Neutral Citation Number: [2019] EWHC 484 (Ch)

Case No: BL-2018-002348

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 6 March 2019

Before :

John Kimbell QC
(sitting as a Deputy Judge of the High Court)

Between :

CATHAY PACIFIC AIRLINES LIMITED	**Claimant**
- and -	
LUFTHANSA TECHNIK AG	**Defendant**

Steven Thompson QC (instructed by **Bird & Bird LLP**) for the **Claimant**
Richard Blakeley (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for the **Defendant**

Hearing dates: 14 February 2019

APPROVED JUDGMENT

John Kimbell QC (sitting as a Deputy Judge of the High Court):

Introduction

1. There are two matters before the court. The first is a procedural application by the Defendant ('**LHT**') for an order under CPR 8.1(3) that the claim brought against it by the Claimant ('**Cathay**') should continue as a Part 7 claim. LHT seeks standard Part 7 directions for service of pleadings, disclosure and witness statements. This application is opposed by Cathay.

2. The second matter is Cathay's request for judgment to be entered on its claim. Cathay's position is that the claim was properly commenced under CPR Part 8 claim and that it can be disposed of today without the need for any further directions. Cathay invites me to enter judgment for US$7,039,571.27 on the basis of the documentary and witness evidence before the court.

Factual Background

3. The figure for which Cathay seeks judgment is the product of a set-off between two liquidated claims. Both Cathay's claim and LHT's counterclaim arise under an aircraft engine maintenance agreement dated 9 May 2007 ('**the Agreement**'). The Agreement sets out the terms under which LHT agreed to provide maintenance services to 27 Pratt and Whitney engines deployed by Cathay on its fleet of six Boeing 747-400 freighter aircraft over a ten-year period. The Agreement commenced on 24 May 2008 and expired on 23 May 2018. It is governed by English law. Cathay's claim, which is disputed by LHT, is for US$42,854,896.44. LHT's counterclaim against Cathay of US$35,815,325.17 is not disputed by Cathay.

4. The Agreement identifies a number of different types of maintenance service. Each has its own detailed charging structure. The most comprehensive service is the Flight Hour Service programme (the '**FHSP**').

5. Clause 21.2 of the Agreement (in its original form) stated:

> "[Cathay] may at its option remove Engines from the Flight Hour Service programme prior to the completion of the Term. A financial reconciliation will be performed with respect to each Engine removed from the Flight Hour Service programme in accordance with Schedule 13."

6. Clause 21.2 was amended in in October 2011. A provision relating to Advantage Performance Upgrade ('**APU**') engines was added. The effect of the amendment was to add the following words to the original clause:

> "When exercising its option to remove Engines from the Flight Hour Service programme prior to the completion of the Term, [Cathay] will use commercially reasonable endeavours to remove the Pre-APU Engines prior to the removal of the APU Engines, and will allow LHT a reasonable opportunity to present commercial proposals to prevent the removal of APU Engines and give reasonable consideration to such proposals"

7. Schedule 13 contains a formula and worked examples of how it is to be applied. Depending on precisely how many flight hours an engine has been used for and the predicted number of 'shop visit' overhauls required by that engine, under the formula there will either be a sum due to Cathay, a sum due to LHT or no sum due either way.

8. Clause 24 of the Agreement contains a dispute resolution clause in the following form:

> **"24.1 Resolution by Senior Management**
> If a dispute arises relating to this Agreement (the "Dispute") either Party shall give written notice to the other Party requesting that management at the level of General Manager Engineering ([Cathay]) or SVP Engine Services (LHT). ("Senior Management") attempt to resolve the Dispute. Within fifteen (15) Days after receipt of such notice, the receiving Party shall submit a written response. The notice and the reasons shall include a statement of the applicable Party's position and a summary of reasons supporting that position. The Parties shall cause Senior Management to meet within forty-five (45) Days after deliver of the notice, at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to use commercially reasonable efforts to resolve the Dispute.
>
> **24.2 Court**
> If a Dispute is not resolved within one hundred and twenty (120) Days (or such longer period agreed between the parties) after such Dispute has been submitted for resolution by Senior Management in accordance with clause 24.1 (Resolution by Senior Management) above, either party may initiate proceedings in the English High Court in London; and the Parties hereby submit to the non-exclusive jurisdiction of that court"

Cathay's warning of engine withdrawal

9. During a meeting in Hong Kong in August 2017, Cathay informed LHT that it intended to remove all (or at least most) of its engines from the FHSP pursuant to clause 21.2 before the expiry of the Agreement.

