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Case No: 2010 Folio 1294

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th June 2011

Before :

HIS HONOUR JUDGE MACKIE QC

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Between :

JET2.COM LIMITED	**Claimant**
- and -	
BLACKPOOL AIRPORT LIMITED	**Defendant**

- -
- -

Mr Philip Shepherd QC and MrAdam Cloherty (instructed by **Bird and Bird LLP**) for the **Claimant**
Mr Michael Crane QC and Mr Paul Sinclair (instructed by **Eversheds LLP**) for the **Defendant**

Hearing dates: 29, 31 March 2011

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JUDGMENT

JUDGE MACKIE QC:

1. This has been the expedited trial of a dispute about the hours when the Claimant airline may operate at the Defendant's Airport. The main issue is the interpretation of the agreement between the parties. There is an alternative claim of estoppel by convention.

The Parties and the Background

2. The Claimant ("Jet2") is a low cost airline with a fleet of over thirty Boeing 737 and 757 aircraft operating scheduled flights from eight airports in the United Kingdom, mainly to European leisure destinations. One of those airports is Blackpool which is owned and operated by the Defendant ("BAL").

3. Blackpool Airport has been making operating losses for some years but investors have seen it as having potential. Thus in 1994 City Hopper Airports Limited bought ninety five percent of the shares in BAL's parent company, Blackpool City Council owned the rest. BAL then sought to attract new carriers. One of these was Jet2 with whom BAL entered into a 15 year agreement on 23 September 2005 ("The Agreement"). For four and a half years Jet2 operated some flights, particularly at peak times in summer, outside the airport's promulgated operating hours and did so with the support and co-operation of BAL. 'Promulgated' hours are those published in the UK Aeronautical Information Publication ("UK AIP"). The hours, which I shall refer to from now on as 'normal hours', are 0700 to 2100 which become 0600 to 2000 in summer.

4. In May 2008 ninety five percent of the shares in BAL's holding company were acquired by a subsidiary of Balfour Beatty Plc. The airport was still making a substantial operating loss and the new team was understandably keen to eliminate or at least reduce that loss. Jet2 had based one aircraft at Blackpool at the outset of the Agreement and in time added a second. BAL wanted Jet 2 to add a third aircraft. Jet 2

would have liked to have done this but eventually concluded, despite the fact that its business was flourishing at other airports, that a third aircraft at Blackpool would not be viable particularly in the midst of a serious recession in the leisure travel market. BAL was disappointed. There were other problems for BAL. Monarch had left Blackpool and Ryanair, BAL's biggest customer, also departed in 2009 at the same time as BAL introduced a £10 per passenger Airport Development Fee.

5. Commercial tension between the parties increased during the Spring and Summer of 2010 following the appointment of a new airport director who started a review of all BAL's contracts as part of a wider drive to improve the finances. Things came to a head when on 22 October 2010 BAL told Jet2 that from midnight on 29 October 2010 it would not accept departures or arrivals scheduled outside normal hours. At short notice two of Jet2's flights had to be diverted from Blackpool to Manchester causing considerable inconvenience to passengers and expense to Jet2.

6. Jet2 applied for and was granted injunctions broadly requiring BAL to allow Jet2 to operate the same flight schedules in the winter of 2010, as for winter 2009. The matter came before Hamblen J on 4 November 2010 at short notice and there was a one day hearing before Beatson J on 18 November. The details are set out in the judgments particularly that of Beatson J who heard full argument. The court ordered an expedited trial because of the urgency. The urgency fell away following BAL's decision, recorded in their solicitors' letter of 21 March 2011, on the eve of trial, not to implement the proposed restrictions currently prevented by the injunction, until the end of the summer season which started on 27 March 2011 and concludes on 29 October. BAL stated that its decision was a voluntary concession.

7. The judges dealt, amongst other things with whether there was a serious issue that BAL had acted in breach of contract in taking this action. I am concerned first with whether there was a breach, secondly with whether Jet2 is entitled to a declaration

and thirdly with whether there has been a relevant estoppel by convention. The trial has involved consideration of nineteen thick bundles of documents and live evidence from four witnesses for Jet2 and six for BAL. Each party also points to what it sees as the deafening silence from one potential witness for the other. All the evidence was extremely interesting but much material in the witness statements, in particular the perception by individuals of the meaning of the contract in dispute was irrelevant. Much time has been spent on articulation by the parties of their accumulated grievances against each other arising from the operation of the Agreement despite its limited relevance to the legal issues.

8. Early in the trial I invited the parties to discuss settlement urgently. I rarely do this in a dispute between sophisticated parties with top rate legal representation. However the Agreement is a long term contract set out in a relatively short letter prepared, with little legal assistance. It is expressed in broad, but not uncertain, terms and includes phrases such as "reasonable endeavours". The court can and will answer questions based on a particular state of affairs but it seemed to me unlikely that much general guidance of future use could be provided given my provisional view (which remains unchanged) that interpretation of the Agreement is very fact sensitive. In time new factors arise and the relative importance of current circumstances may change. As a result this case may prove to be little more than a practice run for the next one. The parties apparently had some discussions without success.

The Agreement

9. The Agreement of 23 September 2005 is on Jet2 notepaper signed by Mr Philip Meeson, Chief Executive of the company which is now Jet2, addressed to Mr Paul Whelan of BAL and of City Hopper Airports. The letter *"sets out the terms of the agreement … in relation to low cost services from and to Blackpool Airport"* and then provides as follows:

1. ***Jet2.com*** *and BAL will co-operate together and use their best endeavours to promote* ***Jet2.com's low*** *cost services from BA* (ie Blackpool Airport) *and BAL will use all reasonable endeavours to provide a cost base that will facilitate* ***Jet2.com's*** *low cost pricing.*

Jet2.com *proposes to commence a service between Belfast International Airport and BA as soon as practicable and to base one B737-300 aircraft, or its equivalent, at BA from the commencement of the Summer operating season, 26 March, 2006, and to operate and build its fleet at BA in accordance with demand for an initial period of 15 years from the date of the first service by* ***Jet2.com*** *from BA and the terms set out in this Letter Agreement will, except as otherwise stated, apply for the 15 year period.*

Not later than three months prior to the expiry of such initial period of 15 years, senior representatives of the parties of this letter agreement will meet in good faith to review and agree a new Charging Scheme which will enable ***Jet2.com*** *to continue to develop its base at BA and increase its low cost services from BA.*

2. *In consideration of the investment that* ***Jet2.com*** *is making in offering such services from BA, BAL will make available the following pricing and other benefits to* ***Jet2.com*** *in relation to BA.*

(a) (i) *BAL will levy airport charges on* ***Jet2.com*** *on the basis of the Charging Scheme as set out in Appendix A for the initial period of 15 years commencing on the date of* ***Jet2.com's*** *first flight from BA. These charges include all BAL's aircraft movement, handling and passenger charges to* ***Jet2.com*** *including landing, navigation, marshalling etc., parking, passenger facilities charges, passenger security charges, security, baggage x-ray*

and security screening, baggage handling, bussing, CUTE and check-in desk charges.

For the avoidance of doubt, these charges do not include charges for the provision of labour for passenger check-in and boarding supervision as is typically provided by handling agents.

