taxes have not been paid then I cannot see any basis on which it can be said that the risk of those events should, via the doctrine of frustration, be reallocated to the Lessor.
3. Clause 8 of the contract provides a covenant of quiet enjoyment on the part of the Lessor. It provides as follows:

“...neither Lessor nor any person claiming through Lessor will interfere with the quiet use, possession and enjoyment of the Aircraft by Lessee... in any jurisdiction...”

1. It does not seem to me that that obligation is of any assistance to the Lessee’s argument on frustration. It was (rightly) not suggested that there has been any breach by the Lessor of that provision by reason of the actions which have been taken by the Italian authorities. The Italian authorities are not the Lessor itself nor any person claiming through the Lessor.
2. Another significant point in relation to that clause is, as Foxton J pointed out in the *Salam Air* case, that the nature of a lease of this kind is that there are very limited obligations which are imposed upon the Lessor. The Lessor’s entitlement is to receive the income stream which is provided for by the lease and once it has delivered the aircraft its obligations are largely limited to ensuring that it does not breach the covenant of quiet enjoyment, which in this case it did not.
3. Clause 9.3(a) and (b) I have already referred to. Some reliance is placed upon those provisions (in particular 9.3(a)) by Mr Shah who contends that the commercial purpose of this contract was frustrated. I shall come back to that argument in due course, but for reasons which I will give at that stage, I do not accept it.
4. Clause 9.4 is another provision which deals with “Taxes and other Outgoings”. There are other provisions within clause 9 to which Mr Shepherd referred me but it seems to me that 9.4 is the most important clause as far as the present facts are concerned. It says:

“Lessee will promptly pay:

1. all license and registration fees, Taxes (other than Lessor Taxes) and other amounts of any nature imposed by any Government Entity with respect to the Aircraft, including without limitation the ownership, delivery, leasing, possession, use, operation, return of the Aircraft; and
2. all rent, fees, charges, Taxes (other than Lessor Taxes) and other amounts in respect of any premises where the Aircraft is located from time to time...”
3. The obligation of the Lessee is basically to pay all relevant taxes. There is a let-out which is referrable to the reasonable opinion of the Lessor. The obligation to pay is limited by an exception which allows for non-payment when:

“...in the reasonable opinion of Lessor, such payment is being contested in good faith by appropriate proceedings, in respect of which adequate resources have been provided by Lessee and non‑payment of which does not give rise to any material likelihood of the Aircraft or any interest therein being sold, forfeited or otherwise lost or a criminal liability on the part of Lessor.”

1. Mr Shah submitted that those words are applicable and provide a reason why in the present case there was no obligation to pay taxes. I was unpersuaded about that point. It does not seem to me that the Lessor has ever been asked to express an opinion as to whether or not the Lessee should be released from its obligation to pay promptly, and there is no evidence that any reasonable opinion has been given by the Lessor.
2. It also seems to me that, for the following reasons, it would be difficult to suggest that, if the Lessor refused to give a positive opinion, the Lessor was not entitled to take that view. There are two consequences potentially (and indeed actually, on the facts of this case) resulting from the events which I have already described.
3. The first is the seizure of the aircraft with, on the evidence before me, some uncertainty as to whether or when the aircraft will ever be released. That seems to me to be a situation where there is a material likelihood of the aircraft, or any interest therein being lost.
4. Secondly, it is also the case that criminal proceedings have been brought against the claimant, as Mr Shepherd would say, as a result of incorrect statements being made by the Lessee. Whether or not that is the case, the provision does seem to me to be one where the Lessor, if asked to give a reasonable opinion as to whether the Lessee should pay the tax, would be perfectly entitled to say: “yes, you should pay that because if you do not then that may result in a criminal liability on my part (see the proceedings which have actually been brought against me)”.
5. The final clause to which I should refer is clause 12. This reiterates provisions previously made. Clause 12.1 is headed, “Risk of loss and damage, etc.” That provides:

“Notwithstanding the provisions of clause 4.2 (Delivery), Lessee shall, from the Delivery Date, bear the full risk of any loss, destruction, hijacking, theft, condemnation, seizure, requisition or confiscation of or damage to the Aircraft howsoever arising and of any other occurrence of whatever kind which may or shall deprive the Lessee of the use, possession or enjoyment thereof.”