10. In a letter dated 20 November 2017, LHT protested that clause 21.2 was not intended to create a unilateral option for Cathay's benefit. According to LHT, the purpose of clause 21.2 was to enable Cathay to phase out engines from the fleet for operational reasons.

11. Cathay confirmed its intention to withdraw all 27 engines from the FHSP prior to the end of the Agreement in a letter dated 7 February 2018. A detailed removal schedule was subsequently sent to LHT on 27 April 2018. According to this schedule the engines were to be removed on 20 or 21 May 2018 i.e. only 2-3 days before the expiry of the Agreement itself on 23 May 2018.

12. Following receipt of the schedule from Cathay, LHT again protested. In a letter sent on 4 May 2018, LHT complained that the removal of the engines was not for any legitimate operational reason but was instead simply aimed at seeking "to reduce the compensation payable to LHT" having already obtained the full benefit of LHT's services in respect of these engines throughout the Term." Cathay's position remained that Clause 21.2 provided an option for Cathay to remove any or all of its engines from the FHSP at any time prior to the expiry of the Agreement and to have a reconciliation performed pursuant to Schedule 13.

13. The engines were duly removed in accordance with Cathay's schedule. It is common ground that the Schedule 13 reconciliation process resulting from the removal of the engines according to Cathay's instructions produces a total credit in Cathay's favour of US$42,854,896.44. Put another way, had all 27 engines stayed in the FHSP a further 2-3 days until the end of the Agreement, Cathay would not have accrued any credit to set off against LHT's undisputed charges under the Agreement of US$35,815,325.17.

The Notice of Dispute

14. LHT submitted a formal Notice of Dispute pursuant to clause 24.1 of the Agreement on 10 July 2018. The Notice is in the form of a detailed fifty paragraph letter which sets out LHT's case as to why Cathay is not entitled to rely on Clause 21.2 to remove the engines in the way it did.

15. The service of this notice by LHT triggered the commencement of the 120-day moratorium period (under clause 24.2 of the Agreement) in which neither party was entitled to commence court proceedings. This period expired on 8 November 2018.

16. Cathay instructed Bird & Bird to respond to the Notice of Dispute. This they did on 25 July 2018. Cathay re-iterated its previous position in relation to clause 21.2 and reserved the right to recharge certain costs relating to one engine (ESN P729239) to LHT. The letter also asserted that in addition to the money owed under Schedule 13 there were separate reconciliation charges payable to Cathay under Schedule 4 of the Agreement (**'the Schedule 4 Charges'**).

17. LHT instructed Wilmer Cutler Pickering Halle and Dorr (**'WCP'**) to respond to Bird & Bird. This they did on 17 August 2018. Neither the Schedule 13 reconciliation figures provided by Cathay nor the Schedule 4 Charges were agreed at this stage.

18. The final letter in this run of correspondence is a letter from Bird & Bird dated 31 August 2018. In this letter Bird & Bird accused WCP of mischaracterising the timeline of events and denied any obligation to pay LHT's invoices. A meeting between the parties on 4 September 2018 did not lead to any resolution of the dispute.

19. There was no further open communication between the parties in the period following the meeting on 4 September 2018 and the issue of proceedings by Cathay on 2 November 2018 (six days before the end of the moratorium imposed by clause 24.2 of the Agreement).

The Claim Form

20. The claim form issued by Cathay on 2 November 2018, described the dispute as follows:

> (1) Under an agreement between the parties on 9 May 2007, and since amended twice, the Defendant agreed to perform maintenance service on certain jet engines installed on Boeing 747-400 freigther aircraft operated by the Claimant. The agreement expired on 23 May 2018.
>
> (2) A dispute has arisen between the parties on the meaning of the agreement and financial consequences of the partial termination of the agreement.
>
> (3) There is no dispute between the parties on the facts but only on the construction and interpretation of the contractual provisions.
>
> (4) The Claimant seeks the Court's determination of the meaning of certain clauses of the Agreement.
>
> (5) The Claimant further seeks an order that the Defendant do settle its obligations under the Agreement by paying the Claimant the sum due following application of the set-off provisions in the Agreement, together with interest

due from the date on which that sum fell due to the date of judgment, together with its costs of this claim.