(ii) In the event of increased terrorist activity resulting in further Government imposed security restrictions, BAL will reserve the right to pass on to ***Jet2.com*** *any additional costs reasonably incurred by BAL.*

(b) BAL will provide a contribution towards ***Jet2.com's*** *marketing expenditure to be calculated in accordance with Schedule B, such payment to be paid quarterly in arrears following* ***Jet2.com's*** *first flight of its BA based aircraft …"*

10. There are then further sub clauses (c) to (m) relating to advertising and public relations and to the details of car parking passes, ticket sales and office accommodation, security, aircraft stands, long-term car parking and jet fuel pricing. These also entitle Jet2 *"without charge to self-handle its aircraft operations, including check-in."*

Clause 3 deals with confidentiality. The other relevant clauses are 4 and 5 which provide as follows:-

"4. The terms set out in this Letter Agreement represent the whole agreement between BAL, CHAL and ***Jet2.com*** *in relation to their subject matter and cannot be changed except by a written document signed by all such parties.*

5. *In the event of any inconsistency between the terms of this letter agreement and the BA conditions of use, the terms of this letter agreement shall prevail to the extent of that inconsistency. Nothing in this letter agreement is to affect the right of* ***Jet2.com*** *to receive from time to time whatever incentives or benefits are provided for in the conditions of use, to the extent in any event not provided to* ***Jet2.com*** *pursuant to the terms of this letter agreement.*

11. The charging scheme in Appendix A requires Jet2 in years one to three inclusive to pay £3 per passenger for non based aircraft and £2 per passenger for based aircraft. These charges increase for years 4 to 15 inclusive to £4.50 and £3.50. Appendix B provides for marketing support over three years starting at £20,000 per average number of weekly departing flights in the first year coming down to £5,000 in the third year. This led to payments totalling £750,000.

12. Jet 2 says that on the proper construction of the Agreement BAL is obliged to accommodate its flight movements between 0600 and 0000, and outside those times, to do its bit to accommodate such movements. Mr Shepherd QC and Mr Cloherty argue that the agreement expressly relates to "*low cost"* services, Clause 1 obliges the parties to co-operate and use their best endeavours to promote Jet2's low cost services and use all reasonable endeavours to provide a cost base that will facilitate Jet2's low cost pricing. They argue that *"promote"* plainly means advance rather than merely advertise or market. The agreement contains no restriction on operating hours, unsurprisingly giving the obligation to promote low cost services.

13. Mr Crane QC and Mr Sinclair for BAL respond that the commitment to use all reasonable endeavours to provide a cost base is limited first to provision of a cost base, meaning an obligation to charge a certain level of prices, and secondly to "*all reasonable endeavours"* which is no more than a commitment on a party to act in a

way consistent with its commercial interests. "*Promote"* refers simply to marketing, the heart of the Agreement. The Agreement does not require BAL to operate outside normal hours but it may choose to do so as it has to a limited extent over the years.

Judgment of Beatson J

14. Both sides' submissions paid regard to what Beatson J had to say about the agreement when considering whether there was a serious issue to be tried. Mr Shepherd commends to me the wisdom of a High Court judge with particular knowledge of the law of contract. Mr Crane emphasises that the views expressed were based on submissions and evidence which had been incomplete and in some respects inaccurate and were concerned only with the question of whether there was a serious issue to be tried.

15. Two paragraphs from Beatson J's judgment are particularly relevant:

> *"37. The next question is whether there is a serious issue to be tried. It is clear from the terms of the Letter Agreement that it is concerned with the provision of airport services to a "low cost operator" which is seeking "a cost base that will facilitate … [its] low cost pricing". The evidence is that this includes maximising the utilisation of each aircraft and thus maximising the number of flights it undertakes in any 24 hour period. That in turn involves schedules which permit sufficient early and late departures and arrivals to obtain the maximum utilisation of an aircraft: see Mr Meeson's first statement, paragraph 32 and his second statement, paragraphs 14-18. In his first statement he states that a cost base that facilitates low cost pricing "is achieved not only by the charges set by the airport for use of its facilities, but also by airline and airport co-operating to get maximum use from the aircraft." He also states that the claimant's aircraft typically fly two or three return flights*

("rotations") to high volume leisure sun destinations and that this is only possible with flight schedules which permit sufficiently early departures and sufficiently late arrivals. Since it started operating at Blackpool airport the Claimant has scheduled flights outside the promulgated operational hours in all but two of its schedules and in the last twelve months 12.5% of its flights have been scheduled to do so: see [16]. There is no documentary support for the defendant's submissions that this was done as an indulgence or by way of special arrangement."

At paragraph 38 the judge refers to Chartbrook and makes it clear that he has regard to evidence from Mr Meeson and Mr Whelan only in relation to the background to the Agreement. He then says this at 39:

"39. Against this background and the terms of the Letter Agreement, I have concluded that the claimant has a strong arguable case that the defendant's change of position under which it now states that it is only prepared to provide services within the hours of 0700 – 2100 would involve a breach of the contact. Mr Rankin's evidence (paragraph 9) is that movement outside the promulgated hours are a matter for the Defendant's discretion and not something to which the Claimant is entitled. But there is no statement in the airport's conditions of use or in the schedule containing the charges specified for other users that flights outside the promulgated operator's hours are only possible by special additional agreement with the defendant. The language of the schedule of charges and the way the charges are set out in the document does not suggest that the airport will not be open outside the hours save by special arrangement. It suggests that a surcharge will be levied for out of hours operations. There is nothing to the contrary in the defendant's standard conditions of use. Nor is there in the Letter Agreement save

that clause 5 indicates that the surcharge does not apply to such operations by the claimant. There is no evidence before me as to the terms of any communication by the defendant to the CAA pursuant to condition 7 of its licence.

16. Mr Crane draws attention to four matters which he contends influenced Beatson J and which have been shown, he says, to be misconceived. I mention these only because BAL attaches importance to them. It is for the Court to reach its own view of the contract not extrapolate from an earlier judgment. I cannot say whether these points would have influenced the decision of Beatson J, although I doubt it, but they do not much affect my perception of the factual matrix.

17. First BAL points out that at the time of the application for the interim injunction evidence was before the court from Mr Meeson in which he recalled that it had been agreed that *"Jet2.com's flights would normally be scheduled within 0700 – 2359 local time and that the airport would stay open until the arrival of such flights."* In his later third statement shortly before the trial Mr Meeson volunteered that in saying that he was *"putting matters a little too highly…My recollection is that I would have merely indicated that our preference was to schedule flights between 0700 and 2359."*

18. Secondly emails which have emerged since the injunction proceedings indicate that the normal operating hours of the airport may have been mentioned, amongst other things, by Mr Whelan of BAL when he met Jet2 at the World Routes 2005 conference in Copenhagen between 25 and 27 September 2005 and possibly earlier.

19. Thirdly BAL points out that information about Jet2 operating"*leisure*" rather than a *"high utilisation"* model was not before Beatson J. BAL claims that Jet2 does not operate a conventional low pricing model of the kind for which flexible airport opening hours is essential. Evidence from Mr Spooner of BAL demonstrates that Jet2's utilisation of aircraft, most of which are of mature age, has been lower in the period 2005 to 2009

than most of its competitors and even British Airways. Jet2's aircraft spend considerable time on the ground unused, particular in the winter. Mr Spooner accepted in cross-examination that his company would have known in September 2005 what Jet2's schedules were at other bases and that these involved early departure and late arrivals.

