Neutral Citation Number: [2010] EWHC 40 (Comm)
Case No: CLAIM NO. 2009 / FOLIO 206

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/01/2010

**Before** :

**MR JUSTICE HAMBLEN**

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**Between :**

**TANDRIN AVIATION HOLDINGS LIMITED** **Cla**

**- and -**

(1) **AERO TOY STORE LLC.**

**Defe**

(2) **INSURED AIRCRAFT TITLE SERVICE, INC.**

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**Mr Michael McLaren QC** (instructed by **DWF LLP**) for the **Claimant**

**(No Appearance for the Defendant)**

Hearing dates: January 15th 2010

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**JUDGMENT**

**Introduction**

1.
The Claimant ("Tandrin") applies for:

a.
summary judgment against the First Defendant ("ATS") pursuant to CPR Pt.24;

b.
(alternatively) an order striking out ATS's Defence pursuant to CPR 3.4(2)(a);

c.
an order that ATS make an interim payment pursuant to CPR 25.6;

d.
judgment against the Second Defendant ("D2") in default of acknowledgement of service, pursuant to CPR pt.12 and/or 23; and

e.
costs.

2.
ATS have not appeared to dispute the application. On Monday 11th January 2010 ATS's solicitors sent to Tandrin's solicitors a letter stating:

a.
that ATS disagrees that the English court is the appropriate forum;

b.
that ATS "vigorously disputes the Claim and [Tandrin's] applications";

c.
that ATS has attempted to resolve the claims without success; and

d.
that ATS has instructed its solicitors [and counsel] not to attend the hearing and that it does not wish to be represented at it.

3.
ATS had previously unsuccessfully sought to challenge the jurisdiction of the Court and adduced evidence in support of that application. The only evidence served specifically for the purpose of the present applications is Mr. Irvine's 2nd statement and 3rd statement on behalf of Tandrin. However, parts of the statements served for the jurisdictional challenge also have some relevance. Given the absence of ATS, I have read that evidence and in particular in addition to the Defence I have read:

a.
1st statement of Mr. Irvine (on behalf of Claimant) dated 11th February 2009.

b.
1st statement of Mr. Lederman (on behalf of the First Defendant) dated 7th April 2009.

c.
1st statement of Mr. Kirk (on behalf of the First Defendant) dated 7th April 2009.

d.
1st statement of Mr. Laggan (on behalf of the First Defendant) dated 2nd June 2009.

e.
Skeleton argument served on behalf of the First Defendant for the hearing on 4th June 2009.

f.
2nd statement of Mr. Irvine (on behalf of Claimant) dated 6th October 2009.

g.
3rd statement of Mr. Irvine (on behalf of Claimant) dated 11th January 2010.

**Factual background**

4.
This action concerns the sale by Tandrin to ATS of a new Bombardier executive jet aircraft ("the Aircraft") for US $31.75m. Pursuant to the Aircraft Sale Agreement ("the Agreement") ATS paid a US $3m deposit ("the Deposit") to D2 as escrow agent. Both the Deposit and the balance of the purchase price were due to be paid to Tandrin on delivery of the Aircraft. Once the Aircraft had been manufactured, Tandrin completed its purchase of the Aircraft from the original vendor (JetCoast 6051

LLC), paid a total of about US $26.5m for the Aircraft and took delivery of it. However, ATS failed to participate in the pre-delivery contractual procedures and in alleged breach of contract failed to accept Tandrin's tendered delivery of the Aircraft on about 16th January 2009 or pay the balance of the purchase price. Ultimately, after expiry of the "cure period", on about 9th February 2009, Tandrin purported to exercise its contractual right to terminate the Agreement on the grounds of ATS's alleged breach, the consequence of which was (according to the Agreement) that the Deposit became payable to Tandrin as liquidated damages for the breach. However, in further alleged breach of contract (viz. cl.7.4.2 of the Agreement), ATS then failed to instruct D2 to pay the deposit to Tandrin.

5.
Tandrin's evidence is that it is very heavily out of pocket; it has had to pay JetCoast for the new Aircraft, which it was ultimately forced to sell on for only US $24m, i.e. at a significant loss. One year later Tandrin has yet to receive a cent from ATS, yet has had to bear entirely out of its own resources the substantial costs of financing not only the purchase price from JetCoast but also the shortfall after the resale of the Aircraft.

6.
The most relevant terms of the Agreement are as follows:

a.
Deposit (to be held in escrow and non-refundable save in certain circumstances): clauses 2.2 – 2.3.

b.
Pre-closing and closing obligations: clauses 4.2 – 4.3.

c.
Purchaser's default (including liquidated damages clause etc.); cl.7.4.2.

d.
Force Majeure clause; cl.7.17.

