Neutral Citation Number: [2025] EWHC 3259 (Comm)

Case No: LM-2022-000220

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 12/12/2025

Before :

PAUL MITCHELL KC

(Sitting as a Deputy High Court Judge)

- -

Between :

FIBULA AIR TRAVEL SRL	**Claimant/ Defendant to counterclaim**
- and -	
JUST US AIR SRL	**Defendant/ Claimant to counterclaim**

- -
- -

Mr Matthew Bradley KC and Ms Seohyung Kim (instructed by **Hudson Morgan Williams Solicitors**) for Fibula Air Travel SRL
Mr Jonathan Dawid and Ms Emilie Gonin (instructed by **Consortium Legal**) for Just Us Air SRL

Hearing dates: 12, 13, 17, 18, 19 March 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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PAUL MITCHELL KC (SITTING AS A JUDGE OF THE HIGH COURT)

PAUL MITCHELL KC:

Introductory

1. These proceedings arise from events following the conclusion on 9 December 2019 of a contract to lease an aircraft ("**the Lease**") for the period 1 April 2020 to 31 October 2020. There were two lessees: a Turkish company called Turistik Hava Tasimacilik which traded as "Corendon Airlines" and a Maltese company called Touristic Aviation Services Limited which traded as "Corendon Airlines Europe". I refer hereafter to these two companies as "**Corendon Turkey**" and "**Corendon Malta**" respectively. The Claimant ("**Fibula**") was a party to the Lease, albeit it was not defined as a lessee but rather as "Charterer". The Defendant ("**Just Us**") was the lessor. The Lease was subject to English law and contained a jurisdiction clause in favour of the English courts.

2. On 30 January 2020, the World Health Organisation declared the Covid-19 outbreak a Public Health Emergency of International Concern. On 11 March 2020, the WHO declared the outbreak to be a pandemic. On 17 March 2020, Fibula wrote to Just Us, Corendon Turkey and Corendon Malta "to determine" the Lease.

3. The dispute between the parties concerns the effect of the terms of the Lease. Fibula contended originally that it had been entitled to determine the Lease pursuant to a force majeure clause; alternatively on the grounds that the Lease had been frustrated; or in the further alternative, that the Lease was discharged when performance of it became illegal. It launched these proceedings against Just Us on 8 October 2020 seeking the return of a security deposit ("**the Deposit**") it had paid pursuant to the Lease; alternatively a refund of the Deposit pursuant to the operation of a pricing clause in the Lease. By its amended counterclaim, Just Us sought payment from Fibula of the rental payments due under the Lease for its whole term. Neither Corendon Turkey nor Corendon Malta have ever been parties to the proceedings.

4. On 30 October 2022, Jacobs J refused to grant a notification injunction to Fibula, which had sought an order that Just Us notify it of any intention to deal with moneys to the value of the Deposit. This judgment was reported at [2020] EWHC 3048 (Comm).

5. On 2 March 2022, HHJ Pelling KC gave summary judgment for Just Us against Fibula on the claim for the return of the Deposit, reported at [2022] EWHC 731 (Comm)[1]. Fibula's application for permission to appeal was refused by Males LJ on 15 August 2022. Fibula's role as claimant effectively came to an end after that judgment, but it remained as defendant to Just Us's counterclaim. The counterclaim was the action tried before me.

6. As I shall examine below, aspects of the dispute between these parties have been before the courts on various other occasions besides the hearings before Jacobs J and HHJ Pelling KC mentioned above. Of the various hearings, four have resulted in substantive

[1] I had a copy of this judgment because it was in the trial bundle. It bears the neutral citation number [2022] EWHC 731 (Comm). It is however very difficult to find this reported judgment on any of the usual sources such as Bailii, possibly because the same neutral citation number was also given to an application for permission to appeal in a different case, *Michael Wilson & Partners v Emmott*.

judgments: the one before Jacobs J in October 2020; the one before HHJ Pelling KC in March 2022; one before Mrs Justice Dias DBE in March 2023 (reported at [2023] EWHC 1049); and one before HHJ Klein in March 2024 at which Fibula unsuccessfully sought summary judgment on the basis that the counterclaim had no real prospect of succeeding. There is no transcript of HHJ Klein's judgment but a summary is reported at [2024] 3WLUK 185.

7. By the time of the trial, Fibula's defence had crystallised into two key propositions:

   i) First, the "**Audit Defence**". Fibula contends that it only had an obligation to pay sums under the Lease once an event termed in the Lease a "pre agreed successful audit" had occurred. Fibula says that as a matter of fact there never was a "successful audit" for the purpose of the relevant term in the Lease and thus that it never came under any obligation to pay Just Us.

   ii) Second, the "**Approvals Defence**". There is a clause in the Lease which provides "Agreement will come into force when Turkish and Romanian Civil Aviation Authorities' approvals obtained, as well Malta Civil Aviation Authority". Fibula says that, as a matter of fact, the relevant approvals were never obtained; and that therefore on its true construction the Lease never came into force. Fibula also contends that Just Us was obliged, but failed to, provide certain documentation necessary for the lawful operation of the Aircraft under applicable Turkish and EU aviation regulations, such that the fault for approvals not being obtained lies with Just Us. The result, Fibula contends, is that it never had an obligation to pay anything to Just Us.

8. As well as joining issue with the Audit Defence and the Approvals Defence, Just Us also contended that as a result of Fibula's actions and statements it is estopped from running the Audit Defence and the Approvals Defence entirely: in short, Just Us maintains, Fibula behaved for a very long time as if the Lease had come into force and cannot now adopt the position that, notwithstanding any previous arguments it might have advanced, in truth there had not been a "successful audit" and/or that the Lease had never come into force.

9. At the hearing before me in March 2025, Just Us was represented by Mr Jonathan Dawid and Ms Emilie Gonin and Fibula by Mr Matthew Bradley KC and Ms Seohyung Kim. The guidance in CPR 39PG.5 is to the effect that junior counsel in Business and Property Courts litigation should be given "better opportunities to advance oral arguments". Ms Gonin and Ms Kim each skilfully cross-examined significant witnesses for the other party. Cross-examination is not oral argument; but it is, in my respectful view, important that junior counsel in commercial cases also have opportunities to practice that skill as well. It seems to me that the respective counsel teams were committed to allowing junior counsel an opportunity to practice important skills and had given expression to that commitment by focussing on cross examination rather than submissions. I am very grateful to all counsel for their assistance both in written and oral submissions.

10. This judgment is structured as follows:

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1. The Parties

11. Just Us is an air operator based in Romania. It leases aircraft to third parties, complete with crew, maintenance and insurance. That combination of services is commonly referred to in the air operator industry as "**ACMI**": Aircraft, Crew, Maintenance, Insurance.

12. Fibula is a travel agent and tour operator, also based in Romania. It sells package holidays to Romanian customers to various holiday resorts.

13. To operate its business, Fibula charters aircraft to transport its customers to their destinations.

2. The Lease

Background

14. Aircraft operation is regulated in all parts of the world. Those who operate aircraft seek rights to do so from regulators and, if they satisfy the applicable regulatory requirements, they are granted what in English are called Air Operator Certificates ("**AOCs**").

15. Just Us commonly offers two ways of obtaining the use of aircraft supplied by it: charters and "wet leases". Under a charter, the lessor is the sole operator of the aircraft for all relevant regulatory purposes: the charterer's role is merely to choose the route and pay the lessor. A "wet lease" is a more complex arrangement. It provides a mechanism whereby one air carrier can put at the disposal of another air carrier an aircraft, together with flight crew, so that the second carrier can perform the flights it wishes, but does not have aircraft to, perform.

16. By way of background only, in the United Kingdom under a wet lease, the lessor has operational control of the aircraft, which is operated under the lessor's AOC: see the definition of "wet lease" in Regulation (EC) No 1008/2008, which (now with various post-Brexit amendments) still forms part of UK law. The lessee has the economic benefits of operating the aircraft to meet its own customer's needs: it has what can be termed economic control of the aircraft. Compliance with applicable safety regulations is thus the responsibility of the lessor, which operates the flights pursuant to its AOC. Compliance with applicable economic regulations (e.g., authority to fly particular routes, ticket pricing, consumer protection etc) is the responsibility of the lessee.

17. As will be seen below, in Turkey when a locally-based lessee such as Corendon Turkey wishes to enter a wet lease agreement with a lessor based outside Turkey such as Just Us, the Turkish civil aviation regulator – the Directorate General of Civil Aviation ("**DGCA**") – has put in place specific provisions designed to ensure that passenger safety and consumer protection are not adversely affected by the fact that the lessor and lessee under the wet lease are regulated under different regimes. These provisions are contained in a directive known in English as the Aircraft Leasing Procedures and Principles Directive (SHT Leasing). I follow the two Turkish law experts called by the parties in referring to this Directive hereafter as simply "**SHT Leasing**". I will consider the terms of SHT Leasing in more detail below.

18. I have mentioned above that one of the parties to the Lease was Corendon Malta. Malta being a Member State of the EU, on the face of it the provisions of Regulation (EC) No 1008/2008 would apply where Corendon Malta sought to enter a wet lease agreement as lessee where the lessor was a carrier based in the EU. For reasons explained below, the focus of the parties in this litigation has been on the impact on their relationship of Corendon Turkey's regulatory obligations under SHT Leasing rather than on Corendon Malta's obligations under Regulation (EC) No 1008/2008.