(6) The Claimant relies upon the evidence set out in the witness statement of Ms Sophie Jane Eyre dated 2 November 2018

The witness statement which accompanied the Claim Form made clear that Cathay was seeking to recover both the Schedule 4 Charges and the sum due under Schedule 13 whilst giving credit to LHT for its invoiced charges.

21. Following receipt of Claim Form on 5 November WCP wrote to Bird & Bird in these terms:

> "LHT is currently considering whether the procedure under CPT Part 8 is appropriate to resolve the Dispute between the parties or whether [Cathay's] claims and any related claims or counterclaims are more appropriately resolved through the procedure under CPR Part 7. As you are aware, the CPR Part 8 procedure is generally only appropriate where there are not substantial disputed issues of fact or whether the parties have agreed that the Court can determine a question of contractual construction based on assumed or agreed facts."

The letter then put six factual assertions to Cathay for their agreement.

22. No agreement could be reached either on the factual assertions or their relevance. So, on 19 November 2018, LHT filed its acknowledgement of service and in Section D it objected to the use of the Part 8 Procedure in the following terms:

> "The Defendant disputes that it is liable to the Claimant for any sum under the agreement (as amended) reference at paragraph 1 of the Claim Form ('the Agreement'). Rather, the Claimant is liable to the Defendant for US$35,815,325.17 under invoices issued by the Defendant or alternatively in damages…
>
> The Claimant claims to be entitled to set-off against this debt sums alleged owed to it by the Defendant. That contention arises out of the fact that on 27 April 2018 the Claimant purported to act under clause 21.2 of the Agreement to remove all Engines from the Flight Hour Services programme over two consecutive days immediately prior to the end of the Agreement's term. The Claimant's contention is wrong. Thus, no right of set-off arises and the sum of the invoices issued by the Defendant is due from the Claimant to the Defendant.
>
> The purported removal of said engines was not permitted by clause 21.2: (a) the Claimant's construction of 21.2 is inconsistent with other terms of the Agreement; and/or the express requirements of clause 21.2 were not met; and/or (c) any removal of engines under clause 21.2 was subject to a requirement of reasonableness and/or non-arbitrariness and/or good faith which were not met.

> The Defendant therefore seeks: (a) US$35,815,325.17 or damages in the same sum for non-payment in breach of the Agreement (b) a declaration that the Claimant's purported removal of the engines was invalid and/or not in accordance with clause 21.2 of the Agreement; and (c) contractual interest."

23. The form concluded as follows:

> "The Defendant considers the CPR Part 7 procedure as the most appropriate procedure for the efficient and proper resolution of the current dispute between the parties and therefore requests the Court to allocate this dispute under CPR Part 7 so that both issues of fact and law in dispute between the parties can be resolved most efficiently and in one proceeding."

24. On 3 December 2018, LHT filed Particulars of Claim under cover of an application notice. In their covering letter, LHT requested an order that:

1. The proceedings be transferred to Part 7; and
2. LHT's Particulars of Claim stand as its Defence and Counterclaim in the Part 7 proceedings.

The letter goes on to say that if the Court were to decide that Part 8 is appropriate, LHT seeks permission to bring its claim for US35,815,325.17 as an additional claim or counterclaim.

Direction of Master Clark

25. On 5 December 2018, Master Clark issued the following direction:

> "The Claimant should clarify whether it opposes the defendant's application. If the application is not opposed, the parties should file a draft consent order. If the application is opposed then it must be listed for a hearing"

26. In response to Master Clark's direction, Bird & Bird wrote to the court:

a. Confirming that it opposed LHT's application for transfer of the claim to Part 7
b. Suggesting the issue of whether the matter should proceed under Part 7 or Part 8 should be determined first

c. Suggesting that the hearing ought to be before a judge so that if the matter does proceed under Part 8 it can either be determined at the first hearing or further directions given.

The witness evidence

27. There followed an exchange of witness evidence. Three witness statements were served on behalf of Cathay and one on behalf of LHT. All the statements were by solicitors rather than those directly involved in the performance of the Agreement. The statements set out the background to the dispute and exhibited relevant documents and correspondence.

The parties' submissions

28. By the time of the hearing before me, LHT's stance remained that the dispute was not appropriate for Part 8 and invited me to order that the proceedings to continue under Part 7.

29. Mr Thompson QC, who appeared on behalf of Cathay, invited me to enter judgment for Cathay for US$7,039,571.27. His submission was that save for one part of Cathay's case, there were no material factual issues needing to be tried and the issues relating to the construction of the Agreement ought to be resolved in Cathay's favour.