1. It does seem to me that what has happened in this case is, on any view, a seizure. Therefore, that is a matter which falls fairly and squarely within the risks which are taken by the Lessee under this contract. That conclusion is reinforced by the provisions of clause 12.3 and 12.4. Those provide that even if, for example, the helicopter is completely lost, rent payments remain payable at least for a period of time before the first defendant or the insurers have provided complete compensation to the claimant.
2. In the light of all of those provisions, I come back to where I started which is that the case which is advanced on frustration would effectively reallocate to the Lessor the risk which has very clearly under this contract been assumed by the Lessee. I see no reason at all why the risk of proceedings by the Italian authorities relating to an importation of an aircraft into Italy by the defendant should fall upon the claimant, and that remains the case even if, as the defendant seeks to allege, the Italian authorities have acted in some way wrongfully in the actions which have been taken. It seems to me that that conclusion is consistent with the various cases to which I have been referred and the judgments of Teare J, Foxton J and Julia Dias QC in cases which are directly concerned with dry leases.
3. I have reached that conclusion on the basis of looking at the contract and determining where the allocation of risk lies in this case. I have taken into account the fact that the contract terms are not determinative. It may be that in a particular case some set of facts occur which causes the court to say that nevertheless, despite the contract terms, the contract has been frustrated. But that is not the position in this case. The contract terms remain very important and the defendant’s submission, which has the effect of reversing the allocation of risk, is not consonant with frustration.
4. It also seems to me that there is an additional reason for reaching the conclusion which I have reached: the principle that a party cannot rely upon his own act or default in order to invoke the doctrine of frustration. In the present case, the reasons why the problems occurred are because the defendant has not paid taxes. The obligation to pay taxes is squarely upon the defendant under both clause 6 and clause 9.
5. It does seem to me that the doctrine of self-induced frustration is potentially applicable in the present case, and I would go further and say not only is it potentially applicable but there is no real prospect on the present facts of the defendant being able to invoke it for that separate reason. However, that conclusion in relation to self-induced frustration is not central to my conclusion, which I reach because of the allocation of risk to which I have already referred.
6. I will briefly deal with a number of arguments which were advanced by Mr Shah in support of his contention.
7. First of all, he relied heavily upon a statement that was alleged to have been made by the claimant and allegedly passed through to the Italian Civil Aviation Authorities relating to the transportation of the helicopter from Ireland to Italy. It is said that that may have had some impact on the tax problems which have arisen in the present case.
8. I see no evidence, sufficient for the purposes of summary judgment, to consider that that is a point of any substance at all. There is no evidence of any relevant statement in fact being made. I have not been shown any document in which any particular statement was made, but in any event the statement, if made at all, was made to the equivalent of the Civil Aviation Authority. The ENAC is not the tax authority and although there are materials in the papers before me which relate to the Italian proceedings, I have not been shown anything which suggests that the problems which have been encountered by the first defendant have anything whatever to do with statements which were made by the claimant, and which were passed through to ENAC.
9. Secondly, Mr Shah placed some considerable emphasis in his argument on clause 9.3 of the contract which refers to the fact that the use of the helicopter was to be for HEMS operations, and he says that the effect of the seizure by the Italian authorities is to frustrate that commercial purpose. It does not seem to me that that argument has any substance at all, even leaving aside the general difficulty in a party seeking to generally invoke commercial purpose as a basis for frustration. There was nothing in the present case which meant that the underlying commercial purpose could not be fulfilled. This is not a case where, for whatever reason, the Italian authorities no longer wish to have helicopters to provide helicopter emergency and medical services. Mr Shah has told me that the position is that the contract which the defendant has with the Italian authorities in fact remains in place. There therefore remains a demand for that particular service.
10. The case is quite unlike one of the so-called “Coronation” cases where the underlying purpose was to view the King’s coronation and that was no longer possible. It is not even like one of the cases which concerns the impact of the Covid pandemic on commercial operations, where commercial operations were no longer viable and may be prohibited by authorities for a period of time. In the present case, the demand for services is still there. All that has happened is that there is a seizure which means that the aircraft is unavailable for any services at all. It does seem to me that that has no relevant connection with the HEMS contract save only that it cannot be performed, and indeed no contract and no services to anybody can be performed, while the aircraft remains under arrest. For those reasons, I do not consider that the commercial purpose argument has any substance.
11. It was also submitted by Mr Shah that there is some other reason for a trial, and he reminds me that I need to be careful in giving summary judgment. It does seem to me that this is a case where, as Mr Shepherd said at the start of his submissions, the frustration defence is in fact hopeless. I do not consider that there are any facts which might conceivably emerge which would result in a reversal of the contractual allocation, which I regard as very important. Nor do I consider that any facts might emerge which would provide an answer to the case that the relevant events in the present case have been brought about by matters for which the defendant is squarely responsible, namely the obligation to pay taxes.
12. So for those reasons, I consider that Mr Shepherd’s argument is correct, and I will grant summary judgment to the claimant.

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