The parties to the Lease

19. The Lease at the heart of this case was titled "This Wet Lease Agreement No. 0960". Just Us was described as the lessor of a 180-seat aircraft, an Airbus A320 ("**the Aircraft**"). There were two lessees: Corendon Turkey, referred to in the Lease as "Lessee B" and Corendon Malta, referred to as "Lessee C". That nomenclature would suggest that there might be a "Lessee A", but in fact no party was so identified.

20. The recitals provided, among other things, as follows:

> "Lessee [sic] hereby declares that he has all rights and required authorizations, AOC and licenses to operate the Flights in accordance with the Flight schedule (as

> defined herein) and has obtained all approvals and authorizations, if needed, to enter into this Agreement and wet lease the Aircraft from Lessor.
>
> Subject to the conditions and pursuant to the terms of this Agreement and subject to any applicable approvals, Lessor agrees to wet lease and operate the Aircraft with its own or [sic] cabin and cockpit crew for the term on ACMI basis.
>
> Wet Lease (ACMI basis) means the leasing of the Aircraft by Lessor for use by Lessee [sic] throughout the Term (as defined herein) only for the performance of agreed Lessee's Flights to be operated by Lessor's own cockpit and cabin crew, maintained by Lessor and with corresponding insurance effected by both Lessor and Lessee as provided therein [sic] below, under consideration that the Aircraft shall at all times remain under Lessor's operational control and the title to the Aircraft shall at all-time [sic] remain with the Aircraft owner.
>
> For the purposes of this Agreement, Lessee (B) and Lessee (C) shall be defined as the party requiring Wet Lease (ACMI) capacity, Lessor shall be the party that supplies and operates the Aircraft on an [sic] Wet Lease (ACMI) basis, and collectively shall be defined as the Parties"

21. Native speakers of English will immediately appreciate that the Lease was not finalised by a native speaker of English. In the passages I have just quoted, I have indicated where the original text contains an actual or potential error by using the conventional abbreviation 'sic' in square brackets after the doubted text. In the remainder of this judgment, however, I do not continue that practice: I have simply reproduced the exact wording used in the Lease.

22. Fibula was not formally identified as a party to the Lease. The final recital to the Lease, however, provided:

> "Parties herein, decided to get into a Wet Lease Agreement to provide charter flights in the benefit of Fibula Air Travel, a Romanian Tour Operator herein as Charterer, registered at Register of Commerce with J40/8407/2005, Tourism Licence 1059/07.02.2019, Insurance Policy BN 1145, and duly represented by Mr Muharrem MAVISU."

23. As will be seen below, the Lease expressly recorded certain obligations placed on Fibula; and then the concluding words of the Lease were these:

> "Signatories to this Agreement hereby acknowledge that both parties have read and understand the terms of this Agreement, and acknowledge they have full legal authority to execute the document in the name of the party for which they have given their signature. It is further agreed that faxed and scanned copies of this document are deemed as legally binding as the original.
>
> AGREED AND ACCEPTED ON BEHALF OF
>
> Just Us Air [above the signature of Captain Dan Iuhas]

> Corendon Airlines [above the signature of the commercial director of the Corendon Turkey; there was no signature on behalf of Corendon Malta]
>
> Fibula Air Travel [above the signature of Muharrem Mavisu]"

24. There is no live dispute between the parties that Fibula was indeed a party to the Lease. Nor does either party contend that Corendon Malta was not a party to the Lease despite not having signed it. There is, however, a dispute over whether the definition of Lessee encompasses Fibula, such that certain obligations imposed on "the Lessee" were in truth obligations imposed upon Fibula alone/imposed upon Fibula as well as upon "the Lessee".

25. Most of the Lease, which occupies 21 pages of single-spaced type, is taken up with terms regulating the wet lease agreement made between Just Us as lessor and Corendon Turkey and Corendon Malta as lessees. There were, however, clauses in the Lease which placed payment obligations on Fibula; and gave Fibula certain rights which could, if exercised, alter some of the details of how Just Us, Corendon Turkey and/or Corendon Malta carried out their obligations and exercised their rights under the Lease. The Lease was in effect a hybrid of a wet lease and a charter, making provision for the wet lease of the Aircraft by Just Us to Corendon Turkey and Corendon Malta, and the charter of the Aircraft from the Corendon companies by Fibula.

26. Returning to the Lease, its terms were not organised by numbered paragraphs, nor was the Lease divided into sections by subject-matter. The relevant terms of the Lease for the purposes of this judgment were as follows.

The Term

27. Just Us agreed to lease the Aircraft, or an alternative similar aircraft if the intended one were not available, to "the Lessee" for the period 1 April 2020 to 31 October 2020 (page 2). The Lessee was entitled to return the Aircraft to Just Us at any time it chose after the "agreed total Minimum Guaranteed Utilization" was reached. That minimum guaranteed usage time was 2,100 block hours, as defined below.

Delivery

28. The Aircraft was to be delivered to the Lessee at any airport within Romania "2 days earlier from agreement commencement date" so that the Lessee could provide on board sales training to the cabin crew, who were of course provided by Just Us. The condition of any aircraft delivered was particularised: it was to meet "international airline standards"; be clean; have a Certificate of Airworthiness; have Corendon Turkey/Corendon Malta's decals on its fuselage and tail; have a full complement of emergency equipment; and the airframe should have passed any relevant recent checks required by an approved maintenance programme.

Aircraft base

29. There is a dispute over the meaning of the following clause, to be found on page 2:
> "Aircraft Base:

> - The aircraft will be based in an airport which will be informed by Charterer. Operating Base can be changed also anytime during the Lease Period by Lessee, with 15 calendar days notification period. Lessee and Lessor agree that in case the 'Operational Base' is changed after the date of this agreement from Antalya (IATA: AYT), Turkey to any base of CAI (Corendon Airlines) or CXI (Corendon Airlines Europe) all operated flight hours with CAI/ CXI callsign with aircraft from any base will be in total 2.100 MGBH [Minimum Guaranteed Block Hours: see below, paragraph 33]. Positioning flight from any European Airport to the Operational Base shall be operated under Lessee's call sign and cost. Positioning flights can be planned as commercial flights according Lessee's flight plan"

30. Just Us says that the parties to the Lease always understood that the operating base was to be Romania; that there was provision for Fibula to nominate another base; but that it never did so. Fibula says that the default operating base was to be Antalya in Turkey.

The Flights

31. As noted above (paragraph 20), the first recital provided a definition of "Wet Lease" as meaning "the leasing of the Aircraft by Lessor for use by Lessee throughout the term (as defined herein) only for the performance of agreed Lessee's Flights…". The Flights were defined on page 11 by reference to the Flight Schedule appended to the Lease at Annex 1: "Flight Schedule: Flights to be listed in Annex 1, which shall be performed by Lessor in accordance with the terms of this Agreement". On page 7 there was a clause that gave Fibula power to alter the Flight Schedule:

> "Additional Flights
> - Charterer may add supplement Flights to the Flight Schedule within 24 hour to flight with subject to Lessor prior written approval. In urgent cases Lessee can add flight to schedules with approval of Lessor
> - The Aircraft shall be for the sole and exclusive use and benefit of the Charterer and shall not be used or operated for, or made available by the Lessor to, any other parties"

32. The Flight Schedule itself showed two pro-forma seven-day flight timetables named Version 1 and Version 2. In both schedules, flights began and ended every day at Bucharest International Airport in Romania; and in both the Aircraft was scheduled to visit Antalya airport on at least 4 days each week. In Version 1, there were two days on which direct flights were scheduled between airports in Romania and Hurghada in Egypt.

Consideration

33. The sum payable to Just Us was calculated by reference to a unit of measurement termed the "Block Hour". A Block Hour was defined as "each hour or part thereof elapsing from the moment the chocks are removed from the wheels of the Aircraft as a preparation for flight… until the chocks are next again returned to the wheels of the Aircraft". There was a minimum guaranteed number of 2,100 Block Hours over the term of the Lease. Each Block Hour was valued at €2,550 (page 3).

34. After the term providing for a minimum guaranteed number of Block Hours, the Lease continued (page 3):

> "For the avoidance of doubt, Lessee guarantees the payment of the Guaranteed Block Hours during the lease period, even when during Term, not all Guaranteed Block Hours have been performed due to default of Lessee. In case of not all Guaranteed Block Hours have been performed due to default of Lessor, all done payments and security deposit will be refund for non-performed hours after reconciliation"

35. That clause regarding the payment of the Block Hours in any event by the Lessee suggests that (as might be expected), it was the "Lessee" who was under the obligation to pay Just Us for the wet lease of the Aircraft. The primary obligation to make payments to Just Us, however, fell not on Corendon Turkey and Corendon Malta but on Fibula: see paragraph 37 below.