7.
Clause 7.4.2 provided as follows:

"**Purchaser's Default**. In the event Purchaser fails to accept delivery of the Aircraft and pay the Purchase Price to Seller in violation of the terms and conditions of this Agreement, and provided Seller is not then in breach or default in timely performing its written obligations hereunder, Seller shall have the right, after ten (10) Business Days' prior written notice from Seller of such breach or default and Purchaser's failure to cure (or commence curing) the same with such 10-day period, to terminate this Agreement by written notice to Purchaser and the Escrow Agent. If Seller elects to terminate this Agreement pursuant to this Section 7.4.2, the Escrow Agent shall pay the Deposit to Seller as liquidated damages (and Seller and Purchaser shall promptly give written instructions to the Escrow Agent to that effect), and this Agreement shall be of no further force or effect. Seller acknowledges and represents that the liquidated damages amount provided for in this Section 7.4.2 is a reasonable estimate of the damages that would be incurred by Seller in the event Purchaser defaults on Purchaser's obligations under this Agreement. Seller's right to receive the Deposit as liquidated damages, shall be cumulative and not alternative, and shall be the sole remedy available to Seller in the event Purchaser defaults on Purchaser's obligations under this Agreement (other than a default under this Article 7.4.2); and Seller waives any other remedies that may be available to Seller, at law or in equity, as a consequence thereof."

8.
Clause 7.17 provided as follows:

**"Force Majeure**. Neither party shall be liable to the other as a result of any failure of, or delay in the performance of, its obligations hereunder, for the period that such failure or delay is due to: Acts of God or the public enemy; war, insurrection or riots; fires; governmental actions; strikes or labor disputes; inability to obtain aircraft materials, accessories, equipment or parts from vendors; or any other cause beyond Seller's reasonable control. Upon the occurrence of any such event, the time required for performance by such party of its obligations arising under this Agreement, shall be extended by a period equal to the duration of such event."

**Procedural History**

9.
On 16th February 2009 Tandrin issued an Application for permission to serve proceedings out of the jurisdiction on ATS and D2.

10.
The Claim Form (with attached Particulars of Claim) was issued on 16th February 2009.

11.
On 18th February 2009 an Order was made by Mrs. Justice Gloster (without hearing the parties) granting permission for service out of the jurisdiction. Service was duly effected in compliance with that Order.

12.
D2 did not acknowledge service and has played no part in the English proceedings. However, ATS acknowledged service on 25th March 2009, and on 8th April 2009 issued a Notice of Application to set aside the Order of Gloster J. on the grounds that England was not the appropriate jurisdiction.

13.
On 4th June 2009 the application was argued before Mr. Justice Field, who made an Order dismissing the application with costs. Leave to appeal was refused by Field J.; and (so far as Tandrin is aware) no further application for leave to appeal was made to the Court of Appeal.

14.
On 26th June 2009 ATS served a fresh Acknowledgement of Service, and on or soon after 30th July 2009 served its Defence.

15.
On 19th October 2009 Tandrin issued its Application Notice for the relief sought on this hearing, supported by Mr. Irvine's 2nd statement and 3rd statement. As noted above, no evidence in response has been served by ATS.

**Part 24 application**

16.
The Particulars of Claim claims the following relief against ATS:

a.
Prayer paragraph (1): declarations in relation to the termination of the Agreement and the payment of the Deposit.

b.
Prayer paragraph (2): an order that ATS do forthwith give instructions to D2 for payment of the deposit to Tandrin.

c.
Prayer paragraph (3): damages, being those flowing from the delay in ATS giving instructions for the release of the Deposit (see para 16 of the Particulars of Claim).

d.
Prayer paragraphs (4)-(5): interest and further or other relief.

Tandrin has hitherto not sought from ATS damages in the sum of US $3m. It says that this is for consistency with the regime in cl.7.4.2 of the Agreement and lest to do so might cause further difficulty in recovering the deposit from D2.

17.
On this Part 24 application for summary judgment, Tandrin seeks as against ATS:

a.
the declarations as prayed;

b.
an order that ATS give the necessary instructions for the release of the deposit, as prayed;

c.
judgment on the claim for damages to be assessed, with an order for the payment of an interim amount of damages (the final amount of damages may vary according to whether or when ATS gives instructions to D2 for the release of the Deposit);

d.
costs.