30. The part of Cathay's case which he accepted could not continue under Part 8 because there was a factual dispute in relation to them was the claim for the Schedule 4 Charges. The difference between the parties' positions in respect of these charges was at least US$1.5 million. He submitted that this claim could be "excised" from the Part 8 proceedings. However, the only two options available to Cathay in respect of this part of its claim, in my judgment, was that it be permitted to continue under Part 7 or that it be discontinued. There is no such thing as a holding chamber for excised Part 8 claims outside of both Part 7 and Part 8.

CPR Part 8

31. CPR Part 8 provides a procedure for dealing with two distinct categories of claim. The first category is where a party seeks "the court's decision on a question which is unlikely to involve a substantial dispute of fact" (CPR Part 8.1(2)(a)). The second category comprises claims under certain statutes (CPR Part 8.1(2)(b)). Somewhat confusingly, claims in this second category often require substantial disputes of fact to be resolved – see for example M v B and Others [2006] 1 FLR 117.

32. In some cases, the court will permit the parties to use CPR Part 8 as a means of obtaining a quick decision on one or more issues of law or construction in a broader litigation – see e.g. Myers v Kestrel Acquisitions Limited [2015] EWHC 916 (Ch). In such cases it is imperative that there be an agreed statement of facts and a precisely framed question. The court must ensure that the parties' submissions remain within the bounds of the agreed issue for determination – see Myers at [6].

33. The court may in appropriate circumstances agree a hybrid procedure under which limited factual disputes requiring oral evidence can be accommodated within Part 8 proceedings – see Vitpol Building Service v Samen [2008] EWHC 2283 (TCC) at [18] and Forest Heath District Council v ISG Jackson Limited [2010] EWHC 322 (TCC) at [10]. In the Vitpol case Coulson J, as he then was, said this "I do think it is important that the procedure serves the individual needs of the case, rather than itself becoming the dominant element of the proceedings."

34. This flexible approach to Part 8 is reflected in the Chancery Guide which states at para 17.64:

> "The Part 8 claim procedure is flexible and is used for a range of disputes, some of which require substantial disputes of fact to be resolved (for example Inheritance Act claims). However, as a general rule the procedure will lead to a final hearing, generally referred to as a 'disposal hearing' far more quickly than a Part 7 claim and the majority of Part 8 claims are dealt with by Masters."

35. However, flexibility under Part 8 has its limits. In ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, Stanley Burton LJ commented that CPR Part 8 is wholly unsuitable for the trial of an issue of estoppel. He went on to say that:

> "A disputed claim of estoppel should be carefully pleaded. I strongly endorse the contents of the note at paragraph 8.0.2 of the White Book
>
> 'In essence, the Pt 8 procedure is in general terms designed for the determination of relevant claims without elaborate pleadings. If the procedure is misused, the defendant can object and equally the court of its own motion, and as part of its function to manage claims, will order the claim to proceed under the general procedure and allocate a track and give appropriate directions."

36. The same has been said of a disputed rectification claim: FSHC Group Holdings Limited v Barclays Bank PLC (2017) Ch D unreported.

37. A recent example of a case where a Part 8 claim was ordered to proceed as a Part 7 claim because of the individual needs of the case is Canary Wharf (BP4) T1 Limited v European Medicines Agency [2019] EWHC 335 (Ch.). In that case the Claimant sought an urgent declaration that a commercial lease would be frustrated by the UK's withdrawal from the European Union. The Defendant objected to the use of Part 8. Marcus Smith J. decided to order the claim continue as a Part 7 claim and gave directions. He observed as follows:

> "The reality was however is that the claim lies somewhere on the spectrum between CPR Part 8 and CPR Part 7. As a result, there was limited disclosure and limited cross examination of the factual witnesses. Most of the facts were uncontentious" [47].

The directions in that case were therefore adapted to the particular needs of the case, in accordance with Coulson J's dicta in Vitpol Building Service v Samen [2008] EWHC 2283 (TCC) at [18] which I have already referred to.

38. Turning to the Claim Form in this case, in my judgment, it had two technical defects.

39. First, it did not contain the statement required by CPR 8.2 (a) that Part 8 applies. This might be thought to be a rather pedantic point but the rule is intended to serve a useful prophylactic purpose. The aim of the requirement is to ensure that anyone commencing part 8 claims has given proper thought as to whether or not it really applies. It is not a promising start to any Part 8 proceedings when this basic requirement is overlooked.