36. Upon signature of the Lease, Fibula was to pay a "Security Deposit" of €765,000 (page 3). That deposited sum was to be returned following the determination of the Lease and after a process of "Final Reconciliation":

> "The half of Security Deposit or remaining part of it, shall be refunded to Charterer, after final reconciliation, 30 days after the end of the contract. 'Final Reconciliation' as defined below after the expiration of the Agreement Period but not later than 30th of November, 2020. Lessor irrevocably and unconditionally guarantees to Charterer that would refund the balance of all payments (including the Deposit, if applicable) to Charterer in accordance with this Agreement, 30 days after at the expiration of the Agreement Period following the final reconciliation"

37. Pages 3 – 4 of the Lease provided that Fibula came under the following payment obligations:

> "Charterer, following the pre agreed successful audit from Lessee quality And compliance department to lessor, shall unconditionally and without any set-off pay the following wet lease payments ("the Due Payment") defined therein below, which shall be received by Lessor on its account on the following dates and amounts.
>
> Payment schedule for one Aircraft Wet Lease:
> Payment schedule for Period:
> Payment schedule as below:

Due Date	Period	BHs	Acmi rate	Amount
18.03.2020	01-15.04.2020	150	EUR 2,550	EUR 382,500
01.04.2020	16-30.04.2020	150	EUR 2,550	EUR 382,500
15.04.2020	01-15.05.2020	150	EUR 2,550	EUR 382,500
30.04.2020	16-31.05.2020	150	EUR 2,550	EUR 382,500

> [the table of scheduled payments then continued in like manner showing the tranches of the Due Payment due until the end of the Term]
> …
>
> The Due Payment is unconditional to obligations of Charterer and is condition precedent for Lessor's obligations to perform and operate the Flights and any Flight under this Agreement…

38. Thus, the obligation to pay the Due Payment to Just Us rested primarily with Fibula, albeit Corendon Turkey and Corendon Malta guaranteed Fibula's obligation.

39. The first paragraph of the clauses of the Lease quoted above at paragraph 37 ("Charterer, following the pre agreed successful audit from Lessee quality And compliance department to lessor, shall unconditionally and without any set-off pay the following wet lease payments") has been labelled "**the Audit Clause**"; the Audit Defence is founded upon it.

40. There was then provision made for monthly reconciliation of actual hours flown with minimum guaranteed block hours paid for – I refer to this clause as the "**Block Hours Flown Price Adjustment Clause**". In the event the number of actual hours flown was less than the minimum guaranteed number, the position was as follows:

> "In case that on Date of reconciliation the actually performed Block Hours amount during the respective reconciliation period, are less than the Minimum Guaranteed BH due to Lessee default, Charterer shall no right to deduct any amount from Prepayments for Minimum Guaranteed BH.
> In case that on the Date of reconciliation the actually performed Block Hours amount during the respective reconciliation period, are less than the Minimum Guaranteed BH due to Lessor default, Charterer shall have right to deduct any amount from Prepayments for Minimum Guaranteed BH"

41. The Lease went on after the "Due Payment" clauses to address Fibula's rights to make deductions or set offs from payments due and the position of Fibula and Just Us at the conclusion of the Lease, when a final accounting was to be performed, and Fibula's obligations to pay various other costs that Just Us might incur (pages 5 – 6).

Just Us's further responsibilities

42. Pages 7 – 8 of the Lease contained various clauses setting out what were described there as Just Us's "responsibilities". These were expressed at a relatively high level of abstraction, as, for example:

- "Lessor shall be responsible for the technical operation of the Aircraft and the safe performance of Flights and shall retain full operational control and possession of the Aircraft to enable it to do so...

- Arrange comprehensive hull, third party liability and war insurance;

- Ensure that Aircraft is operated in a lawful manner and does not invalidate the insurance cover;

To operate the Aircraft in accordance to Operation procedures and AOC certificate of Lessor;

- Secure all Wet Lease approvals from Lessor's local authorities.

- Operation and maintenance surveillance of the Aircraft during the entire lease period shall remain under the full authority of the Aviation Authority Of the Lessor. The Lessee shall enable the Aviation Authority inspectors and Lessor quality personnel an access on board of the Aircraft and to the Operational Base to carry out random operational and maintenance inspections. The Aviation Authority shall give notice of such an inspection reasonably in advance to enable the Lessee to arrange for the necessary entrance permit to be issued by the relevant Authorities. Reciprocally, Lessor shall allow the CAA inspectors of the Lessee's country to perform spot inspections on board of the Aircraft and at the Operational Base…"

43. There were further obligations of the Lessor on page 9 of the Lease, dealing with line maintenance, fuel, and "Aircraft on Ground" or "AOG" situations. AOG meant "the aircraft being unserviceable for technical reasons". In such an event, the core of Just Us's obligation was to ensure that Corendon Turkey/Corendon Malta could keep flying so as to provide Fibula the service it needed.

44. The relevant parts of the clause relating to line maintenance (on page 9, hereafter "**the Line Maintenance Clause**") were as follows:

- Lessor shall be responsible for all line maintenance costs of the Aircraft, including the continuous support of spare parts and consumables in order to achieve smooth operation during the Agreement's term. Lessee shall provide all reasonable support for the customs clearance and handling of spare parts and consumables, required for Maintenance of the Aircraft…
- During Lease Period, Lessor shall provide and bear the cost of sufficient number of maintenance staff required for smooth operation of Aircraft at Base and abroad. Lessor has right to subcontract an external maintenance provider, however Lessor shall have as option setting up their maintenance station at base"

Corendon Turkey/Corendon Malta's/Fibula's further responsibilities

45. Pages 8 – 9 of the Lease contained clauses under the heading "Lessee responsibilities". These clauses, however, not only stated the responsibilities of "the Lessee", but also gave certain powers and responsibilities to Fibula:

"Lessee Responsibilities
- Commercial control of the Aircraft during the Lease Period shall be vested in the Charterer. The Lessee shall, subject to operational and technical considerations as specified in Article 11 [the Lease does not contain any numbered Articles, so this reference appears erroneous], be solely competent to cancel, delay or re-route a Flight for commercial reasons.
- Passenger Liability, cargo & mail insurance acceptable to Lessor.

- Hotel Accommodations (except in Romania) which shall be of airline standard on bed breakfast basis with paid internet, and laundry two pieces max per day, for Lessor's flight crew, cabin crew and technicians plus local travel between hotel and airport. All costs related will be reimbursed by Charterer.
- Lessee will perform technical, safety, security and operational checks or audits of the Aircraft and will inform Lessor about findings. Lessor prepare corrective action plan within 3 business days which shall be approved by the Lessee. Besides agreement may terminate if any standards which is asked by Turkish DGCA cannot meet or lost any of them and Lessor do not make any corrective action to obtain requested standards…
- Secure all necessary permissions and approvals from its local authorities (unless such approvals should be obtained by Lessor under the applicable law) and the authorities of operations area"

46. The wording of that first paragraph – which as I have already remarked, contains references to a non-existent "Article 11" – also appears to contain a contradiction: commercial control of the Aircraft is vested in Fibula; and yet "the Lessee" is solely competent to cancel, delay or re-route a flight "for commercial reasons".

47. There followed a list of categories of cost which Just Us was to incur but which would be reimbursed by Fibula; and provisions regarding the lessees' obligations to pay such compensation to passengers as might arise under applicable law.

48. In the remaining pages of the Lease were clauses concerning traffic rights; disclaimers and limitations of liability; insurance; the effect of the damage or destruction of the leased aircraft; security measures; safety measures; confidentiality; applicable law; an entire agreement clause; and a clause permitting Just Us to deal with its own interest in the Aircraft in various ways.

Clauses referring to legal obligations arising outside the terms of the Lease

49. On page 7 of the Lease was a heading, "Confirmations". Under this appeared two clauses. One dealt with the payment of any VAT that might be due from Fibula on any payments made under the Lease (including the Security Deposit) The other was as follows:

> "Lessee confirms that all traffic rights, authorizations and clearances for entering into this Agreement and assuming obligations under this Agreement will be obtained. Lessee shall obtain and maintain in full force and effect all authorizations for the time being required by all applicable laws, including the laws or regulations of the state to which/from which Flights to be performed or any other applicable jurisdiction, to enable Lessor to perform its obligations under this Agreement"

50. That clause clearly echoes the declaration made by the lessees and recorded in the recitals as set out above at paragraph 20, i.e.,

> "Lessee hereby declares that he has all rights and required authorizations, AOC and licenses to operate the Flights in accordance with the Flight schedule (as defined herein) and has obtained all approvals and authorizations, if needed, to enter into this Agreement and wet lease the Aircraft from Lessor".

51. The declaration in the recitals, however, is that "the Lessee" already has "all rights and required authorizations… and has obtained all approvals and authorizations, if needed"; whereas under "confirmations", "the Lessee" confirms (i.e., promises) that such authorisations etc will be obtained at some future date.

52. Later in the Lease, on page 11, there was a heading, "other conditions". The clauses appearing below that heading read as follows (and sit on the page in the original agreement as set out below, i.e., with the first and third clauses indented but the second clause not):

> "Other conditions:
>
> - All Aircraft equipment (including but not limited to catering, baggage containers, trolleys) supplied will be returned with the Aircraft, any loss or damage sustained to any of the above will be recharged to Charterer at the cost for each Atlas box at the rate of USD 700 and each ATLAS trolley at the rate of USD 500.
>
> Agreement will come into force when Turkish and Romanian Civil Aviation Authorities' approvals obtained, as well Malta Civil Aviation Authority. Lessor will provide Romanian CAA acceptance letter but not later than 30 days after agreement execution together with all requested docs for Turkish CAA application.
>
> - Lessor will provide a statement from its own Civil Aviation regulatory which confirms all operational responsibilities will on Lessor account and all operational and technical surveillance will be done by themselves according to EASA/ICAO rules during the lease term"

53. The second and third clauses above – termed "**the Approvals Clause**" by the parties – found the Approvals Defence.

54. It will be noted that it is not expressly stated in these clauses which of the parties was obliged to obtain approvals from the Turkish, Romanian and Maltese CAAs; nor is it stated to whom Just Us was to provide the "Romanian CAA acceptance letter", nor what that document might be.