**Tandrin's case against ATS**

18.
In support of its application Tandrin has referred me to a number of underlying documents, and in particular:

a.
The Agreement.

b.
Documents evidencing receipt of the deposit by D2 and D2's statement as to how it proposed to deal with the deposit.

c.
The attendance note of a telephone conversation on 12th November 2008 with Tandrin's lawyers, when the issue of force majeure was first raised by ATS.

d.
ATS' petition dated 26th November 2008 to the Oklahoma court in which force majeure was formally asserted.

e.
Letters sent by Tandrin to ATS in accordance with the pre-closing obligations under the Agreement on 8th, 11th, 16th December 2008, 8th and 13th January 2009, the last letter fixing 16th January 2009 as the closing date for the deal.

f.
The notice of breach and "cure notice" from Tandrin to ATS dated 20th January 2009.

g.
The notice of termination of the Agreement pursuant to cl.7.4.2 dated 9th February 2009.

h.
Tandrin's instruction to D2 the same day to pay the Deposit to Tandrin.

**The defences of ATS**

19.
The Defence pleads three 3 positive defences:

a.
Penalty clause: ATS pleads that the provisions of the Aircraft Sale Agreement, which provide for Tandrin to retain the deposit in the event of failure by ATS to take delivery, amount to a penalty clause.

b.
Inappropriate jurisdiction: ATS pleads that England is an inappropriate jurisdiction to seek specific performance against ATS.

c.
Force majeure: ATS pleads that it is entitled to rely on the Force Majeure clause, cl.17.7, in the Agreement.

20.
The Aircraft Sale Agreement was subject to English law and contains an English non-exclusive jurisdiction clause.

21.
In order to succeed on its Part 24 Application Tandrin has to establish that none of these defences has a real prospect of success.

**Penalty clause**

22.
The Defence pleads that the provisions of the Aircraft Sale Agreement, which provide for Tandrin to retain the deposit in the event of failure by ATS to take delivery, amount to a penalty clause.

23.
The law:

a.
A clause providing for liquidated damages is enforceable if it does not exceed a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the

obligation in question; and it is enforceable irrespective of the amount of loss actually suffered - See, Chitty on Contract, 30th Ed., para 26-125.

b.
The question whether a sum stipulated for in a contract is a penalty or liquidated damages is a question of law. The law was authoritatively summarised by Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co Ltd. [1915] AC 79, 86-88:

"1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages....

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage ( Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda [1905] AC 6).

4. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach ( Public Works Commissioner v. Hills [1906] AC 368, 376 and Webster v. Bosanquet [1912] AC 394 ).

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in Clydebank Case [1905] AC 6, 17.

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ( Kemble v. Farren [1829] 6 Bing. 141, 148)....

(c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" ( Lord Watson in Lord Elphinstone v. Monkland Iron and Coal Co. [1886] 11 App. Cas. 332, 342).

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties..."

24.
Tandrin contends that this defence has no real prospect of success and relies in particular on the following facts and matters.

25.
Deposit / liquidated damages clause common in aircraft sale agreements: There is unchallenged evidence from Mr. Irvine that clauses of this sort are common in aircraft sale agreements. Further:

a.

A clause of this sort appears in all 3 actual aircraft sale agreements in evidence, namely:

a.
The agreement by which Tandrin purchased the Aircraft from Jetcoast.

b.
The Agreement between Tandrin and ATS.

c.
The agreement by which Tandrin re-sold the Aircraft to Hatta.

b.
A clause of this sort appears in the model aircraft agreement exhibited to the text entitled “Asset and Project Finance: Law and Precedents”. The accompanying text also states that it is “common practice in the aviation industry for the seller to require a prospective purchaser to pay a deposit”.

26.
Amount of deposit not unusual: There is unchallenged evidence from Mr. Irvine that the amount of the deposit in the Agreement (less than 9.5%) is neither unusual nor excessive.

a.
Mr. Cunningham (Head of Banking and Finance at DWF LLP, solicitors instructed by Tandrin) considers that for a non-refundable deposit, the amount of 10% would be a “typical or common amount”.

b.
In the agreement by which Tandrin purchased the Aircraft from Jetcoast, the retention by way of liquidated damages (in fact only part of the deposit paid to the seller) was 10% of the purchase price.

c.
In the agreement by which Tandrin re-sold the Aircraft to Hatta, the deposit was 7.3% of the purchase price, but that figure was lower than usual for the reasons identified by Mr. Irvine (including that there would be only a short time period between exchange and completion).

27.
Amount of deposit was a reasonable pre-estimate of Tandrin’s possible loss: There is unchallenged evidence from Mr. Irvine as follows:

a.
In the very “hot” market of the time, with prices foreseeably near their peak, a 10% deposit / pre-estimate of loss would have represented what could reasonably have been expected to be the drop in value of the Aircraft if the market declined. (In this Agreement the deposit of US $3m was less than 9.5% of the purchase price of US $31.75m.)

b.
In adverse market conditions sellers of corporate jets could well expect to lose far more than 50% of their anticipated profit on a deal, perhaps 100%; yet the US $3m deposit under this Agreement represented only about 50% of the anticipated profit on the deal.