20. Fourthly BAL attaches importance to the fact that there was no evidence before Beatson J about the terms of any communications by BAL to the CAA about promulgated hours. It is now clear that BAL had communicated these hours to the CAA but again this does not seem to me to affect the composition of the factual matrix.

The Factual Matrix

21. At the trial considerable attention was directed to the factual matrix. Two obvious points need emphasis. First the factual matrix does not dictate what the terms of the contract are. It provides the background against which the words of an agreement are interpreted. Secondly I am concerned with what the parties both knew when entering into the Agreement not with what has happened since. The fact that the airport has operated outside normal hours since 2005 is irrelevant to interpretation. So is the fact that in practice Jet2 may have operated a different model from low cost airlines such as Easyjet.

22. The Agreement says nothing about operations outside Blackpool's normal opening hours. As I see it the arguments about factual matrix have been too detailed. Drawing on the evidence, the documents and general knowledge and common sense the most relevant considerations are as follows.

23. Blackpool is a small regional airport with published opening hours which provide for other hours only by agreement. The cost of opening the airport to service a single flight greatly exceeds the revenue which the operation will generate. The low cost services

described in the Agreement would have been seen by the parties in 2005 as requiring flexibility in scheduling early departures and late arrivals. This is so particularly during the peak summer season when maximum utilisation of aircraft is required on flying days. This requirement is obvious and is also supported, for example, by a document produced by the European Low Fares Airlines Association. The need for a low cost and flexible base for Jet2.com was also identified by BAL in presentations made to Jet2 in 2004 and 2005 before the Agreement was entered into. The need for flexibility increases where an airline has aircraft based at the airport because there are significant costs associated with diverting aircraft crews and support services from one airport to another. As both parties knew from, for example, the list of destinations used in BAL's presentations to Jet2 the services would be primarily to summer sun destinations.

24. At sometime in 2005 BAL produced the *"Master Plan Passenger Forecast 2005 to 2030"* described as a *"methodology and output for the long-term forecasts developed as part of the Blackpool International Airport master planning process".* BAL witnesses sought to play down the significance of this document and argue that as it was a document which Jet2 did not see at the time it is not part of the matrix. Mr Orrell described the master plan as a *"very aspirational document*", Mr Spooner said it was simply a "*statement of ambition*". Although neither was around at the time that may well be right. But the document does contain indications that assumptions made by Jet2 were shared at the time within BAL. Thus *"based aircraft need to depart between 0600 and 0730 in order to keep utilisation high but operate within a two crew roster; which in turn creates additional pressures on runway capacity on a morning peak."* It is pointed out that *"typically, low-cost airlines look to achieve around twelve hours airborne per unit per day, four rotations or sectors using two sets of crew."*

25. Obtaining "slots" to visit high summer demand destinations is competitive and those available to Jet2 would often be outside peak hours. It would be known to both parties

that allocation of slots is often ‘grandfathered’ in favour of those who have operated the longest. Furthermore because of the distance to some of those destinations and the commercial requirement to operate two or three rotations each day, early and late departures and arrivals might well be necessary. The direct first hand experience of Mr Ward of Jet2 was more convincing than the less detailed and more anecdotal evidence put forward by BAL.

26. At the time the Agreement was being negotiated both Ryanair and Monarch were operating scheduled services at Blackpool outside BAL’s promulgated opening hours.

27. Unforeseen delays are a fact of life in air travel.

28. This picture would be of no surprise to any member of the public who has struggled to stay awake at an airport early in the morning or late in the evening when going to or returning from holiday.

29. Despite the wealth of new material now available the overall picture of what would have been within the contemplation of both parties at the time the Agreement was entered into is in substance what it appeared to be when the matter was considered by Beatson J.

30. Having identified the background knowledge which would have been available to the parties, what would a reasonable person have understood them to mean by using the language in the Agreement?

Construction- Submissions of the parties

31. Mr Shepherd for Jet 2 submits that “promote” means to further or to advance. The word appears in Clause 1 setting out the principles of the agreement and would not therefore be used to address an aspect like marketing rather than the central focus of

the contract. Further marketing is dealt with in the detailed clauses of Clause 2 and would not fit naturally into Clause 1 if promote were used in a narrow sense. The obligation to *"provide a cost base to facilitate Jet2's low cost pricing"* requires BAL to keep the airport open to enable Jet2 to operate cost effectively, in particular by maximum utilisation, obtaining slots at the destinations for which there is a demand from the airport and to allow its based aircraft to return at the end of the flying and take off from its base on the following day.

32. Clause 2(a)(i) describes the services that Jet2 is to pay for as including those relating to *"all aircraft movement, handling and passenger"* services. An agreement to pay for services connotes an obligation to provide them. Clause 2(a)(i) contains no restriction as to the times the services are to be provided. If there were to be a restriction on opening hours the Agreement would have set it out. The imposition of a rigid closing time for an airport of 9pm in the evening and 8pm in the summer is so obviously unworkable that it cannot have been within the parties' contemplation.

33. BAL's general Conditions of Use provide that the airport would accept flight movements outside the promulgated hours. Jet2 submits that since clause 5 of the agreement promises that whatever incentives and benefits are provided for in the conditions of use shall be available to Jet2 that should be an end to the case on construction.

34. In contrast Mr Crane submits that BAL did not contract to operate outside its published hours of operation. It was not replacing an old commitment with a new one. Nothing was said about opening hours. Details of those hours were, as was well known, available.

35. The word *"promotion"* must be taken to mean to advertise and market. The whole emphasis of Mr Meeson's evidence, and it was he who drafted the contract, was on

the crucial importance of marketing. He emphasised that if Blackpool Airport was promoted properly the problems facing both parties would fall away.

36. Further even if the concepts of "low cost promotion" were resolved in Jet2's favour the construction for which they contend fails because of the limits imposed by the use of the words "best endeavours" and "all reasonable endeavours". (It is common ground that "all reasonable endeavours" means the same as "best endeavours.")

Construction – decision of the Court

37. The contract starts by saying that it is *"in relation to low cost services from and to Blackpool Airport"*. Low cost is of defining importance. The word "promote" is used in paragraph 1 of the Agreement in the context of co-operation between the parties. Its position at the outset describes the main activity which the parties will co-operate and use their best endeavours to carry on. Promotion in the limited marketing and advertising sense is covered by clause 2. I therefore prefer Jet2's interpretation of the word.

Clause 1 also refers, in its first sentence, to BAL using all reasonable endeavours to provide a cost base that will facilitate Jet2's low cost pricing in the context of promoting low cost services. The provision of a cost base means, as I see it, providing in a broad sense facilities and services that will bring about the low cost pricing. The sentence distinguishes between the cost base and the low cost pricing which its provision will facilitate. Further there is no material to suggest that the parties had in mind a special sort of low cost pricing with lower or higher utilisation of aircraft. Indeed the Agreement refers to "Jet2.com's low cost services" and prices not those of anybody else. The absence of an express provision as to opening hours relied on by each side suggests, if anything, that it was too obvious to mention that Jet2, like its competitors at Blackpool, would not be confined to normal operating hours. If, as may have been the case, the existence of Blackpool Airport's normal opening hours had formed part of

discussions, this would not have eroded as fundamental an assumption that Jet2 would be operating its aircraft and BAL providing airport services, in broad terms, at the hours of the day and night when low cost passenger services can generally be expected to run.