55. Finally, for completeness mention should be made of the Force Majeure clause, relied on by Fibula at an earlier stage of these proceedings:

> "Lessor or Lessee shall not be liable for any failure to delay in the performance of any obligations under this Agreement due to Force Majeure. In the event of a Force Majeure situation continuing for a period of ten (10) days or longer (during which time the parties shall use their best efforts to alleviate the effects of the Force Majeure situation), either party will be free immediately to terminate the leasing of the Aircraft under this Agreement by notice in writing to the other, provided always that such termination shall be without prejudice to any obligations accrued at the date of termination and to any continuing obligations under this Agreement"

3. The lay witnesses

56. There were three: for Just Us, Captain Dan Iuhas and Ms Anda Miclea; for Fibula, Mr Ayhan Mavisu. Captain Iuhas was the president of Just Us (now renamed to Dan Air SRL). Ms Miclea was the cabin crew manager of Just Us at the material time and was involved in the preparation for the audit. Mr Mavisu is the owner of Fibula.

Captain Dan Iuhas

57. Captain Iuhas was a commanding figure who at times was impetuously defensive in answering Mr Bradley's questions, as if concerned that agreeing with what Mr Bradley was about to ask might amount in some sense to a defeat. He was also, however, completely candid and, even though Mr Bradley's skilful cross-examination from time to time led him into making errors (most notably, he maintained that Corendon Malta was not a party to the Lease and then seemed a little surprised to see that Just Us's pleaded case and its written opening submissions were to the opposite effect), in my judgment he was doing his best to help the court despite his concern not to be bested by Mr Bradley. As it happens, very little of his evidence was ultimately relevant: what he recalled of how the Lease was negotiated, for example; his opinions on the requirements of Turkish law; the steps taken by Just Us to furlough employees; his opinions on whether Fibula had a role to play in obtaining approvals from the DGCA or the Maltese CAA; these and various other lines of enquiry cast only the faintest light on the issues. I have largely accepted his evidence where it was relevant.

Ms Anda Miclea

58. Ms Miclea's evidence was largely accepted by Ms Kim, who asked an appropriately limited range of questions. Ms Miclea answered all of these courteously and was obviously trying to assist the court. I accept her evidence.

Mr Ayhan Mavisu

59. Mr Mavisu had access to an interpreter but on the whole gave his evidence in English. Like Captain Iuhas, he was confident in his understanding of the basic regulatory framework governing his area of activity: where he could fly to from which countries, what airlines were likely to be able to give him what he needed. Like Captain Iuhas, his understanding was not a lawyer's but a businessman's. Mr Dawid probed Mr Mavisu's understanding of the development of Fibula's case, in particular what Mr Dawid characterised as Fibula's change of position on whether the Lease came into force; Mr Mavisu, however, was unable to give a great deal of assistance on these questions. He was asked, for example, about the fact that Fibula obtained a copy of the Audit Report in early 2021 but did not seek to run the argument at the heart of the Audit Defence for another 18 months:

> "Q. I would suggest that what happened is, after this audit report was received by Fibula and its lawyers in 2021, you took the view that it indicated the audit had been successfully completed and it wasn't until some time late in 2022 that you changed your mind about that. You disagree with me?

> A. I didn't change my mind. I just to make this to – to – that we will see the court and finished. I don't know about at that time and other things and how we can go to the court or other things. I didn't change any mind. Our lawyer, when he say and when we discover from Corendon and from Just Us – not from Just Us, mainly from Corendon, that it didn't audit succeed, so we are… and we knew in that time – I just want to say something – in that time, in this chaos, everybody knew that nobody can perform and finish all documentation".

60. Although Mr Mavisu's evidence was not always clear, I consider he was trying sincerely to assist the court. As with Captain Iuhas' evidence, very little of what Mr Mavisu said turned to be helpful to the issues to be determined; I have largely accepted his evidence where it was relevant.

4. The background facts

61. The background facts are largely undisputed. They are as follows.

62. On or around 9 December 2019, Fibula paid to Just Us the Deposit in the sum of €765,000.

63. On 7 January 2020, Fibula entered a further agreement with Corendon Turkey and Corendon Malta. It was written in English and governed by Turkish law and provided as follows:

    i) Fibula agreed to reimburse any payments whatever that might be incurred by Corendon Turkey or Corendon Malta arising out of their undertaking activities pursuant to the Lease.

    ii) Fibula also agreed to indemnify the two Corendon companies against any liability they might incur arising out of or in connection with the Lease save to the extent such liability flowed from "gross negligence or wilful misconduct" on their part.

    iii) Fibula agreed to pay the Corendon companies a fee of €100 per Block Hour, following the same payment schedule as provided for the payment of fees to Just Us under the Lease.

    iv) Fibula agreed to pay the Corendon companies a deposit of €950,000 to secure operational payments and direct operating costs. This deposit was to be paid in two tranches: €550,000 by 13 January 2020 and €400,000 by 15 March 2020.

    v) All payments under this agreement were to be made to the bank account of Corendon Turkey.

64. There was no other formal agreement entered between either of the Corendon companies and Fibula: the Lease and the 7 January 2020 agreement ("**the Corendon Agreement**") appear to represent the only written agreements between these parties governing the use by Fibula of the Aircraft to be wet leased by the Corendon companies from Just Us.

65. It will be recalled that one of the terms of the Approvals Clause was that Just Us would provide "Romanian CAA acceptance letter but not later than 30 days after agreement execution together with all requested docs for Turkish CAA application". As at 8 January 2020, Just Us had not made a request to the Romanian CAA for any document.

66. Corendon Turkey wrote to Just Us on 13 February 2020 with a suite of checklists that would be used during an audit planned for later that month. It requested various technical documents. In the list of requested documents, paragraph 14 provided as follows:

> "Maintenance Service Supplier Agreements for Antalya is mandatory **(This item have special importance in order to apply wet-lease operation to Turkish DGCA)**"

67. On 26 and 27 February 2020, Corendon Turkey undertook the audit ("**the Audit**").

68. On 2 March 2020, Corendon Turkey sent Just Us a version of the Lease which named only Corendon Malta as lessee. It explained that "when Malta CAA see Turkey in agreement it cause to confusion" and asked Just Us to execute the amended version.

69. On 3 March 2020, Just Us sent Fibula invoices for the first two payments on the schedule reproduced in part above at paragraph 37.

70. On 5 March 2020, Corendon Turkey issued to Just Us a report with the results of the Audit ("**the Audit Report**"). It is more convenient to consider the Audit Report below when addressing the Audit Defence.

71. Also on 5 March 2020, Just Us asked Corendon Turkey "when do you think it is possible to send me your certificates and your wet lease approval from the Turkish/Maltese CAA?"

72. There followed a number of emails between Corendon Turkey and Just Us concerning a document which Corendon Turkey wished Just Us to procure from the Romanian CAA to provide to the Turkish DGCA. Corendon Turkey explained to Just Us on 5 March 2020 that the Turkish DGCA wished to have a letter from the Romanian CAA which stated "all the operational responsibility will be on Justus within wet lease period and that the technical and operational controls of the Justus shall be carried out by RCAA in accordance with ICAO/ EASA rules", i.e., a statement of the kind described in the second paragraph of the Approvals Clause. Corendon Turkey provided Just Us with a precedent of the kind of letter the DGCA would accept.

73. On 11 March 2020, Just Us submitted to the Romanian CAA a letter notifying it of the Lease and requesting a letter addressed to whom it may concern containing the wording requested by Corendon Turkey for sending to the Turkish DGCA.

74. The wording of the letter sent to the Romanian CAA contained no request for approval from the Romanian CAA for Just Us's provision of services under the Lease. Captain Iuhas' evidence regarding the "Romanian CAA Acceptance Letter" referred to in the Lease was frank:

> "Q. Right. Well, what this says is:
> 'Lessor…"
> That's Just Us, not Corendon –
>
> A. Yes
>
> Q. – is going to provide a Romanian CAA acceptance letter?
>
> A. There is no such document, sir. So if – if somebody put that in there, somebody from our commercial department, I don't know why they did, but it's highly incorrect… my Lord, from the Romanian CAA, when I wet lease out, if I'm going to give an aircraft to the UK, Romanian CAA, there is no such document under the sun, unless they invent one, that I could give to the UK CAA. There is no such document. I meant, my Lord, to inform them, even 24 hours before, which I did, and that's it, because I do, my Lord, wet least out, not wet lease in. The emphasis, the burden is on the operator from Turkey, Germany, France, whichever the country, for them to obtain their own approvals. I'm just the lessor. I'm giving the aircraft, as the name suggests, ACMI, aircraft with crew, with maintenance and insurance. And that's where, my Lord, my responsibilities stop. It's a big, huge full stop"

75. No letter was ever in fact issued by the Romanian CAA, whether in the form of the draft emailed to it by Just Us or any other form.