28.
Amount of deposit in fact is an under-estimate of Tandrin’s loss: There is unchallenged evidence from Mr. Irvine that Tandrin’s loss is in excess of US $7.75m, a sum far greater than the US $3m amount of

the deposit. This provides some empirical support for the proposition that the parties' decision to treat the amount of US $3m as a pre-estimate of loss was anything but unjustifiably harsh to the purchaser; it proved in fact to be a significant under-estimate of the actual loss.

29.
Not open to ATS to take this point: There is unchallenged evidence from Mr. Irvine that:

a.
the offer of the deposit and the amount thereof was first suggested / proffered by ATS, not demanded by Tandrin; and

b.
the draft agreement (proposing by cl.2.2 that the deposit be treated as non-refundable and by cl.7.4.2 that the seller be entitled to treat the deposit as liquidated damages in the event of default by the purchaser) was first produced by ATS, not by Tandrin; and the terms of that draft agreement dealing with the deposit (including cl.7.4.2) remained unchanged in the (signed) Agreement.

For these reasons, Tandrin submits that it is not now open to ATS to contend that cl.7.4.2 rendered the deposit was a penalty and relies on the principles of estoppel. Whilst I do not accept that an estoppel case is made out on the evidence, in considering whether the sum stipulated as liquidated damages is extravagant or unconscionable it is relevant that it was ATS who proposed it. It lies ill in ATS's mouth now to contend that the US $3m is a penalty, given that both the amount of the deposit and its characterisation as liquidated damages originated from ATS.

30.
Addressing each of the 4 tests which Lord Dunedin said at paragraph (4) of his formulation would assist the task of construction against the above factual background, I accept that ATS has no real prospect of establishing that cl.7.17 is to be construed as a penalty by reference to any of those tests. In particular:

a.
The sum stipulated is not extravagant or unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach. In particular, Tandrin's actual loss was far greater than the US $3m deposit.

b.
ATS's breach of contract did not consist only in not paying a sum of money, but instead comprised the failure to accept delivery of the aircraft and pay for it (the balance of the purchase price being nearly 10 times the amount of the deposit / liquidated damages).

c.
Cl.7.4.2 provided that the deposit could be treated as liquidated damages only in the event of ATS's breach in failing to accept delivery of the aircraft and pay the balance of the purchase price. So this is not a case where the liquidated damages are payable by way of compensation on the occurrence of several events, some of which may occasion only trifling damage.

d.
This is a case where the consequences of the breach are such as to make precise pre-estimation of damage almost an impossibility. Hence, this is a situation where the pre-estimated damage was, and should be taken to be, the true bargain between the parties.

31.
I therefore conclude that there is no triable argument that cl.7.4.2 is unenforceable as a penalty.

**Inappropriate jurisdiction**

32.
The Defence pleads that it is inappropriate and contrary to principle for Tandrin to seek an equitable specific performance remedy in an English court against foreign defendants for three reasons.

33.
First, it is said by ATS that the appropriate jurisdiction in which to seek such a remedy would have been Florida or Oklahoma. However, the issue of whether the English court has jurisdiction to do so has been determined against ATS by Field J's judgment, which judgment has not been appealed. ATS cannot go behind Field J's judgment.

34.
The next reason relied on by ATS is that there are in existence established proceedings between Tandin and ATS relating to the same subject matter as the subject matter of these proceedings. But again, this issue was central in the argument on the jurisdictional challenge, resulting in Field J's judgment, which judgment has not been appealed. Again, ATS cannot go behind Field J's judgment on this.

35.
The last reason relied on by ATS is that Tandrin will have to start fresh proceedings either in Florida or Oklahoma should it wish to enforce any specific performance order made by the English court. As to that:

a.
Unless the matter were able to be resolved without recourse to the courts in the USA, Tandrin states that it will apply for relief in the existing proceedings in the Oklahoma court. Such an application is likely to be fortified by a reasoned, final and conclusive judgment from the English Commercial Court dismissing the defences raised. Tandrin anticipates that such a judgment from the Commercial Court would greatly assist the Oklahoma court and enable it to order D2 to release the deposit to Tandrin and/or order ATS to give the instruction to D2 to that effect without the need for issues as to English law to be argued at any length before it.

b.
In any event, Tandrin anticipates that the existence of a reasoned, final and conclusive judgment from the English Commercial Court, dismissing the force majeure argument (and the penalty argument) and ordering ATS to instruct D2 to release the deposit monies to Tandrin, might well persuade D2 to release the deposit monies to Tandrin (even in the event of non-compliance by ATS with that order). In practice, a US court is unlikely to take a different view from the English court on an English law question (namely the applicability of the force majeure clause), so:

a.
D2, being a reputable escrow agent and playing a neutral role in this dispute, is unlikely to wish to jeopardise its good commercial reputation by ignoring an order of a competent English court, in circumstances where ATS's defence will have been dismissed; and

b.