The evidence as it has emerged reinforces and does not undermine the basis on which Beatson's J provisional view was formed and I respectfully adopt his reasoning. I therefore conclude that the object to which the parties are obliged to direct their best endeavours includes securing flexible working hours beyond those promulgated by BAL. However the judge was considering the particular circumstances giving rise to the injunction application and not even on a 'serious issue to be tried' basis addressing Jet2's case for a Declaration as to the hours for which the airport must remain open for the remaining ten years of the contract. It is also necessary to consider in more detail one of Mr Crane's main arguments, the fact that the obligations of the parties are qualified by 'best' or 'all reasonable' endeavours.

"All reasonable endeavours" and "best endeavours"

38. The court interprets a contract to decide what it means. What it means is what a reasonable person with all the relevant background knowledge of the parties at the time when the contract was made would have understood those parties to mean by the language they have used. That approach applies equally to terms which have been given particular meaning by the courts when considering other contracts. At one level these are ordinary English words and it is simply a question of fact in deciding whether or not all reasonable or best endeavours have been made.

39. BAL argues that the obligation does not require it to do anything contrary to its legitimate commercial interests. Jet2 argues that BAL cannot simply choose to reduce the level of service committed by the Agreement, potentially down to nothing, simply because it has subsequently decided that it is no longer in its commercial interests to

do so. These different approaches are informed by case law which has considered the meaning of this and similar expressions.

40. In Yewbelle v London Green Developments [2007] EWCA Civ 475; [2007] All ER (D) 379 the Court of Appeal was concerned with an agreement by which one party would buy land from the other, develop it in accordance with a planning permission and then lease parts of it back. The planning permission required the obtaining of a suitable section 106 Agreement. The party buying the land was obliged to use all reasonable endeavours to secure a completed section 106 Agreement and the other was under no obligation to complete in the absence of such an Agreement. At first instance the judge, Lewison J, had considered the obligation to use reasonable endeavours in some detail, the most relevant passage being this, which I quote in detail because of the submissions made about it;

> **[119]** The second case was the decision of the Court of Appeal in *Phillips Petroleum Company United Kingdom Ltd v Enron Europe Ltd* [1997] CLC 329. This was another case of an agreement for the supply of North Sea gas. The contract contained a number of obligations requiring the parties to use "reasonable endeavours". One was an obligation to use reasonable endeavours to co-ordinate the construction of their respective facilities. Another was an obligation to use reasonable endeavours to agree the date on which deliveries were to begin ("the Commissioning Date") and the date of a three day test of the parties' respective capacities to receive and deliver gas ("the Run-In Test"). The same clause went on to say that in the absence of agreement, the Commissioning Date would be 25 September 1996 and the Run-In Test would take place on 25 to 28 September 1996. Because of a fall in the price of gas Phillips refused to agree dates earlier than the fall-back dates. Enron argued that each party was under an obligation to use reasonable endeavours to reach agreement on the Commissioning Date and the Run-In Test having regard only to criteria of technical and operational practicability and without regard to selfish or commercial motives. The Court of Appeal rejected that argument. Kennedy LJ said:
>
> "I find it impossible to say that they [ie the contract terms] impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligation to use reasonable endeavours to agree to a commissioning date prior to 25 September 1996. If the obligation were to be strait-jacketed in that way, that is something which to my mind would have been expressly stated, and, as Mr Pollock's argument really conceded, this is not a situation in which it would be appropriate for the court to imply a term, not least because it is unnecessary to do so for purposes of business efficiency. The fall-back provision expressly states what is to happen if no early commissioning date is agreed."
>
> **[120]** Potter LJ said:
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> "The GSA was an agreement drawn up between international energy companies intended to regulate their trading and financial relationship over a period of at least 15 years and involving hundreds of millions of pounds worth of business. They were plainly the product of much arm's length negotiation

and careful legal drafting, which appears to have been calculated to provide sequentially for every contractual eventuality which might occur at the various stages of the development and operation of the supply contract. That being so, I see no reason to suppose that it was the expectation, let alone the obligation, of the parties that, in any area of activity in which room was left for manoeuvre or further negotiation, they were not at liberty to take into account their own financial position and act in the manner most beneficial to them, short of bad faith or breach of an express term of the contract."

[121] Much of the argument in the case was directed to the question whether an obligation to use reasonable endeavours to agree was an obligation capable of being legally enforced. As Millett LJ explained in *Little v Courage Ltd* (1995) 70 P & CR 469:

"An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced. An undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation."

[122] It is not suggested in the present case that the obligation to use reasonable endeavours to obtain the s 106 agreement is unenforceable. Mr Bannister submitted that both *P & O* and *Phillips* were essentially cases about agreements to agree, and to that extent were unhelpful. I agree that this is a factor that I must bear in mind. However, the essence of the obligation required Yewbelle to use reasonable endeavours to reach an agreement, not with the other party to the contract, but with a third party. To that extent it seems to me that at the very least *Phillips* is a useful analogy. In using reasonable endeavours towards that end, I do not consider that Yewbelle was required to sacrifice its own commercial interests.

41. He went on to consider the question of how long the seller must continue to use reasonable endeavours to achieve the desired result. As he saw it, broadly, the efforts must continue until the point is reached when all reasonable endeavours have been exhausted.

42. The Court of Appeal did not review this aspect of reasonable endeavours although Lloyd LJ mentioned it at 29. But as I see it the judgment of Lloyd LJ contains two particularly pertinent points. First he considered, for another aspect, the case of A P Stephen v Scottish Boatowners Mutual Insurance Association, The Talisman [1989] (1) Lloyd's Rep 535.This was an insurance claim. Under the rules the Association was not liable, amongst other things, when the insured "*has not used all reasonable endeavours to save his vessel from such loss or damage."* The Court of Appeal rejected a submission that the House of Lords had set out a different test, that whether a particular step is within the scope of a reasonable endeavours obligation is whether,

if taken, it would offer a significant chance of achieving the result aimed at. In Stephen Lord Keith held that the standard for measuring the reasonableness of the endeavours was an objective one. Secondly Lloyd LJ gave as part of an additional reason for rejecting the Appellant's case the following:

"The present case is a long way from The Talisman *on the facts, and in terms of the content and context of the reasonable endeavours obligation"*

43. The issue was reviewed in Scotland by the Outer House of the Court of Session in EDI Central Limited v National Car Parks [2010] CSOH 141 by Lord Glennie, a judge particularly familiar with English cases. In this case a developer was obliged to procure that a project was *"pursued with all reasonable endeavours and as would be expected of a normal prudent commercial developer, experienced in developments of that nature."* The expression *"all reasonable endeavours*" also came up in another clause. The judge reviewed similar authorities noting that in Stephen Lord Keith had said that on the question of whether the skipper of a fishing boat had used all reasonable endeavours to save his vessel, the test was an objective one directed to ascertaining what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances. Lord Glennie concludes:

> *"It is not, I think, helpful to attempt to define more precisely what is encompassed by that obligation. It will, as Lord Hodge suggests [in MacTaggart & Mickel Homes Limited v Hunter & Hunter [2010] CSOH 130], require the Court to consider whether there were reasonable steps which could have been taken but were not taken. The party on whom the obligation is placed will be expected to explore all avenues reasonably open to him, and to explore them all to the extent reasonable. But unless the contract otherwise stipulates, he is not required to act against his own commercial interests: see Yewbelle. …"*

44. Mr Crane submits that it follows that as a result of this qualification which has been consciously included in the Agreement, BAL is obliged to act only in a way which is consistent with its commercial interests. As regards promotion the best endeavours are to be used by both parties co-operating together. The obligation to use all reasonable endeavours is upon BAL alone to provide a cost base. BAL cannot be required to take steps which are commercially unreasonable particularly in a context where Jet2 undertakes no obligation beyond its proposal to commence a service with one aircraft based at Blackpool and then operate and build its fleet in accordance with demand. Just as Jet2 has no obligation to operate at all in Blackpool when it is not in its financial interests to do so, BAL's own obligations are very limited.