76. On 16 March 2020, Fibula emailed Just Us and Corendon Turkey as follows:

> "Urgent !!!
> Dear Partners;
> Since the World Health Organisation (WHO) escalated current SARS Cov-2 to Pandemic; Our passengers and partners accepted the situation as a force Majeure. There is no booking thru individual passengers or our partners for the upcoming 2 months April and May. All the previous reservations as been cancelled for this period.. In this circumstances we should suspend all our operations during April. We will review the situation in next days for May and share with all of our partners. Thank you for your kind understanding"

77. Although Fibula's position on 16 March 2020 was simply that it was suspending its own operations for April, it wrote again to Just Us and Corendon Turkey on 17 March 2020 as follows:

> "Just Us and Corendon Airlines.
> First of all thank you for your support during these unprecedented times and I would like to assure you that you have our absolute support.
> The recent outbreak of Coronavirus (COVID-19) and associated travel restrictions across Europe-Egypt constitute FORCE MAJEURE under our contract with you. Unfortunately, regarding to force majeur prosedures we will have to determine our secured (and guaranteed) contracts which Nr 0960 under signed on 09th December 2019, into wet lease agreement with immediate effect.

> This does not mean that we have given up on your Collaborations but we feel that it will take time for the market to recover and many of the guarantees and commitments will not be achievable.
> Fibula has right to ask all prepayments which its made for "Just Us" and "Corendon Airline".
> Nevertheless these circumstances mean that Fibula Air Travel (Just us – Corendon/ nr. 960 agreement) shall not be liable for unfulfilled contractual obligations (including guarantee and commitments or being unable to use the flights) in accordance with our contract with you.
> Once flying recommences, we will of course continue to work with you… We are here to work with you are your partner, and to get things back to normal as soon as possible. When we have clarity on what is happening, we will be in touch to establish how we can fill our aircraft by working together. As always if you have anything you wish to discuss, please do not hesitate to contact with me.
> Thank you for your continued support during these difficult circumstances."

78. With effect from 18 March 2020, flights between Romania and Egypt were suspended.

79. On 24 March 2020, Romanian lawyers for Just Us wrote to Fibula rejecting its purported termination of the Lease. Among other things, they contended that the "main parties" to the Lease were only Just Us, Corendon Turkey and Corendon Malta and asserted "the rights and obligations related to the actual performance of the Lease, including to its termination, are solely borne by the Lessor and Lessees". They also said that even if Fibula had terminated its charter relationship with Corendon Turkey and Corendon Malta, that had nothing to do with Just Us and the Lease itself remained in force as between Just Us and Corendon Turkey and Corendon Malta.

80. On 25 March 2020, Just Us notified 34 of its 70 employees that it was suspending their contracts of employment pursuant to certain provisions of the Romanian Labour Code with immediate effect, until 30 June 2020.

81. On 27 March 2020, Turkey suspended all international flights (there had been suspensions of flights from some countries with effect from 17 March 2020, but not a blanket ban).

82. On 30 March 2020, Corendon Turkey wrote to Just Us regarding the letters sent by Fibula earlier in the month. Corendon Turkey's position was that the pandemic was likely to be interpreted as an event falling within the force majeure clause of the Lease and it proposed a variation to the Lease, effectively that the term should commence when travel restrictions were lifted and that payment should be made only in relation to block hours actually performed after flights had resumed. It maintained that if agreement could not be reached, the Lease could be terminated; in that event, it said, the Deposit was to be repaid to Fibula.

83. Just Us responded to this proposal the following day, emailing Corendon Turkey and Fibula offering to vary the Lease so that flying started and finished later in 2020, with the total number of block hours reduced to 1,350 at the same rate per block hour as under the Lease. On 6 April 2020, Fibula responded to that offer, wanting to pay only for block hours flown whenever flying resumed and being unwilling to commit to a

start date for any revised or alternative Lease. It proposed that the Deposit be used to cover flying costs under any new contract.

84. There was then a little more correspondence between Fibula and Just Us aimed at reaching a renegotiation of the terms of the Lease, before, on 23 April 2020, Fibula wrote to Just Us and both Corendon companies. It explained that it had to return the price of holidays to consumers and said that it was now terminating the Lease and the Corendon Agreement pursuant to the Force Majeure clause in the Lease. It demanded repayment from Just Us of the Deposit of €765,000 and repayment from Corendon Turkey the deposit it had paid under the Corendon Agreement, a further €550,000. Mr Mavisu's evidence was that the Corendon companies repaid that €550,000.

85. Just Us resolutely refused to accept the Lease was terminated and negotiations continued between it and Fibula regarding a varied form of the Lease. Just Us sent Fibula a draft lease on 1 July 2020: it was in similar form to the Lease but it was in numbered sections with numbered paragraphs; it also contained clauses aimed at settling any existing dispute concerning the Lease Negotiations between Fibula and Just Us foundered; but from no later than 8 August 2020, Fibula was advertising to Romanian tourists package holidays to Turkey starting on 17 August 2020. As is clear from the advertising literature, Fibula's partners in delivering these package holidays were Corendon Turkey and Tarom Romanian Air Transport (the national Romanian carrier).

86. On 25 August 2020, Fibula's English solicitors issued a formal demand for the return of the Deposit; and on 8 October 2020, Fibula issued these proceedings.

87. In October 2020 Just Us produced invoices addressed to Fibula for each sum that had fallen due in accordance with the payment schedule in the Lease. The total sum invoiced was €5,355,000; Just Us gives credit for the Deposit and claims the balance, being €4,590,000. The invoices were not actually received by Fibula until 18 January 2021; it returned them to Just Us on 20 January 2021 on the basis that they were disputed.

5. Procedural history

88. It is necessary to set out the procedural history in some detail as it forms the background to some of the substantive arguments made by the parties as well as to my determination of an application made by Just Us in closing submissions to re-amend its Amended Reply to the Re-Amended Defence to the Amended Counterclaim.

89. In the original Particulars of Claim, the sole basis upon which Fibula reclaimed the Deposit was that it had "terminated the Agreement by written notice with immediate effect on 17 03 2020 and demanded the return of the Security Deposit" but that, in breach of contract, Just Us had refused to return the Deposit.

90. After the failure of its application for a notification injunction before Jacobs J on 30 October 2020, Fibula amended its Particulars of Claim. It now gave more details of the basis upon which it claimed to have terminated the Lease on 17 March 2020. It said that after 16 March 2020 (sic), Just Us "ceased to have all authorisations required so as to perform flights" and that on 17 March 2020 Fibula "accepted the Defendant's repudiatory breach of contract".

91. In its original Defence and Counterclaim, prepared in November 2020, Just Us denied that Fibula was a party to the Lease and sought declarations that it was entitled to retain the Deposit and that the Lease had "remained in force during the entirety of the Lease Period". In March 2021, Just Us amended its counterclaim to add a claim in debt arising from the invoices sent to Fibula in January 2021, alternatively damages for Fibula's breach of its obligation to make the Due Payment. It continued to seek a declaration that the Lease remained in force throughout its term.

92. In its Amended Particulars of Claim, besides the contention that its actions on 17 March 2020 were an acceptance of a repudiatory breach of contract on the part of Just Us, Fibula advanced four alternative cases:

i) On 16 March 2020 (sic) Just Us was prohibited from flying between Romania and Egypt and thus not able to operate flights lawfully. That situation was going to last more than the ten-day period provided in the Force Majeure clause; and so Fibula was entitled to terminate the Lease on 17 March 2020.
ii) By reason of prohibitions on free movement and then flights in Romania, Turkey and Egypt between 16 March and 4 April 2020, the parties to the Lease were prevented from performing their contractual obligations and thus the Lease was frustrated.
iii) The Lease was automatically discharged when Just Us' performance became unlawful under the laws of Romania, Turkey and Egypt;
iv) In the final alternative, since the block hours for the period 1 – 30 April 2020 had been reduced to zero, thus Fibula was entitled to a refund of the Deposit.

93. It is convenient to note here Fibula's pleading at paragraph 11.13 of the Amended Particulars of Claim. Paragraph 11 generally contained a summary of the Lease, and paragraph 11.13 read:

> "[Just Us] was obliged to obtain and maintain all authorisations required so as to perform flights under the Wet Lease Agreement".

94. Just Us applied to strike out the amended claim, the application being heard and granted by HHJ Pelling KC on 2 March 2022. The ratio of HHJ Pelling KC's judgment has already been identified by Dias J in her judgment on Fibula's subsequent application to amend (considered further below). I gratefully adopt her statement of it from *Fibula Air Travel Srl v Just-Us Air Srl* [2023] EWHC 1049 (Comm) at [13]:

> "[13] Dealing with the points that were pleaded by Fibula he held in essence as follows:
>
> (a) The assertion of repudiatory breach was no more than fanciful because it was Fibula and not Just-Us which was under an obligation to obtain all necessary rights, authorisations and clearances for the contemplated flights. The obligations of Just-Us were all concerned with technical operation. In any event, Just-Us never came under any obligation to operate the aircraft unless and until Fibula had made the first of the stage payments which was due on 18 March 2020. It followed that Just-Us could not have been in breach of agreement on 17 March 2020 which was when Fibula purported to accept the alleged repudiation.

(b) A declaration of *force majeure* could only be made after the ten day period had expired and the *force majeure* event relied upon did not take effect until 19 March 2020, such that notice could not be given earlier than 29 March 2020. In any event, there was no contractual provision which limited the operation of the aircraft to flights between Romania and Egypt, nor was it pleaded that the parties had entered into the lease on the agreed but unexpressed basis that the aircraft would be flown only between Romania and Egypt. Accordingly, the prohibition of flights between those two countries did not prevent performance of the agreement since the aircraft could have been directed to fly elsewhere.