ATS would know that, by continuing to refuse to give instructions to D2 to release the Deposit to Tandrin, it would only be increasing the costs and damages.

So there are good reasons for Tandrin hoping that a reasoned English court judgment would be the key to the resolution of this dispute, without the need for any further enforcement proceedings.

c.
If formal enforcement proceedings were necessary, there is no reason to suppose that a Florida court and/or an Oklahoma court would decline to make orders having the effect (directly or indirectly) of enforcing the English court order. In any event, ATS has submitted no evidence as to Florida or Oklahoma law or procedure to the effect that there would be such problems; and the burden of proof on this issue would be on ATS.

36.
For completeness, I note that at the jurisdictional hearing before Field J. counsel for ATS relied on Dicey & Morris on Conflict of Laws Rule 35(1) and para 14-020 thereof in support of its argument that a foreign court (such as Oklahoma or Florida) would not enforce an English court order for specific performance. This argument was adverted to by Field J. at paragraph 20 of his judgment, but did not stand in the way of his dismissal of the application. I accept Tandrin's submission that this argument (which was later also reflected in paragraphs 8-9 of the Defence) should not stand in the way of the court making such an order against ATS (or D2):

a.
for the reasons dealt set out in paragraph 35 above; and

b.
because issues of enforceability and/or enforcement are matters for the Oklahoma court (or the Florida court) subsequently to consider, and do not provide good reasons for the English court to decline at this stage to make such an order.

37.
I therefore conclude that there is no triable argument that it is inappropriate for the court to make an order for specific performance.

**Force majeure**

38.
The principal defence which ATS has advanced to seek to justify its refusal to accept delivery of the Aircraft is that the alleged "unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets" triggered the force majeure clause in the Agreement, thereby postponing the time for ATS to complete the purchase and potentially affecting the price at which ATS should be entitled to purchase the Aircraft.

39.
Tandrin submits that this argument is bad in law because an economic downturn or tightening of credit markets has never been held to be force majeure in English law, and unworkable in practice because the result of the operation of the force majeure clause (as articulated by ATS's solicitor Mr. Lederman at paragraph 11 of his statement) is that ATS "should retain its contractual right to purchase the aircraft in question in a commercially reasonable time and in a commercially reasonable manner; and [D2] should continue to hold the Deposit in the meantime". This is vague and unworkable and the antithesis of the certainty required in commercial transactions.

40.
It is well established under English law that a change in economic / market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a force majeure event. Thus a failure of performance due to the provision of insufficient financial resources has been held not to amount to force majeure - see The Concadoro [1916] AC 2 AC 199; and likewise a rise in cost or expense - see Brauer & Co. (GB) Ltd. v. James Clark (Brush Materials) Ltd. [1952] 2 All ER 497 and generally the discussion in Chitty on Contract, 30th Ed., para 14-148.

41.
A helpful summary of which matters are, and which are not, capable of constituting force majeure is set out in Chitty on Contract, 30th Ed,. para 14-148. The matters which are listed as having been held **not** to be capable of constituting force majeure include "a failure of performance due to the provision of insufficient financial resources or to a miscalculation, a rise in cost or expense, …"

42.
A recent judicial statement disapproving the notion that economic circumstances can generally found a claim for force majeure or frustration appears in Thames Valley Power Ltd. v. Total Gas & Power Ltd. [2006] 1 Lloyd's Rep. 441, where Christopher Clarke J. said this:

" … It does not at all follow that the supplier is entitled to rely upon an increase in the market price in comparison to the contract price as a force majeure circumstance. ……. This conclusion is consistent with a line of cases, both on force majeure clauses and on frustration, ….., to the effect that the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration. I take as an example Tennants (Lancashire) Ltd v CS Wilson & Co Ltd [1917] AC 495, a force majeure case where Lord Loreburn observed at page 510:

"The argument that a man can be excused from performance of his contract when it becomes "commercially impossible" seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect.""

43.
Whether a force majeure clause in a contract is triggered depends on the proper construction of the wording of that clause; "force majeure" is not a term of art. Here, there are a number of hurdles in the way of cl.7.17 being construed in such a way as to permit ATS to rely on market conditions as a force majeure event.

44.
The phrase "any other cause beyond the Seller's reasonable control" should be read in the context of the entire clause. The specific instances of force majeure in the preceding words are as follows: "act of God or the public enemy; war; insurrection or riots; fires; governmental actions; strikes or labour disputes; inability to obtain the aircraft materials, accessories, equipment or parts from the vendors". Whilst there is no requirement to construe the phrase "any other cause beyond the Seller's reasonable control" ejusdem generis with those earlier specific examples, it is telling that there is nothing in any of those specific examples of force majeure in cl.7.17 which is even remotely connected with economic downturn, market circumstances or the financing of the deal.