45. Mr Shepherd seeks to distinguish Yewbelle and EDI as they concern very different contracts in different circumstances. The requirement to use all reasonable endeavours was directed to achieving a desired result dependent at least in part on the actions of a third party. In Yewbelle the issue was really whether nothing more could have been done to achieve the section 106 Agreement. Similarly EDI turned on its facts on the prospect of the Council giving the scheme the go ahead. All reasonable endeavours would have been futile. Further the decisions give no guidance on what "legitimate commercial interests" may mean. Jet2 submits that this is not a case where the parties were relying on the actions or decisions of a third party over whom they had no control. It was up to BAL to set the level of payment that it required. Further it is obviously in BAL's commercial interest to accommodate the flight movements of its major base airline. The obligations on BAL relate solely to things which are within its control, such as the times which it will accommodate Jet2's flights at the airport. It cannot have been intended that BAL could trim its services to whatever was necessary for Balfour Beatty to satisfy itself that it was making an acceptable return on what may have been a badly timed investment in the airport.

46. The meaning of the expression remains a question of construction not of extrapolation from other cases. As is implicit from Lloyd LJ's remark about context, the expression will not always mean the same thing. Sometimes, for example, in Phillips cited by Lewison J considerations such as a party's own inclinations and subjectively measured interests will be part of the exercise. Sometimes, as in Stephen the approach is objective. Clearly when considering an obligation to use all reasonable endeavours to obtain something from a third party, it is established that sacrifice of one's own commercial interests is not required. (See also the decision of the then Julian Flaux QC in Rhodia International Holdings v Huntsman International [2007] 2 Lloyd's Rep at 335 paras 30 to 35). It may not be clear what considerations are within that concept but clearly one should not have to pay an extortionate price to obtain what is required from a third party.

47. The obligation to use best endeavours to promote low cost services is a joint one, that to use all reasonable endeavour to provide a cost base is on BAL alone. It is common ground that there is no difference between best and all reasonable endeavours. The fact that Jet2 does not have to build its presence at the airport except in accordance with demand is relevant but it is no part of the exercise to relieve BAL from what may have proved a burdensome contract. The parties are assuming commercial and risk bearing obligations as part of the cooperative venture with each other- the words are not used in the context of leaving open for later negotiation an aspect of an otherwise explicit commitment as in Phillips or of obtaining consent from a third party as in Yewbelle. It cannot have been intended that BAL should be able to pick and choose what to do in the light of what suits it or Balfour Beatty financially. It has been losing money since the start and its profitability will have been affected by all sorts of considerations such as its overall efficiency, the terms on which Balfour Beatty bought its shares, the decisions it has taken about other airlines at Blackpool and its general competence. These are all risks which one would assume BAL alone to bear in a commercial contract. It is improbable that the parties would have used an expression

in the Agreement to mean that one of them could limit or abandon performance once it became commercially undesirable or unprofitable, just the sort of risks that parties expect to undertake when they contract. Any such unusual provision would have to be explicit before being accepted as part of what had been agreed. It would, as Mr Shepherd almost put it, be in effect the ultimate exclusion clause.

48. As Lloyd LJ points out explicitly in Yewbelle and Potter LJ implicitly in the extract from his Judgment in Phillips referred to above the meaning of words is shaped by their context. As I see it this provision is towards the objective Stephen end of the range although perhaps not necessarily so clear cut as to enable one to proceed by, adapting the approach of Lord Keith, ascertaining what "an ordinarily competent airport" might reasonably be expected to do in the same circumstances. Accepting however that the provision of a cost base requires the wide and flexible hours contended for by Jet2 the words "all reasonable endeavours" must impose a lesser obligation than an absolute commitment to provide those specific hours regardless throughout a fifteen year period. That is why, whatever the justice of Jet2's current claim, I am cautious about making a Declaration in terms explicit enough to be useful. The exercise of determining whether or not best endeavours have been used is highly fact sensitive and a conclusion reached on one set of facts may be different, even if those facts change in comparatively minor respects. I decline to enter into interesting speculation about how the application of the Agreement to circumstances which may arise in the future.

49. I now turn to deal with the facts which gave rise to these proceedings and whether these involved a breach by BAL of its obligations under the Agreement.

Events between 2005 and 2010

50. It is common ground that the parties co-operated to good effect for at least four and a half years. The airport regularly serviced Jet2's requirements outside promulgated

opening hours. The last scheduled arrival in the summer 06 season was, at the weekend, 0045. For the summer of 2007 the first scheduled departure was at 0600 and the last arrival at 0015 with a similar pattern in later years, as a helpful chart demonstrates.

51. In March 2007 the parties entered into a Ground Handling Agreement. The Balfour Beatty acquisition of BAL occurred in May 2008. In January 2009 BAL imposed an Airport Development Fee of £10 per departing passenger offset to some degree by free parking. Ryanair ceased operating from Blackpool Airport and there was a consequent decline in passengers from 439,000 in 2008 to 277,000 in 2009. By this time Jet2 had two aircraft based at the airport. BAL was understandably urging Jet2 to base a third aircraft at Blackpool. There is disagreement about how discussions on this issue went. Jet2 made it clear in December 2008 for 2009 and in June and September 2009 for 2010 that there would be no third aircraft. The airport director left in 2009 and after some months Mr Paul Rankin took up the post. A series of meetings and negotiations took place in the first half of 2010. BAL was concerned about its level of profitability and it determined to do something about it by negotiating more vigorously than before with Jet2. Jet2 had itself talked tough over the years and admits having threatened to withdraw aircraft from the airport from time to time. BAL was planning to try to get Ryanair back to Blackpool and one of its planning assumptions envisaged that there might be *"no Jet2 traffic"* (see Mr Condie's email of 28 June.) Throughout BAL was obviously well aware, as Captain James accepted, of the fact that some Jet2 flights left before promulgated opening hours and arrived afterwards. Jet2 was well aware that there were normal opening hours and that it operated outside them from time to time.