40. Secondly, and more substantively, the Claim Form did not identify the question of construction which Cathay wanted the Court to decide, as required by CPR 8.2(b((i). Paragraph 4 of the claim form in this case (set out in paragraph 20 above) is as vague the Part 8 Claim Form criticised by Jefford J. in Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC). In that case the Claimant sought a declaration "as to the correct interpretation of the contract". In the course of her judgment, Mrs Justice Jefford said this:

> "[21] … Part 8.2 provides that the Part 8 Claim Form must state 'the question which the claimant wants the court to decide; or the remedy which the claimant is seeking and the legal basis for the claim to that remedy.' It is therefore, an express requirement of the use of the Part 8 procedure that the question for the court is one what is unlikely to involve a substantial dispute of fact and it is, it seems to me, to be implied in the rules that the question should be framed with some degree of precision and/or be capable of a precise answer.
>
> [22] The experience of this Court shows that there is a real risk of the Part 8 Procedure being used too liberally and inappropriately with the risks both of prejudice to one or

other of the parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions."

41. By the time of the first hearing in the Merit Holdings Limited v Michael J Lonsdale Limited, the Defendant had withdrawn its opposition to the use of Part 8 and both parties made suggestions as to issues which the Court might usefully decide on the evidence before it. Nevertheless, Jefford J. declined to do so. In paragraph 31 of her judgement she said this:

> "[31] Had a Part 7 procedure been adopted, then on the fact of the pleadings, the parties' positions would have been fully set out and, if not, further information could have been sought. If there were no need for factual evidence, there would have been mechanisms available (in the discretion of the court) to resolve the issue of the contractual relationship between the parties promptly – for example, by the hearing of a preliminary issue or an expedited hearing – and on a surer footing than is offered by the Part 8 procedure.
>
> [32] All these issues seem to me to illustrate why care should be taken by the parties and the Court in the deployment of the Part 8 Procedure."

42. I agree with the observations made in all four of the passages I have cited from the Merit Holdings Limited v Michael J Lonsdale Limited. They deserve greater prominence. I would, however, go one step further. Whenever a party is contemplating commencing proceedings under CPR Part 8 in respect of a claim which could be started under CPR Part 7, the following steps ought generally to be taken:

(a) The proposed Defendant ought to be notified that the use of CPR Part 8 is being contemplated.
(b) A brief explanation ought to be provided as why CPR Part 8 is considered to more appropriate than under CPR Part 7 in the particular circumstances of the case.
(c) A draft of the precise issue or question which the Claimant is proposing to ask the Court to decide ought to be supplied to the Defendant for comment.
(d) Any agreed facts relevant to the issue or question ought to be identified.

The obligation to take these steps can be derived from the broader duties imposed on parties in CPR 1.3 ('Duty of Parties to help the court further the overriding objective') and Paragraph 3 (a), (b) and (e) of the Practice Direction on Pre-Action Conduct and Protocols. There will no doubt be exceptional cases (e.g. urgency or an uncontactable Defendant) where these steps will not be practical but if they are followed in the general run of cases, it ought to mean that the situation which arose before Jefford J. and which has arisen again in this case can be avoided in future.

Application to the facts of this case

43. The parties in this case found themselves in a dispute arising from the winding up of a ten-year commercial relationship. In addition to large sums allegedly owed in both directions under two separate schedules of their agreement (Schedule 13 and Schedule 4), it was clear that the parties had taken up diametrically opposed stances on whether Cathay's exercise of the contractual option in clause 21.2 was legitimate in all the circumstances. The dispute between the parties was, in my judgment, ideally suited to being commenced in the Shorter Trials Scheme in either the Commercial Court or the Chancery Division.

44. The fact that there was no discussion between the parties before proceedings were issued as to how the might be most expeditiously dealt was a lamentable failure, in particular on the part of Cathay, who not only issued proceedings within the contractual moratorium period without any good reason but did so without any attempt to comply with paragraph 3 of the Practice Direction on Pre-Action Conduct.