45.

Further, it is striking that the clause does not refer to “any other cause beyond the Purchaser’s reasonable control” or “any other cause beyond either party’s reasonable control” but only to “any other cause beyond the Seller’s reasonable control”. The natural and ordinary meaning of such a provision is that it is addressing the position of the seller rather than the purchaser and is a force majeure circumstance that only the seller can rely upon. There would be nothing particularly surprising if this part of the force majeure clause was limited in this way since it is the seller who has the principal performance obligations under the Agreement. The purchaser’s essential performance obligation is to pay the price and accept delivery, obligations that are far less likely to be affected by force majeure circumstances.

46.
Further:

a.
The expression “any other cause beyond the S**eller’s** reasonable control” cannot sensibly be construed to include matters with which the seller was never expected to be concerned. For instance, the seller would never have been expected to be concerned with, still less to have any control or influence over, the purchaser’s financing arrangements; or any back-to-back sale by the purchaser to a third party which would have provided the purchase monies.

b.
Instead, the expression “any other cause beyond the **seller’s** reasonable control” should be construed to comprise only those matters which have some connection with the seller’s obligations under the Agreement and/or with which the seller would have been expected to be concerned. For instance, matters relevant to the delivery of the aircraft (which is the obligation of the seller and a matter principally under the seller’s control) would be caught by that clause, such as the seller being unable to deliver the aircraft on time due to a pandemic causing a dearth of delivery pilots.

c.
To construe the clause as if it were worded “any other cause beyond **the purchaser’s** control”, or “any other cause beyond **either party’s** control”, would be wrong because:

a.
it would give no meaning to the words “the seller’s”;

b.
it would fundamentally change the meaning of the phrase.

d.
If the clause were to be construed as ATS contends, i.e. as if it applied to matters over which the seller could never be expected to have any influence, it would have an unacceptably wide ambit.

e.
If, as ATS contends, it is entitled to rely on force majeure events beyond the seller’s rather than ATS’s control, it would mean that it could rely on force majeure events which were not beyond its control, which would be an absurdity.

47.
This conclusion as to construction is further supported by a consideration of the element of causation:

a.

An alleged inability on the part of the **purchaser** (ATS) to obtain finance for the deal cannot properly be construed as being a "cause beyond the **Seller's** reasonable control". Instead, that phrase can only sensibly be construed to apply to a matter which would (or would be expected to) have a causal link with the performance of the seller's own obligations, i.e. a matter which, because the **seller** has no reasonable control over it, causes the **seller** to fail to perform one of the **seller's** own obligations (e.g. a factor preventing the seller delivering the Aircraft).

b.
Cl.7.17 requires a causal link between the "cause beyond the seller's reasonable control" and the failure / delay in the performance of the obligation. There is no causal link between any inability of the **seller** to influence or control the credit markets and the **purchaser's** inability to pay the purchase price.

48.
Under English law, just as the burden of proof is on the party seeking to rely upon a force majeure clause to prove the facts bringing the case within the clause, so the burden of proof is on ATS to show that this force majeure clause is capable of being construed so as to include any funding difficulties it is encountering. For the reasons above, I accept Tandrin's submission that ATS cannot show this.

49.
At the jurisdictional challenge before Field J., ATS sought to rely on two authorities to support its argument that economic circumstances can constitute force majeure. However, ATS's reliance on those authorities is misplaced:

a.
Brauer v. James Clark: in brief:

a.
In that case, the court held that the seller could **not** rely on the force majeure clause, since the mere need to pay more for an export licence did not constitute an inability to obtain an export licence.

b.
The specific clause in that case was construed as relieving the sellers of liability if they could show that they had taken all reasonable steps to obtain an export licence but failed - see, e.g. per Singleton LJ at p.500D, Denning LJ at 501F. These obiter remarks by Singleton and Denning LJJ were in the context of that specific and unusual background; and they did no more than leave open the possibility that (in the circumstances of that case) reasonable steps would not necessarily require a party to pay a prohibitive price. Such considerations do not arise here.

c.
In any event, the passages relied on by ATS were merely obiter and the fact of the matter is that there has been no reported case where change of economic / market circumstances has been held by an English court to amount to force majeure, and ATS was unable to cite any such case at the jurisdictional hearing.

b.
Tennants (Lancashire) Ltd. v. C S Wilson & Co. Ltd.: the passage relied on by ATS refers to dislocation of business and breach of other contracts, which is not in issue in the current case. The more relevant passage from the Tennants case was quoted by Christopher Clarke J. in Thames Valley v. Total Group

(cited above). Also, immediately prior to that quoted passage Lord Loreburn said at [1917] AC 495, 510:

“By “hindering” delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders delivery. If that had been intended different language would have been used, and I cannot regard shortage of cash or inability to buy at a remunerative price as a contingency beyond the sellers’ control.”