52. Jet2 says that there was a plan by BAL to force it out of the airport if a third aircraft was not based at Blackpool. BAL denies it. Some of the documents generated within BAL and its advisers in the first half of 2010 envisage the possibility of Jet2 ceasing to

be at Blackpool. Jet2 relies particularly on two emails from Ms Sue Kendrick, who became Company Secretary of BAL in March 2009 and was its corporate affairs manager responsible for communication, to BAL's public relations advisers. One email dated 7 June 2010 includes:-

> *"We have 3 different scenarios really:*
>
> *1. Ryanair coming back but not serving routes Jet2.com do*
>
> *2. Ryanair coming back and serving all the Jet2.com routes*
>
> *3. Jet2.com leaving & airport regauges to Cat 4 i.e. corporate/general aviation flying only plus Aer Lingus Dublin and Manx2.com Isle of Man - no commercial flights*
>
> *Once I know a bit more I will give you some background information … basically the first 2 are positive messages - we have listened to what our customers want - lower fares, more routes and Ryanair coming back …*
>
> *Third scenario is the worst case - because that will mean many redundancies - more than half the workforce but it becomes a sustainable profitable business for the future …*
>
> *All incredibly hush hush…"*

53. A further email on 7 July 2010 included ...

> *"One of the scenarios has almost fallen off the wall …. Ryanair …. they've come back and a very confused counter offer which is a complete joke – we are going to respond but I doubt it's going to happen …*

Next meeting is tomorrow with Jet2.com – we are going for additional capacity or else basically …. We can't get rid of them because we have a contract but we could make it really difficult for them to operate so they have to take their aircraft out …

Then we re-gauge to a Cat 4 airport - GA/Corporate flying plus a bit of Dublin Isle of Man …"

54. There is some debate about the significance of the verb *"gauge",* with some unconvincing semantic points made by BAL witnesses. It clearly refers, at least in the correspondence between the parties in 2010, to the official re-categorisation of the airport so that it could only carry on restricted activity and become unsuitable for Jet2's operations.

55. A meeting took place at Mr Meeson's house in London on 8 July 2010. It was attended by Mr Meeson and Mr Doubtfire for Jet2 and for BAL by Mr Rankin, now the airport director, by Mr Clive Condie, a non executive director of BAL and head of its airport consultants and by Mr John Spooner, Chairman of the Board at BAL. Understandably recollections of this meeting differ but while the question of re-gauging came up at some point it was taken by both sides to have been a very positive exchange. All present had an interest in developing Blackpool Airport and Mr Meeson had enormous enthusiasm for it in principle so far as was consistent with maintaining the profitability of his company. He saw the answer for Blackpool lying in progressive and focused marketing which if successful, would lead to success for the airport and an expansion of Jet2's presence there. This enthusiasm was passed higher up within BAL. Mr Stewart Orrell, a director of Balfour Beatty Capital as well as of BAL was less convinced that progress had been made. It was agreed that Mr Rankin would write to Mr Meeson, as he did on 19 July, in terms which were to bring the dispute to a head.

56. That letter starts by reminding Jet2 that the airport is sustaining losses of several million pounds a year, stating that it will need another 220,000 to 250,000 passengers per year to break even. BAL expressed a belief that there were opportunities for Jet2 to serve a number of new destinations profitably both with existing 737 and 757 aircraft. Reference was made to the possibility of confining airport operations between 0700 to 2100.The last three paragraphs stated:

> *"However, despite their long term commitment to the airport, Balfour Beatty is unable to allow the company to continue to incur current levels of loss unless we can deliver a significantly improved level of profitability, we will be forced to re-gauge the airport's operation to a position where we will no longer be able to maintain any of your operations – a position I envisage we would review after three years or so when the market has picked up and the cost of re-gauging has been recovered.*
>
> *I have discussed your very constructive approach to our dilemma with colleagues and I believe that Balfour Beatty would not insist on reaching break even within a year. However, I am required to show a substantial and sustainable improvement in the airport's financial performance and I believe that I might receive support for a strategy which delivers break even in two years. Therefore if you thought that you might be able to increase Jet2com capacity at Blackpool International sufficient to attract an additional 120,000 departing passengers in 2011, with an agreement to work with us to do the same again in 2012 I believe that we would be supported by the Board and Balfour Beatty.*
>
> *At the next Blackpool Airport Board meeting on 14th September, the decision whether or not to re-gauge the airport to Category 4 operations will be taken*

and therefore I would be most grateful if you would advise us of your plans for Blackpool International by end of August 2010"

57. On 24 August Miss Kendrick wrote to her consultants again in a message which included this:-

"I think it is looking increasingly likely that Jet2.com are not prepared to commit to any more volume for next year and it is likely therefore that the decision (pending Board on 14th September) will be taken to re-gauge the airport to Cat 4 operations - i.e. no commercial 737's - although we could continue with IOM Manx2.com and Dublin with Aer Lingus (Aer Arann)."

58. There were discussions and on 27 August 2010 Mr Meeson replied to the letter of 19 July expressing particular concern about the view of BAL that it might be forced to re-gauge the airports operations. He drew attention to the existence and terms of the Agreement. On 13 September Jet2's solicitors Bird & Bird wrote setting out their clients' position at some length seeking clarification.

59. By early September it was clear to BAL that Jet2 was not going to increase activity at Blackpool yet it would be expanding elsewhere particularly at Manchester. Mr Rankin says that he was shocked by the reaction of Jet2 to the July letter but BAL continued with the same approach except as regards proposal re-gauging. On 22 September BAL took legal advice. On 8 October BAL wrote to Jet2 and confirmed that no decision on re-gauging had been taken at its board meeting on 14 September. It also sent Jet2 invoices for sums which it claimed were due under the agreement and the existing Ground Handling Agreement, some of which form part of the counterclaim. BAL also gave Jet2 sixty days notice of termination of the Ground Handling Agreement.

60. In a letter on 19 October Mr Rankin wrote to Mr Meeson, amongst other things drawing attention to the services advertised on Jet2's website including those outside the Airport's operational hours. He stated:

> *"Blackpool Airports published hours of operation are 07.00 to 21.00 and we do not plan to operate outside of those hours".*

On 22 October Mr Rankin wrote again:-

> *"We recognise that historically Jet.com has scheduled flights outside of our operating hours. As you know, current financial circumstances have caused BAL to take appropriate action to manage the airport as effectively and efficiently as possible and therefore we will only operate within the airport's published hours. To reconfirm, our operating hours are 07.00-21.00 and therefore we have no plan to allow departures or accept arrivals scheduled outside of these hours.*
>
> *Subject to my comment at the end of this letter regarding acceptance, as a gesture of goodwill to allow Jet2.com to amend its schedules accordingly an despite the fact that you have chosen not to notify us of your scheduling, BAL will continue to accept the movement as published on your website for the next 30 days only. This concession, if accepted, will therefore end on 23 November 2010 and normal operating hours will apply from 24 November 2010"*

61. The final paragraph of the letter stated:-

> *"I look forward to hearing from you with confirmation of your receipt and understanding the position regarding operating hours. Should BAL receive no such confirmation by 1700 on Wednesday 27 October 2010 then the goodwill gesture will be withdrawn and no flights will be accepted outside the operating*

hours as of Friday 29 October 2010. In this case, passengers will be informed of the facts of the situation and directed to Jet2.com."