45. Had Cathay's solicitors contacted LHT's solicitors before issuing proceedings, they would have learned that LHT was already preparing a Part 7 claim. A discussion ought then to have been had about how best to proceed. That discussion would in my judgment have almost certainly resulted in the issue of Part 7 proceedings. It might conceivably have been possible to agree a focussed and precisely framed issue of construction for determination under CPR Part 8 against a set of agreed facts. However, in the absence of agreement either on the agreed facts and more generally on the wisdom of isolating an issue of construction triable under CPR Part 8, the default position for both Cathay's claim and LHT's counterclaim was, in my judgment, plainly CPR Part 7. Neither party would have been precluded from applying under CPR Part 24 or Part 3 for summary disposal of either the whole claim or part of it or from seeking a preliminary issue of law or construction of one or more of the clauses in the Agreement at an early stage. The use of Part 7 would not therefore have prevented either party from seeking judgment quickly on the whole or part of its claim.

46. In the course of his attempt to persuade me that there were really no (or no substantial) factual issues to be resolved, counsel for Cathay referred me to a number of authorities in which warnings have been sounded about the need to avoid excessive reference to background factual matrix for interpreting a commercial contract: Sunrock Aircraft Cop.

v SAS [2007] 2 Lloyd's Lar Reports [16] – [18] per Thomas LJ and Arnold v Briton [2015] AC 1619 at [17]. Nevertheless, in the latest word on this topic from the Supreme Court, the process of construction was described as an 'iterative process' by which the rival interpretations of the parties are each checked against the provisions of the contract, its factual background and the commercial consequences – Wood v Capita [2017] UKSC 24 at [12].

47. The degree to which it is necessary or proportionate to devote significant time to considering factual matrix material will vary from case to case. In the present case, given the nature of the contract, its duration and the sums involved, I am satisfied that it would be both proportionate and appropriate to give detailed consideration of the commercial background against which the Agreement was entered into and performed. The relevant facts will need to be pleaded. Even if I had formed the view that the dispute ought to continue under Part 8, I would have given LHT permission to serve witness evidence in relation to this aspect of the dispute.

48. Both parties also referred me to authorities which have considered the extent to which a an obligation of good faith might be read into or implied as a term into a commercial contract: Yam Seng Pte Ltd v International Trade Corp Ltd [2013] 1 All ER Comm 1321; Mid Essex Hospital Services NHS Trust v Compass Group UK [2013] EWCA Civ 200; Braganza v BP Shipping [2015] 1 WLR 1661; Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ionis Kent [2018] EWHC 333 and UBS v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch).

49. Whilst at first blush it seemed to me that clause 21.2 was more likely to be regarded as an unfettered contractual right rather than a Braganza-type clause, I am not persuaded that LHT's argument based on good faith is so weak that it was appropriate to dismiss it summarily. It seems to me to be reasonably arguable that the Agreement falls into the category of long-term collaborative contracts referred to by Leggatt LJ in Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ionis Kent [2018] EWHC 333 at [167] in which obligations of good faith might be implied.

50. Just as claims for estoppel and rectification have been to be generally speaking unsuitable for Part 8 because they require careful pleading in the form of Part 7 statements of case, so it seems to me the same can be said of disputes involving allegations of breach of implied duties of good faith.

51. In his skeleton, counsel for LHT, alleged that Cathay's had acted in bad faith in a number of respects. He clarified in the course of his oral submissions that what was being alleged was that Cathay had engaged in "conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people" per Leggatt LJ. in Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ionnis Kent [2018] EWHC 333 (Comm) at [175]. It is unlikely that such an allegation will prove to of much assistance to LHT unless it succeeds in its argument that a term imposing good faith should be implied into the Agreement but it is impossible for the court to form any view on whether such an allegation is sustainable without both it and the alleged acts of bad faith being properly pleaded.

The Overriding Objective

52. Although in my judgment, these proceedings ought to have been started under CPR Part 7 rather than Part 8, the case management decision I have to make is what to do now with them now. To decide whether to exercise the discretion under CPR 8.1(3) to order both Cathay's claim and LHT's counterclaim to continue as if Cathay had not used the Part 8 Procedure, I must have regard to the Overriding Objective as described in CPR 1.1(2) i.e:

> (a) ensuring that the parties are on an equal footing;
> (b) saving expense
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved
> (ii) to the importance of the case
> (iii) to the complexity of the case
> (iv) to the financial position of each party
> (d) ensuring that it is dealt with expeditiously and fairly
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
> (f) enforcing compliance with the rules, practice directions and orders.