Therefore, far from being authority for the proposition suggested by ATS, Lord Loreburn in the Tennants case rejects the notion that greater cost or an inability to buy profitably can constitute force majeure. So the Tennants case is actually authority against the proposition sought to be advanced by ATS.

50.
Finally, to the extent that there may be some overlap between the operation of force majeure clauses and the doctrine of frustration, Lord Simon made clear in National Carriers Ltd. v. Panalpina (Northern) Ltd that an increase in the mere expense or onerousness of the contract cannot constitute frustration:

“Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (**not merely the expense or onerousness**) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.” (emphasis added)

So there is nothing in the doctrine of frustration which assists ATS in its argument. For the doctrine of frustration generally, see Chitty on Contract, 30th Ed., para 23-001 to 23-021.

51.
For all these reasons, I accept and hold that ATS has not shown that as a matter of principle extreme economic circumstances can arguably give rise to force majeure in the context of a clause such as cl. 7.17. I hold that ATS has no real prospect of establishing either that cl.7.17 should be construed as ATS asserts or that as a matter of law it is arguable that the circumstances contended for by ATS can give rise to force majeure under cl.7.17.

52.
I therefore conclude that there is no triable argument that ATS can rely on the force majeure clause to excuse its non performance.

**Other relief against ATS**

53.
Declarations and Order: I accept that the declarations (at paragraph (1) of the Prayer) and the order (at paragraph (2) of the Prayer) flow from the conclusion that I have reached, namely that ATS’s defences disclose no triable defence.

54.
Damages: In addition, Tandrin seeks judgment for damages to be assessed, with an interim payment of £37,785.41. In support, Tandrin makes the following submissions:

a.

Once an election to terminate the contract has been made pursuant to cl.7.4.2, the last sentence of cl. 7.4.2 makes clear that, although the deposit is the sole remedy for Tandrin for ATS's breaches up to that point, Tandrin may seek further relief for any breach by ATS of its obligations under cl.7.4.2 – e.g. any failure to give instructions for the payment of the deposit.

b.
As pleaded at paragraph 16 of the Particulars of Claim, ATS's delay in giving prompt instructions to D2 for payment of the deposit to Tandrin is a breach of cl.7.4.2 of the Agreement and has caused Tandrin to incur considerable additional financing costs which it would not otherwise have incurred. Those losses are continuing, and will continue after judgment herein, until such time as Tandrin receives the deposit from D2.

c.
The current quantification of those damages is set out at paragraphs 2 to 3 of Mr. Irvine's 3rd statement and pages 1-2 of Exhibit "JRMI 14". This statement shows Tandrin's loss to be the sum of £37,785.41 for the period from 10th February 2009 to 1st January 2010. However, it was stated at paragraphs 39 and 40(b) of Mr. Irvine's earlier 2nd statement that such damages would only be claimed from **13th** February 2009, that being the date when Tandrin ought to have received the monies from D2 had ATS given instructions to D2 promptly after receipt of the termination notice on 9th February 2009. So the figure for damages in Mr. Irvine's 3rd statement should be reduced by £508.23, being Tandrin's loss over the period from 9th to 13th February 2009. So interim damages in the slightly lesser amount of £37,277.18 are sought in respect of the period from 13th February 2009 to 1st January 2010.

d.
In addition, Tandrin seeks an order for further damages to be assessed, to cover potentially the following losses:

a.
Such losses flowing from the delay as have accrued since 1st January 2010 and will inevitably continue to accrue.

b.
Such further losses as might further flow from any ultimate inability of Tandrin to recover the deposit from D2 by reason of ATS's existing and/or any further breaches of cl.7.4.2 (e.g. refusing to comply with the English court order; persuading D2 wrongly to pay the deposit to ATS). Such further losses might be the sum of US $3m.

However, in order that such assessment can include all the relevant losses, Tandrin would also seek an order that such assessment be stayed until after the date when Tandrin receives the deposit from D2 or monies in lieu.

55.
I accept that Tandrin is entitled to judgment for damages to be assessed for the reasons stated. However, I do not consider that it would be appropriate to order an interim payment for the full amount of damages claimed to date. In my judgment and in the exercise of my discretion I hold that there should be an order for interim payment on account of damages in the sum of £25,000.

56.

Interest: The claimed losses have been sustained over the period from 13th February 2009 to date. I consider that the interim payment should include interest at 1% above base rate over the period from 13th February 2009. Up until 1st January 2010 that has been assessed as being £336.30 so that the total interim payment shall be £25,336.30.