(c) The frustration argument failed for much the same reasons as the *force majeure* argument, namely, that the lease did not impose any geographical restrictions on the use of the aircraft and that Fibula had not pleaded any factual basis for saying that the lease was agreed on the joint assumption that flights to and from Egypt would be permitted. Neither the Egyptian decree of 16 March 2020 nor the Romanian restriction of 4 April 2020 was a frustrating event and the mere fact that it may have become more expensive and difficult for Fibula to utilise the aircraft in the circumstances which had occurred did not itself result in frustration.

(d) There was no relevant supervening illegality: (i) none of the decrees on which reliance was placed made operation of the aircraft illegal; (ii) the only obligation of Just-Us was to put the aircraft at the disposal of Fibula in Romania and operate it at Fibula's direction; (iii) Just-Us was under no obligation to do anything until payment under the lease had been made; (iv) only illegality under the law of the place of performance was relevant and no restrictions under Romanian law were imposed until 4 April 2020. Accordingly, it could not be said that performance of the lease had become illegal as at 17 March 2020 but in any event Fibula could not establish any frustrating event".

95. HHJ Pelling KC's decision regarding repudiatory breach needs closer examination in view of the arguments made by the parties before me regarding the effect of the Approvals Clause. At paragraphs 18 to 20 of his judgment, HHJ Pelling KC held as follows:

"[18] The first and primary allegation made by the claimant is that the defendant has wrongfully repudiated the lease, which alleged wrongful repudiation it alleges has been accepted so that the lease came to an end on 17 March 2020. The claimant's pleaded case on this issue is at paragraph 27 of the particulars of claim in these terms:

> 'Contrary to its contractual obligation, as stated in paragraph 11.13 above, from 16 March 2020 onwards, the defendant ceased to have all authorisations required so as to perform flights under the wet lease agreement. The defendant's inability to operate an aircraft lawfully between Romania and Egypt from this date was in breach of the wet lease agreement. On 17 March 2020, the claimant accepted the defendant's repudiatory breach of contract'

[19] In my judgment, this is no more than fanciful because it was the claimant that was under an obligation to obtain all necessary rights, authorisations and clearances

> to enable flights to and from destinations to be operated – see the section of the lease entitled '*Confirmations*', and the second recital to the lease. The lessor's obligations under the agreement are those set out in the lease under the heading, '*Lessor Responsibilities*', and are all concerned with the technical operation of the aircraft.
>
> [20] In any event, the defendant never came under any obligation to operate the aircraft and so could not be in breach, much less a repudiatory breach by not doing so by 17 March 2020. As I have explained, payment by the claimant in accordance with the schedule was expressly agreed to be a condition precedent to the lessor's obligations to '*…perform and operate the flights and any flight under…*" the lease. The first payment under the schedule was due on 18 March 2020, and was not paid prior to or at any stage after that date. It follows that the defendant was under no obligation to operate flights by reason of that failure on 17 March 2020, when it is alleged the claimant accepted the defendant's alleged wrongful repudiation"

96. Just Us contends that HHJ Pelling KC's paragraph 19 is conclusive: it has been held as a matter of construction of the Lease that Fibula was responsible for obtaining necessary approvals from the Turkish DGCA. Fibula contends that HHJ Pelling KC mistakenly elided the lessees with the charterer and that as a result no reliance can be placed by Just Us on the analysis in paragraph 19.

97. HHJ Pelling KC gave judgment on 2 March 2022. On 23 March 2022, Fibula submitted an application to the Court of Appeal for permission to appeal. New counsel had been instructed after the hearing (Mr Bradley KC and Ms Kim were not yet involved), and no appeal was made against the decision to strike out the claim based on repudiatory breach. Rather, counsel then instructed accepted in his skeleton submissions that HHJ Pelling KC could only deal with the case argued before him; he nevertheless argued that there were other flaws in the judgment that justified permission to appeal.

98. Having considered Just Us's statement of reasons for refusing permission, Fibula then obtained further evidence from the Romanian CAA which, it said, showed that, as at 1 April 2020 (the day flights were supposed to commence) Just Us had not obtained certain official approvals that had been noted as outstanding in the Audit Report. Fibula also obtained evidence from the Turkish DGCA to the effect that no application had been made to it for approval of the Lease. In a witness statement made in support of an application to rely on this new evidence in support of the application for permission to appeal, the solicitor for Fibula, Mr Zafer Armutlu, contended:

> "Accordingly, this new evidence (which was not available to [Fibula] at the hearing) shows that [Just Us] failed to make application [to the DGCA] to approve the wet lease"

99. The applications to admit new evidence and for permission to appeal were considered by Males LJ on 15 August 2022. He rejected both entirely. In dismissing the first ground of appeal (which concerned an argument founded on a clause in the Lease that is no longer of any relevance), Males LJ said by way of opening observation "The judge was clearly right to say that it was the applicant's responsibility as lessee to obtain the relevant approvals/ authorisations".

100. Just Us now relies on that statement of Males LJ in further support of its argument that the question of who was responsible for applying for approval from the Turkish DGCA has already been conclusively determined by paragraph 19 of HHJ Pelling KC's judgment.

101. In December 2022, Fibula applied for permission to amend its Reply and Defence to Amended Counterclaim. The amendments sought (pleaded by Mr Bradley KC) were to plead the Audit Defence and the Approvals Defence, which I have sketched out already above; and to plead a new variant of an earlier defence that performance of the Lease was frustrated.

102. That application came on before Dias J on 24 March 2023, by which time the identities of counsel for the parties had settled to how it was before me. One of the grounds of Just Us's resistance to the amendments was that all of them amounted to a collateral attack on the decision of HHJ Pelling KC; were res judicata by virtue of an issue estoppel; and/or were abusive on the principle stated in *Henderson v Henderson* (1843) 3 Hare 100. Dias J allowed the Audit Defence and the Approvals Defence, concluding that neither of them involved the consideration of issues which were the subject of decisions in the sense required for issue estoppel and neither amounted to *Henderson*-type abuse. She refused permission for the other defences.

103. Just Us applied for permission to appeal Dias J's judgment. Once again, the application came before Males LJ; and on 10 July 2023 he dismissed it as having no real prospect of success.

104. In October 2023, Fibula applied to strike out Just Us' counterclaim as having no real prospect of success in view of the Approvals Defence. In December 2023, Fibula served further evidence in support of its summary judgment application in the form of a witness statement from a Mr Haydar Yalcin, a retired Deputy Director General of the Turkish DGCA. He opined in that statement on the prospects of the DGCA ever approving the Lease in the absence of a Romanian CAA Acceptance Letter. The service of that evidence prompted a new dispute over whether this evidence was expert evidence, and in due course Just Us applied for and obtained permission to serve expert evidence from Ms Serap Zuvin in answer to Mr Yalcin's evidence.

105. The application came on before HHJ Klein on 12 March 2024. HHJ Klein refused to grant the application on the grounds that there was more than one way of construing the Approvals Clause and that the correct interpretation of the Lease should be undertaken after consideration of all the evidence.

106. On 13 March 2024 there was the first Costs and Case Management hearing in these proceedings. The parties sought and obtained permission to call expert evidence on Turkish aviation law and regulation, with two carefully-drafted questions to be put to the experts. Fibula's nominated expert was Mr Yalcin, formerly of the DGCA; Just Us's expert was Ms Zuvin. The parties were also granted liberty to apply for permission to adduce expert evidence "as to the construction of the words 'pre agreed successful audit' in the Lease". Mr Dawid told me that such evidence was intended to go to the simple question whether these words had a particular established meaning in the aircraft operating industry.

107. At some point shortly after the hearing before HHJ Klein, Fibula had applied to re-amend its defence to Just Us's counterclaim. HHJ Pelling KC granted permission for the re-amendments on 29 April 2024, after HHJ Klein's judgment. On the same occasion, he gave Fibula permission to call a different expert in the stead of Mr Yalcin, Ms Gulistan Baltacı Hatay.

108. On 21 May 2024 (amended under the slip rule on 24 May 2024), HHJ Pelling KC made an order on the papers permitting the parties to call expert evidence on the construction of the words "pre agreed successful audit" in the Lease. I shall have to return below to the scope of the expert evidence that was ordered.

109. The re-amendments from Fibula were met with an Amended Reply to the Re-Amended Defence to the Amended Counterclaim from Just Us on 28 May 2024. That further round of amendments gave rise to a fresh point of dispute, as follows.

110. At paragraph 9A(b) of its Reply and Re-Amended Defence to Amended Counterclaim, Fibula pleads that references in the Lease to "the Lessee" are references to "one or other or both of" Corendon Turkey and Corendon Malta. It then refers to the two Corendon companies collectively as "Corendon".

111. At paragraph 9B(e1) of the same statement of case (introduced in the 29 April 2024 amendments), Fibula contends as follows:

> "Alternatively, on the proper construction of the first sentence of the Approvals Clause, the parties' principal or essential obligations under the Lease (being (i) [Just Us's] obligation to supply and fly the aircraft, (ii) Corendon's obligation to undertake a variety of operational and regulatory matters incidental to flying the aircraft and (iii) [Fibula's] obligations to pay for the charter of the aircraft) did not come into force until such time as all approvals necessary for conducting flights using the aircraft forming the object of the Lease had been obtained from the civil aviation authorities of each of Turkey, Romania and Malta. Obtaining such approvals was accordingly a condition precedent to the parties' principal or essential obligations under the Lease coming into force"

112. Just Us responded to this plea in its Amended Reply to the Re-Amended Defence to the Amended Counterclaim at paragraph 10A:

> "Paragraph 9B(e1) is denied for the reasons given above. Alternatively and in any event, even of the parties' '*principal or essential obligations*' were as described in paragraph 9B(e1), Turkish CAA approval was not necessary for flights to be conducted under the Lease, as it remained open to Corendon to operate flights using its Maltese Air Operator Certificate (including flights to and from Turkey)".