53. In my judgment, Cathay's decision to take LHT commence proceedings within 120 day contractual moratorium on commencing litigation and without complying with the paragraph 3 of the Practice Direction for Pre-Action Conduct put the parties on unequal footing within the meaning of CPR 1.2(a). By taking this step, Cathay unfairly took LHT by surprise and prevented the parties from having a sensible pre-commencement discussion as to how best to manage the litigation which they had both decided was inevitable.

54. Given the sums involved are US$42,854,896.44 million in respect of Cathay's Schedule 13 claim and at least US$1.5 million in respect of the Schedule 4 Charges claim, it cannot

be said that it is disproportionate to require the parties to plead their respective cases in the way required by CPR Part 7.

55. There is also nothing in the parties' respective financial positions which makes a transfer now to CPT Part 7 in any way unfair or inappropriate.

56. The dispute is not unduly complex. However, in my judgment, given the nature of the issues it is preferable to have the relevant facts properly pleaded rather than emerge piecemeal in witness statements.

57. CPR 1.2(e) is in my judgment promoted by having all the issues between the parties resolved together in a single set of proceedings. To have the Schedule 4 Charges dispute alone hived off to separate Part 7 proceedings seems to me to be an undesirable option.

58. Finally, as I have already held, the proceedings as commenced did not comply with Part 8, CPR 1.3 or the Practice Direction on Pre-Action Conduct. To prevent them continuing under Part 8 in these circumstances is in accordance with CPT 1.2(1)(f).

59. An order under CPR 8.1(3) inevitably entails some delay but that can be mitigated by requiring any exchange of pleadings to take place in short order. In the notes to the predecessor to CPR 8.1(3), RSC O.28 r.8(1) in the Supreme Court Practice 1999 Vol . 1, the following appears:

> "When this rule is invoked, the usual order will be for pleading to be served very quickly and then for the matter to be restored for final directions. It is better not to let affidavits stand as pleading because affidavits cannot be amended nor can particulars of them be ordered".

I propose to take that course in this case by ordering the parties to serve Part 7 pleadings accompanied by Initial Disclosure within the meaning of paragraph 5 of Practice Direction 51U.

60. A consideration of each of the elements of CPR 1.2 thus in my judgment leads to a balance which falls heavily in favour of making the order sought by LHT.

Further directions

61. CPR 8.1(3) requires consideration be given to further directions consequential upon the transfer into Part 7.

62. In this case, I consider it is highly desirable that the proceedings should continue under the Shorter Trial Scheme of the Chancery Division. I order that they should do so pursuant to paragraph 2.13 of Practice Direction 57AB.

63. Although I will invite the parties to agree terms for a detailed order to reflect this judgment, I make clear now that I envisage that the time required for the parties to serve the Particulars of Claim, Defence and any Reply together with Initial Disclosure (within the meaning of paragraph 5 of Practice Direction 51U) ought to be short. I would expect a case management conference to take place within 6 – 8 weeks at which final directions for trial can be given.

64. In light of the arguments advanced before me, I expect LHT to provide full particulars of any background factual matters said to impact on the correct interpretation of the Agreement, any implied term of good faith and any alleged acts of bad faith.

65. By ordering Initial Disclosure be provided at the same time as the pleadings are served, it ought to be clear to what extent the parties are able to prove their respective cases by reference documents alone. During the course of argument, Mr Blakeley suggested that there were no more than one or two key decision makers on LHT's from whom witness evidence might need to be adduced. Under paragraph 2.44 of Practice Direction 57AB, there is a limit on the length of any witness statement served for a trial in the Shorter Trials Scheme and paragraph 2.45 states that orders may be made which limit the scope of witness statements to identified issues or identified topics.

66. To the extent that witness evidence is required by either party, I order pursuant to CPR 3.1(2)(m) that the parties identify in their respective pleadings which, if any, of the pleaded allegations they propose to prove by means of oral witness evidence and to identify the witness in each case. An order in this form will assist the parties to limit factual witness evidence to those allegations which really need to be proved by witness evidence. This is in accordance with paragraph 19.3 of the Chancery Guide and the Overriding Objective. It will also assist the court when it comes to consider further directions for witness evidence under paragraph 2.45 of Practice Direction 57AB.

Disposal

67. I accordingly grant the order sought by the Defendant under CPR Part 8.1(3) that these proceedings shall continue as a Part 7 Claim. I decline to enter judgment for the Claimant judgment under CPR Part 8.

Draft Order

68. I invite the parties to draw up an order for further directions reflecting my findings and conclusions above and to agree all consequential matters, including costs, so far as possible.