57.
Further relief / costs: Tandrin seeks its costs of the application against ATS. It submitted a costs schedule and invited me summarily assess the costs which I do in the sum of £30,000.

58.
Striking out: if, as is the case, judgment is given on the Part 24 application, Tandrin does not pursue the alternative relief of seeking an order striking out ATS's Defence pursuant to part 3.4(2)(a), which was only included in the Application Notice as a fall-back alternative to Part 24.

**The relief sought against D2**

59.
D2 has played no part at all in either the Oklahoma or the English proceedings. D2 has not acknowledged service of process in either set of proceedings nor service of any subsequent application notices.

60.
D2's position is as follows:

a.
On 7th May 2008 (prior to the Agreement), D2 acknowledged receipt into escrow of the deposit from ATS; and confirmed that it "will be held in escrow and is considered refundable pending receipt of a fully executed purchase agreement governing the funds held in escrow".

b.
A signed copy of the Agreement (executed on 16th May 2008) was sent to D2 shortly after execution.

c.
There is no evidence that D2 signed the Consent and Joinder section of the Agreement, confirming their agreement to act in accordance with the terms of the Agreement. However, by an e-mail dated 12th November 2008 D2 confirmed that the "deposit will remain in escrow until we either have instructions from both parties or a court order stipulating what is to be done with the funds".

d.
D2's reported position in relation to the English action in March 2009 was that they would "do nothing" in response to it, because "it was [their] standard practice not to consent to jurisdiction outside of Oklahoma and that they would not execute the Acknowledgement of Service …".

61.
As regards the English proceedings, the evidence as to proper service on D2 is as follows:

a.
For evidence of due service on D2 of the Claim Form and the order of Gloster J. permitting service out of the jurisdiction, the documents at Exhibit JRMI 9.

b.

For evidence of due service on D2 of this Application Notice and Mr. Irvine's 2nd statement, paragraph 4 of Mr. Irvine's 3rd statement.

62.
Tandrin seeks as against D2 judgment in default of acknowledgement of service pursuant to CPR Part 12. The Particulars of Claim pleads the following relief against D2:

a.
Prayer paragraph (1): declarations in relation to the termination of the Agreement and the payment of the Deposit.

b.
Prayer paragraph (6): an order that D2 do forthwith pay the deposit to Tandrin. This relief should follow any judgment against ATS, since:

a.
D2 accept that they are holding the deposit as escrow agents and that they themselves have no interest in the deposit monies;

b.
Tandrin gave to D2 instructions in February 2009 for the payment of the deposit to it;

c.
ATS will be obliged (by the court's judgment) to give similar instructions.

c.
Prayer paragraph (7)-(8): interest and further or other relief. Nothing further is sought under these headings.

63.
It might be questioned whether it is appropriate for the court to order D2 to pay the Deposit to Tandrin, where (at least arguably) D2 is under no contractual obligation to pay the Deposit to Tandrin until it receives instructions from ATS to do so. However, Tandrin submits and I accept that there are good answers to that point.

64.
First, the relief sought against D2 is essentially equitable relief; it is an order for specific performance or a mandatory injunction. There is a well known maxim of equity:

"Equity looks on that as done which ought to be done"

The ambit of that maximum is set out in Snell's Equity, 2005 Ed., para 5-25. The Court should treat as done that which ATS ought to have done, namely the giving of instructions to D2 to transfer the Deposit to Tandrin. It is not only as against ATS but also as against D2 that the court should treat that step as having been done. It follows that (in equity) D2 is already treated, or capable of being treated, as being under an obligation to pay the Deposit to Tandrin.

65.
Further or alternatively, the court will be making certain declarations at paragraph 1 of the Order (mirroring the relief sought at paragraph 1 of the Prayer to the Particulars of Claim). These include the declarations that Tandrin is entitled to the Deposit and that the Deposit is not refundable or payable to ATS. Accordingly, it can be said that D2 is to be treated, or is capable of being treated, as

being the trustee of the Deposit for the benefit of Tandrin alone. If so, it follows that the absence of a contractual obligation on D2 to pay Tandrin no longer matters, since D2 as trustee now falls under a duty in that capacity to do so.

66.
In any event, D2 has effectively accepted that it will deal with the Deposit in accordance with "instructions from both parties or a court order stipulating what is to be done with the funds".

67.
For the above reasons, I accept that there is no bar to the court making an order on this application in the form of paragraph 6 of the Prayer to the Particulars of Claim, namely that D2 forthwith pay the Deposit to Tandrin; and that, in all the circumstances, it is appropriate for the court to do so.

**Conclusion**

68.
For the reasons set out above I accept that Tandrin is entitled to and should be granted the relief sought by it.