62. Late in the evening of 29 October Mr Rankin sent a message to Mr Meeson proposing to accommodate the already scheduled service due that weekend, *"Without waiver of any of our rights and entitlement purely as a gesture of goodwill",* provided three conditions were satisfied. First Jet2 were to pay £5,720, the cost of labour, secondly written confirmation of Ground Handling arrangements from 8 December was to be provided by no later then Wednesday 3 November and thirdly there was to be a meeting by no later than 4 November to discuss an overall way forward.

63. Unsurprisingly Jet2 was taken aback by this as one sees from a long email sent by Mr Doubtfire to Mr Rankin first thing the following morning, Saturday 30 October. Mr Rankin then responded referring to having made a *"very reasonable offer to accommodate … out of hour's services"* and confirming that out of hours movements that weekend would not be handled. BAL were as good as their word and as a result flights which were due to arrive outside operating hours from Faro that weekend had to be diverted to Manchester with serious consequences for Jet2. Quite apart from the disruption to the airline, 321 passengers had to be transferred by bus between Blackpool and Manchester airports as did the flight crew. Many of the passengers were families returning from half term holidays. Jet2 then applied to the court for an injunction.

The Witness Evidence

64. I will refer to the witness evidence only briefly for two reasons. First it is only of limited assistance for reasons I have given. Secondly, where, as in this case, both parties are reputable companies, the contemporaneous documents carry considerable weight much more so than later recollections of some of those involved, and indeed not involved, at the time.

65. Jet 2 called four witnesses.

66. Mr Ian Doubtfire, Managing Director of Jet2, was a careful witness with a formidable grasp of detail. He was candid about his company's readiness to use its bargaining power to the best possible advantage. In particular I accept his evidence, to the extent that the matter is not already clear from the documents, that Jet2 has regularly planned for and operated flights outside normal hours without BAL describing this as an indulgence or a goodwill gesture on its part.

67. Mr Meeson, Chief Executive Officer of Jet2, is a highly successful entrepreneur and, as was clear from the manner in which he gave his evidence, a forceful character with a flamboyant manner. He and Mr Doubtfire no doubt make a formidable combination. I accept Mr Meeson's account that he has a personal commitment to Blackpool Airport tempered by the need to run a profitable company. He too was quite frank about his company's willingness to use its bargaining power for commercial advantage. I found his evidence honest and candid but not always accurate on detail. He readily accepted the distinction drawn between the high utilisation model of Ryanair and others and the way Jet2 operates its fleet. However he emphasised that flexibility was still crucial given the need to allow his customers to fly to the destinations they want at the times they want and at low cost. I have already referred to the statement Mr Meeson made before the trial qualifying his recollection of events at the time of the contract. His correction seemed to me to be unforced and appropriate. He became confused about what he had or had not been told at the control tower in 2005. I believe he was mistaken about this but it did not undermine his overall credibility.

68. Mr Phillip Ward, Passenger Sales Director of Jet2, explained the difficulties for a carrier with a new route to acquire slots at busy airports. He said that it would be unrealistic to expect Jet2 to change its schedules around, particular to busy destinations in the summer, so as to be sure of operating within normal opening hours.

Mr Ward's original recollection about his dealings with Mr Whelan in July 2005 was that airport opening hours were not discussed. An email which came to light on 21 March 2011 shows that Mr Whelan had mentioned that the airport opening hours were currently from 07.00 to 21.00. This did not seem to me to undermine Mr Ward's evidence on other matters. It did not seem to me that a sentence in emails would be likely to linger on for more than five years in Mr Ward's memory, particularly given the absence of similar observations in later dealings between the parties.

69. Captain Paul James, the Jet2 base captain of Blackpool Airport, gave evidence about the actual operational hours at Blackpool Airport, Jet2's efforts return to Blackpool before midnight and similar matters. He accepted in cross-examination that, subject to the availability of slots, accommodations could be made that would reduce to some degree the need for out of hours operations by Jet2 at Blackpool.

70. BAL called six witnesses.

71. Mr John Spooner is the Chairman of BAL. His evidence made good the claim by BAL that Jet2 is not a low cost airline in quite the same sense as Ryanair, EasyJet and BMI Baby. He suggested that the only reason BAL was not *"strictly enforcing the terms of the letter agreement"* in relation to everything from requiring all operations to be within promulgated hours to not charging for staff car parking was to *"encourage Jet2 to deliver on their promise of growth."* He was critical of Jet2's *"failure to increase its capacity at the airport"* at a time when there was a serious recession in air travel (albeit that Jet2's operations continued to grow at other airports.) He gave evidence in terms of what was claimed to be an unconditional promise by Jet2 to grow its capacity at the airport. His picture of the dealings between these parties on these matters was not consistent with the contemporaneous documents and he was one of several BAL witnesses who seemed to prefer advocacy of BAL's case to candour. The reliance

placed by BAL on his evidence that it is “perfectly possible” for Jet2 to operate profitably within normal hours at Blackpool was, misplaced.

72. Mr Paul Rankin dealt with similar matters from the standpoint of his position after he became Airport Director at Blackpool in January 2010. His evidence that the cost to BAL of keeping the airport open outside normal hours was £853,000 was not disputed. Apart from that I did not get much assistance from Mr Rankin’s evidence. His witness statements at the time of the injunction warned of dire practical consequences should an order be made. Unsurprisingly given the fact that the injunction restored a situation that had prevailed for four years those consequences did not materialise. Unfortunately when giving evidence he repeatedly seemed unable to give direct answers to questions even about matters that might not seem controversial. An example of this is the following on Day 4.

“page 22, you will see they finish the letter by asking for undertakings? Do you remember?

A. I am familiar with the letter, my Lord.

Q. Just to help you, go back to page 21 – to paragraph 2. You were asked to withdraw all restrictions on flight times of Jet2; do you remember?

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A. Well, the paragraph states that we should abide fully by the terms of the letter agreement.

Q. And, in particular, will withdraw all restrictions of flight times of Jet2.com’s operations; do you see?

A. Yes, I do.

Q. The request for that undertaking was declined, wasn't it, Mr Rankin?

A. We have always taken legal advice. From 22 September, we took legal advice on every action that we undertook; and we believe that we are still complying fully with the terms of the letter agreement, my Lord.

Q. But my question, Mr Rankin, was simple. The request for an undertaking was declined, wasn't it.

A. As I said, my Lord, we believe that we are fully complying with the terms of the letter agreement.

As late as 22 October 2010 Mr Rankin wrote to Mr Meeson recognising *"that historically Jet2.com has scheduled flights outside of our operating hours."* Yet at Paragraph 14 of his second witness statement he said:

> "I have never considered that the arrangements with Jet2 under the letter Agreement concerned anything other than operations within the Airports promulgated operating hours (except by agreement otherwise). As far as I was aware, Jet2 believed the same."

73. Mr Rankin explained that one of his first tasks as director of the airport was to review all contractual arrangements to ensure that these were effected and that BAL was receiving what it was entitled to and not paying more than it owed. This was of course what one would expect a new director to do and it is no criticism of Mr Rankin or of BAL that it examined matters close and sought to protect its contractual rights, including those with Jet2. Mr Rankin's views about re-gauging and what it would involve for Jet2 did not seem consistent with the correspondence or with what seem to have been the commercial realities. As Mr Rankin saw it Mrs Kendrick was mistaken and had in some respects gone off at a tangent in her emails.