113. Shortly before the trial, on 5 February 2025, Fibula applied for permission to rely on a further report from Ms Baltacı Hatay. It seems that the further evidence addressed Just Us's contention that Corendon Malta could have operated flights to and from Turkey and thus that Turkish CAA approval for the Lease was not necessary at all. That application was heard by HHJ Pelling KC on 19 February 2025. Shortly before the application, Just Us undertook not to rely on the words "(including flights to and from Turkey)"; HHJ Pelling KC then dismissed Fibula's application to reply on further

expert evidence but ordered the costs of the application to be in the case: see the short report at [2025] 2 WLUK 335.

114. Finally, I should note that on 12 July 2024 HHJ Pelling KC made an order by consent granting the parties permission to call reply evidence from each of their experts in aviation auditing.

115. It is clear from the foregoing that this litigation has been extremely hard fought. Each party has been represented by no fewer than five different barristers; Fibula's position has evolved substantially over time and the nature of its evolving case has been vigorously resisted by Just Us; and Just Us's own analysis has also evolved over time. The Court had by the time of the trial made 31 Orders. The main trial bundle has 6,438 pages; the supplemental trial bundle 66 pages; the three sets of authorities bundles (which do not include further authorities handed up during the course of the trial) contain 22 authorities, numerous extracts from practitioner texts, and various EU regulations occupying another 1,430 pages. It may fairly be said that there cannot be many stones left unturned by each party in their search for victory.

6. The issues for decision

116. Although many issues arise on the pleadings, by the time of the trial, the agreed issues to be determined had been reduced to fifteen, as follows.

No.	Issue
	The Lease
1	Were references to the "*Lessee*" to one or other or both of Corendon Turkey and Corendon Malta, or did such references also encompass Fibula?
2	What is the true construction of the Audit Clause? In particular, what is the meaning of a "*pre agreed successful audit*"?
3	What is the true construction of the Approvals Clause? In particular: a. What approvals were required to be obtained from the civil aviation authorities of each of Turkey and Romania and whose obligation was it to obtain them under the Lease? b. Was the obtaining of such approvals a condition precedent to the Lease coming into force (and therefore Fibula's obligation to make payments under the Lease)? Or was it a condition precedent only to the Just Us' obligations under the Lease? in this respect, what is the meaning of regulation 1(k) of SHT Leasing?
4	What is the scope and extent of Just Us's obligations pursuant to the Line Maintenance Clause?
5	Which party's responsibility was it to request/provide documents for the application to the Turkish DGCA?
	The Audit
6	Was the Audit a "*pre agreed successful audit*" for the purposes of the Audit Clause in the light of the matters identified in the Audit Report?

No.	Issue
7	Did the completion of a successful audit require Just Us (or anyone else) to provide any further documents to Corendon Turkey/Corendon Malta?
8	If the Audit was unsuccessful, what are the consequences?
	The Approvals
9	What (if any) approvals were necessary for conducting flights using the Aircraft from the Turkish DGCA and the Romanian CAA?
10	By when was it necessary for such approvals to be in place?
11	What was needed to be able to obtain such approvals? In particular, was the provision of a line maintenance agreement in Antalya a necessary condition to obtain approval by the Turkish DGCA?
12	What (if any) approvals were in fact obtained and when?
	Lease coming into force/obligation to pay
13	Did the Lease come into force?
14	Did Fibula come under the obligation to pay any of the invoices Just Us sent to it?
	Estoppel/Waiver
15	Is Fibula estopped by convention and/or promissory estoppel from contending that the Lease had not come into force and/or that the Audit was unsuccessful? In particular: a. Is Fibula so estopped by virtue of the steps taken in connection with planning and preparing for operations under the Lease between 24 January and 13 March 2020? b. Is Fibula so estopped by virtue of the representations it made and/or its conduct from at least 30 March 2020 until the hearing before HHJ Pelling KC on 2 March 2022?

7. The expert witnesses

117. The parties each called expert evidence on Turkish law and on the auditing of an aircraft's compliance with applicable regulatory requirements.

Ms Serap Zuvin

118. Ms Zuvin was called by Just Us. She had 36 years' experience of the practice of commercial law in Turkey, with a particular focus on aviation law and had engaged with the DGCA frequently over the years. Her unchallenged evidence was that she had gained a deep understanding of its practices and regulations. Among various badges of recognition from her peers, she had chaired the Aviation Law Committee of the International Bar Association between 2020 and 2022; and she has served as visiting professor of international aircraft leasing and finance law at universities around the world. I found her evidence to be straightforward, clear, and very helpful in understanding SHT Leasing. She was an impressive and professional witness.

Ms Gulistan Baltacı Hatay

119. Fibula called Ms Baltacı Hatay, who is the head of the European Transportation and Infrastructure Team at a partnership of attorneys in Istanbul. Her experience was less specialised than Ms Zuvin's: she specialised in asset finance, securitisations, banking and finance, maritime, admiralty and aviation matters and litigation. There were aspects of Ms Baltacı Hatay's evidence which undermined any confidence I could place in her opinions overall. By the time of the joint report, she contended that Turkish law applied to the Lease, saying.

> "The purpose of the Lease is clearly defined on page 1 of the Lease as follows: 'to provide flight operations to certain operational bases in Türkiye'. Article 170 of 6098 Turkish Code of Obligations ("**TCO**")… states that '*if the validity of a contract is subject to a phenomenon that may or may not be occur, the contract is subject to a suspensive condition. Unless otherwise agreed, a contract subject to a suspensive condition shall become effective only from the moment the condition is fulfilled*". The main purpose and the essential component of the Lease is the operation of the flights dedicated to a specific operation base which is a phenomenon that may or may not occur given that it is unknown whether the necessary DGCA approvals will be able to be obtained. Therefore the Lease should be considered as an agreement subject to a suspensive condition under TCO"

120. There is no wording on page 1 of the Lease that its purpose is "to provide flight operations to certain operational bases in Türkiye". Ms Baltacı Hatay told Mr Dawid in cross-examination that she expressed herself the way she did in her written report because she was simply trying to explain her position. I find that explanation difficult to understand: Ms Baltacı Hatay stated in her report that her command of English was fluent and she had prepared her report in English; there can be no mistaking the meaning of the words, "the purpose of the Lease is clearly defined on page 1 of the Lease as follows: 'to provide flight operations to certain operational bases in Türkiye'". Furthermore, I found it very difficult to understand how the Lease could be construed as if Turkish law applied to it.

121. Accordingly, I have treated Ms Baltacı Hatay's evidence with caution save where she agreed with Ms Zuvin.

Mr Jonathan Gillespie

122. Mr Gillespie was called by Just Us. He had over 14,000 flying hours accumulated over 30 years as a pilot, first in the Royal Air Force and then with Emirates. At Emirates, he progressed over the years to Vice President of Flight Safety. In that role, the airline's Safety Audit Team reported to him and he was responsible for oversight of the audits they conducted. Since 2010, he has worked as a consultant in aviation safety and regulatory compliance; in that role he has held several substantial safety auditing roles including most recently, between 2017 and 2019, acting as safety and compliance adviser to an airline operating in the ACMI market; his role there included helping to resolve audit findings. I found his evidence to be clear, straightforward and expert.

Mr Aytekin Ozdilek

123. Mr Ozdilek was called by Fibula. He had 37 years of experience in aircraft maintenance, engineering and production; since 2019 he has been operating as a freelance auditor authorised by IATA as a Maintenance and Engineering Auditor for the IATA Operational Safety Audit ("**IOSA**"). Mr Ozdilek was in my view also sincerely trying to help the court.

8. The Turkish regulatory framework

Background

124. SHT Leasing forms part of a suite of Turkish regulations governing air transport in Turkey. These closely shadow EU regulations, including in nomenclature. Within SHT Leasing, reference is made to other Turkish and EU regulations, of which two in particular are relevant to this case: SHY 145 and EASA 145.

125. There was a copy of EASA 145 in the authorities bundle (it is to be found in Annex II of Commission Regulation (EU) No 1321/2014) but not of SHY 145. It is not disputed that these two regulations contain rules concerning the approval of organisations and personnel involved in the maintaining the continuing airworthiness of aircraft. They each form part of a pair with SHT-M and EASA Part M respectively (the latter is to be found in Annex I of the same EU Regulation just referenced). The Part Ms contain regulations on the continuing airworthiness of aircraft and aeronautical products.

126. The questions on which the experts were instructed to opine ("**the Expert Issues**") were set out in the order giving permission for their evidence to be called:

> "1. What is the meaning of the requirement that the wet lease must contain a clause stating that '*the agreement will become effective upon approval by the Directorate General of Civil Aviation*' in Article 1(k) Annex 6 of the Turkish Aircraft Leasing Procedures and Principles Directive (SHT Leasing)? In particular, does it mean that, in the absence of approval, the wet lease should not have any legal effect between the parties, or that no flights may be made without the Turkish airspace under such wet lease, or that a domestic lessee cannot conduct flights under such wet lease, or something else, and if so, what?
>
> 2. What does the requirement that the '*the maintenance of the aircraft planned to be leased will be performed by an organisation approved by SHY 145, EASA Part 145 or equivalent*' in Article (1)(ı) of Annex 6 of the Turkish Aircraft Leasing Procedures and Principles Directive (SHT Leasing) mean? In particular, must the Directorate General of Civil Aviation approve the agreement for the maintenance of the aircraft or must it be provided with evidence that maintenance will be conducted by '*an organisation approved by SHY 145, EASA Part 145 or equivalent*', or something else, and if so what?"