74. Mr Stewart Orrell, the most senior of the BAL witnesses, is also a director of Balfour Beatty Capital Limited and was responsible for the acquisition of Blackpool Airport in 2008. He provided detailed and helpful information about the financial position of BAL and the viability of the Airport and his second witness statement contains a useful summary of those matters. He is clearly a forceful and highly intelligent manager. Criticisms by Jet2 of Mr Orrell for "*making speeches"* in his evidence are unjustified. He did no more than retaliate in a limited way for the licence Mr Meeson had taken in that regard. Mr Orrell also joined Mr Rankin in presenting a benign impression of "re-gauge" as covering a whole spectrum of things to allow BAL's business to operate more effectively. The letter of 19 July 2010 was deliberately written in strong terms and the use of the word *"re-gauge"* had to be seen in that light. Mr Orrell was adamant that steps taken by BAL in 2010 were never intended to drive Jet2, the main customer, away. BAL wanted to achieve a manageable airport that was financially viable. Any steps taken were intended to achieve an agreement with Jet2 which would enable BAL to achieve its objective. Despite six years as a policeman and thus presumably some prior experience of giving evidence, Mr Orrell did not always answer questions directly and persisted in suggesting that the letter of 19 July 2010 meant things other than what its plain words said. Mr Orrell confused to a degree the role of witness with that of an advocate for his company's cause.

75. The evidence of Mr Coleman and Mr Condie was informative but did not much affect the issues with which I have to deal. Mr Glynn Wright, BAL's Finance Manager dealt with aspects of the counterclaim in a commendably straightforward and accurate way. In the end his evidence was accepted without reservation.

Other Potential Witnesses

76. Jet2 relied at the applications for interim injunctions upon witness statements provided by Mr Whelan who had been a director of City Hopper Airports which purchased

Blackpool Airport in 2004. He was on the other side of the negotiations with Jet2 which led to the Agreement. Mr Whelan was also due to give evidence at the trial for Jet2. Jet2 disclosed only days before the trial that Mr Whelan would not be giving evidence because he was on holiday despite the fact that Mr Meeson had known this a couple of weeks before the trial. Mr Whelan was unwilling either to return from his holiday to give evidence or to be available on a video link. By that point BAL had no opportunity itself either to call Mr Whelan or to seek out other witnesses. I infer that this witness has decided to avoid giving evidence. It would be unfair to BAL for me to give any weight to his witness statements.

77. Miss Kendrick wrote the emails I have referred to above. She is a relatively senior manager within BAL and could have given evidence. BAL witnesses have distanced themselves from the views expressed by Miss Kendrick in general terms (thus Mr Orrell said that she was not part of the "operational team") but BAL has chosen not to call her as a witness. In those circumstances I take what she wrote as highly relevant contemporaneous evidence of what was occurring within BAL at the time, the sense of which I have no reason to doubt.

Breaches of Contract: decision of the Court

78. BAL is entitled to exercise its contractual rights to the full in the same way as Jet2. There was nothing surprising or untoward in BAL, facing a burdensome agreement with Jet2, the effect of a recession and severe financial problems doing what it could to retrieve things by negotiating aggressively, just like Jet2, and by reviewing and sticking strictly to its legal rights. Most well run businesses would have done the same. I do however regret the lack of candour shown by BAL witnesses in denying what was obvious on the documents, apparently in defence of the party line.

79. It is not necessary for me to reach conclusions about BAL's ultimate objectives but if it was not to follow the approach summarised by Ms Kendrick, Jet2 were reasonably

entitled to assume that it was. There are no contemporaneous documents to support BAL's claims that the decision to open outside normal hours was an indulgence or in return for assurances from Jet2 about a third aircraft. I reject BAL's claims about this. BAL clearly did hope, understandably so, that if it performed well and kept the airport open for Jet2 as it had for other airlines a third aircraft would come to be based at Blackpool. But opening outside normal hours was, at least in principle, taken to be part of the service BAL provided and part of the deal.

80. It follows from my conclusions about the meaning of the Agreement that the sudden and unilateral decision to refuse to honour Jet2's flights except subject to conditions was a serious breach of contract. Both sides made threats but the difference is that BAL carried theirs out and did so in breach of contract. Whatever the letter of 19 July was intended to achieve ultimately it meant what it said and was taken as such. It does not, for reasons I have given, follow from this conclusion that Jet2 has an immutable right to insist that particular hours must be observed throughout the lifetime of the Agreement.

Estoppel by Convention

81. Jet2 has an alternative claim should it not succeed in its arguments on construction of the contract. Jet2 contends that the parties have operated throughout the life of the agreement on the basis that the airport would be open and available to accommodate Jet2's movement between 06.00 and 00.00.Jet2 consistently scheduled and operated movement within those hours to the knowledge and with the agreement or acquiescence of BAL. Jet2 submits that this is a clear example of an agreement or understanding between the parties as to the regulation of their relationship giving rise to an estoppel. Jet2 says that it had relied on this state of affairs by establishing space at the airport for the summer 2006 season by which time it was apparent that the parties were operating hours from 06.00 to 00.00. It also increased the number of

aircraft from one to two from the summer of 2007 season with all the costs of and associated with that step.Jet2 also schedules its operations well in advance as BAL knows well.

82. Jet2 submits that the elements of estoppel by convention have been established relying on the well known summary in the speech of Lord Steyn in Republic of India v India Steamship Co, The Indian Grace (No. 2) [1998] AC 878 at p. 913E-F:

> *"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law. The assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption"…*

83. BAL disputes that an estoppel can arise both on the facts and, given the terms of the Agreement, as a matter of law. BAL contends that the mutual dealings do not support a claim to an assurance enforceable against BAL throughout the contract term to keep the airport open and operational at such times as may be necessary to accommodate Jet2's schedule. At this point Mr Crane relies on Mr Rankin's evidence that Jet2's flights had been accommodated in the hope or against a very good possibility that additional volume would materialise from promises given by Jet2. The volume of flights operating outside promulgated hours has been comparatively limited and this was permitted on the basis of optimistic assurances from the airline about the future. It was only in the context of Jet2 making it clear that while expanding elsewhere, such as Manchester, in 2011 it would not be doing so at Blackpool despite the rise in Jet2's overall passenger numbers, that BAL adopted a different approach. He relies also on the fact that Jet2 periodically threatened to remove aircraft from the airport, as Mr Doubtfire conceded. Mr Crane points out that the estoppel argument is only under

consideration if the court has found that the Letter Agreement does not contain the obligation contended for.

84. Although I have accepted much of Jet2's argument about construction I do not accept that the Agreement obliges BAL to keep the airport open outside normal hours regardless or to the extent for which Mr Shepherd contends. But as I see it, it must follow from the view I have expressed on the contractual aspect of the case that Jet2 cannot, via the route of estoppel, achieve more than any construction of the Agreement would permit. I have not heard detailed argument on this point however and I will consider any submissions that are made to me about that.

Conclusion

85. Jet2 succeeds to the extent which I have indicated. There will be a need for discussion or argument about the scope of the order which I should make. I shall be grateful if the parties will, not less than 48 hours before the hand down of this judgment, let me have corrections of the usual kind and a draft order, preferably both agreed, and a note of all matters which they seek to raise at the next hearing.

86. I am most grateful to Counsel and solicitors for the admirable way in which this case has been prepared and presented.

GH017282/CS