127. Ms Zuvin had of course already prepared an individual report for which permission had been given in the context of Fibula's reverse summary judgment application (above, paragraph 104), but the order setting out the Expert Issues gave the parties permission for expert evidence on these issues in the form of a joint report. In the event the joint

report was not agreed, they had liberty to apply for permission to adduce further evidence on any points of disagreement.

128. Despite the terms of the permission (and perhaps because Ms Zuvin had already submitted a single report back in January 2024, which covered ground outside the Expert Issues), both parties instructed their experts to prepare individual reports. These were served sequentially in April and May 2024 and then the experts met and produced a joint report in June 2024.

129. Ultimately, there was so little that the experts agreed on that their joint report might as well have been two separate reports; I suspect that if they had produced a joint report first, they would have gone on to produce the individual reports afterwards pursuant to the permission they had to do just that. It is regrettable that the terms of HHJ Klein's order regarding the way expert evidence was to be provided have not been respected, but in the circumstances I am prepared to consider everything the experts had to say, not least because neither of the parties objected with any particular vigour to departures by the experts from the Expert Issues.

130. The relevant provisions of SHT Leasing, in its official English translation, are as follows[2].

> "**ARTICLE 1** – (1) The objective of this Directive is to set out the principles and procedures for commercial air transport operators to charter and lease aircraft for the purpose of carrying passengers and/ or cargo on scheduled or non-scheduled flights on domestic and international routes for a fee.
> …
>
> **Definitions**
>
> **ARTICLE 4 –** (1) In this Directive, the following terms stand for:
> …
> h) Lessee: A commercial air transport operator that receives the use of an aircraft for a certain period of time under a lease agreement in return for a fee
> ı) Lease agreement: A contractual arrangement whereby a commercial air transport operator obtains commercial control of an aircraft without transfer of ownership
> i) Lessor: A commercial air transport operator undertaking that provides an aircraft for the use of another commercial air transport operator undertaking for a certain period in return for a fee.
> j) Wet-lease: The leasing operation in which the aircraft is operated within the scope of the lessor's operating license
> k) Foreign operator: Commercial air operators licensed by the civil aviation authorities of the member States of the International Civil Aviation Organisation in accordance with ICAO Annex 6 and whose operating license is valid

[2] Note that despite being in translation, the text continues to make use of Turkish letters which do not exist in English: ç, ğ and ı. That last letter is known in English as the "dotless i".

l) Domestic operator: Commercial air transport operators licensed in accordance with the Regulation on Commercial Air Transport Operators (SHY-6A) and whose operating license is valid.

…

ARTICLE 5 – (1) Operators licensed to perform international commercial air transport and meeting the requirements outlined in the relevant annexes of this Directive may lease the aircraft specified in Article 1 of their fleet to each other on Wet Lease… for a certain period.

(2) In Wet-Lease… operations, the technical, operational and other administrative responsibilities of the flight activities performed during the lease period belong to the lessor and the commercial responsibility belongs to the lessee. These matters shall be explicitly stated in the lease agreement.

(3) The agreement signed between the two operators shall enter into force in accordance with Article 6 of this Directive.

…

ARTICLE 6 – (1) Leasing operations to be carried out by the operators:

…

e) Wet-Lease operations by domestic operators from foreign operators shall be conducted provided that an application is made to the General Directorate at least 30 days prior to the start date of the operations, meeting the requirements of Annex-6 of this Directive and approval is obtained…

ANNEX – 6

Wet-Lease operations of domestic operators leasing from foreign operators

(1) In order for such leases to be executed and approved by the [DGCA]:

…

g) In accordance with the [DGCA's] requirements, the foreign lessor's safety, security, and leasing agreement responsibilities must be monitored by the domestic operator, and a monitoring report must be submitted to the [DGCA]

…

ı) The maintenance of the aircraft planned to be leased will be performed by an organisation approved by SHY 145, EASA Part 145, or equivalent.

…

k) In the lease agreement through which the domestic operators Wet-Lease from foreign operators, there must be a clause stating that the agreement will become effective upon approval by the [DGCA] and the foreign operator's civil aviation authority.

> l) A letter from the foreign operator's civil aviation authority addressed to the [DGCA], indicating that all operational responsibilities under the signed agreement will be with the foreign operator, and that technical and operational supervision will be carried out by them in accordance with ICAO rules during this period, must be submitted.
>
> …
>
> n) An application for approval, accompanied by all the information and documents indicated in Annex-6, demonstrating that all requirements have been met, must be submitted to the [DGCA] at least 30 days prior to the planned operation start date"

131. The parties were agreed that the common nomenclature for a wet lease where the lessor was a carrier from a different regulatory area to that of the lessee is "wet lease in".

132. Ms Baltacı Hatay and Ms Zuvin agreed on the following propositions concerning the application under Turkish law of the provisions of SHT Leasing:

    i) In order for Corendon Turkey lawfully to conduct flight operations to and from Turkey under the law of Turkey, the approval of the DGCA had to be obtained.

    ii) For approval to be obtained, an application had to be made to DGCA in a way that met the detailed requirements of Annex 6.

Expert Issue 1: meaning and effect of Annex 6, Article (1)(k)

133. Ms Zuvin considered the effect of paragraph 1(k) twice, once in each of her two reports. In the first report, she concluded that in the event regulatory approval were not obtained, a lease could not be given effect in Turkey; but that the mere fact that flights could not be made would not affect the validity of the lease itself, such being a question for the proper law of the Lease.

134. In her second report, she sharpened the focus of her earlier conclusion, observing that the effect of paragraph (1)(k) was that, in the absence of approval from DGCA, the domestic lessee, being bound by SHT Leasing, would not lawfully be able to perform flights under that wet lease in Turkey. She repeated her analysis that such a situation would not affect the validity of the wet lease itself.

135. In the joint report, she made clear again that her view that the effect of the absence of DGCA approval was a question of English law but again said that the absence of such approval would prevent the domestic lessee from conducting flights to and from Turkey under the Lease.

136. Ms Baltacı Hatay's view in her written report was that from a Turkish regulatory perspective, "if such approval from the DGCA is not obtained then the flight operations cannot be carried out". She then said:

> "On the contractual basis, the meaning of the absence of such approval, in other words the meaning of 'effectiveness' must be determined in accordance with English law"

137. As will be recalled, the Approvals Clause does not use the term "effectiveness": it says, "Agreement will come into force when Turkish and Romanian Civil Aviation Authorities' approvals obtained, as well Malta Civil Aviation Authority".

138. Despite acknowledging that the construction of the relevant clause in the Lease was a matter for English law, Ms Baltacı Hatay nevertheless went on in her written report to construe the Lease as if Turkish law applied to it. By the time of the joint report, her position had become firmer (see above, paragraph 119).

139. With all due respect to Ms Baltacı Hatay, I cannot accept any of this. If English law applies to the Lease, then the meaning of the words used in it must be determined in accordance with English law.

140. The fact is that the words Ms Baltacı Hatay contended were in the Lease are not in the Lease. Without them, her entire theory that Turkish law might apply to the Lease falls away. But as I say, I have no hesitation in rejecting her analysis on this point in any event. In my judgment, Ms Zuvin's analysis is correct: if DGCA approval was not obtained, the effect under Turkish law would be that Corendon Turkey could not operate flights to and from Turkey. The effect of that state of affairs on the parties to the Lease is to be determined by construction of the Lease under English law.

Expert Issue 2: the requirements of Annex 6 Article (1)(ı)

141. It is helpful to introduce at this point a distinction between forms of maintenance. There was no expert evidence directly on this point, but Captain Iuhas and Mr Ozdilek both told me there are two forms of maintenance: base maintenance and line maintenance. The former is the regular maintenance carried out at an aircraft's home base and performed in a hangar; the latter is running maintenance carried out as necessary at other airfields when the aircraft is away from its home base. The distinction the industry draws between these two types of maintenance is recognised in EASA Part 145 (they are specifically referred to in Annex I, Section B, Subpart I, Appendix IV).

142. An organisation's approval to carry out Part 145 maintenance is tied to specific locations stated in its approval certificate. Just Us was granted its approval certificate by the Romanian CAA on 4 March 2020; that certificate showed that Just Us had permissions to carry out maintenance at various Romanian airports including Bucharest International Airport.

143. Ms Baltacı Hatay's evidence was that "it is not possible to obtain the necessary wet lease approval without entering into a line maintenance contract specific to the operation area which is Antalya". She said that it was necessary for an applicant for approval to supply to DGCA a copy of the line maintenance contract entered by the foreign operator with the line maintenance provider; this would permit DGCA to review whether the contract referred to the specific provision of line maintenance services in Antalya. She said that even though the contract had to be provided to DGCA, DGCA did not actually have to approve the line maintenance contract.

144. There is no wording in SHT Leasing itself which suggests that any maintenance (whether line maintenance or any other kind) *must* be provided to the lessor on Turkish soil. Ms Baltacı Hatay did not explain the basis for her opinion, and her evidence boiled down to this statement:

> "In my professional opinion and as per previous experiences, without the submission of a line maintenance agreement specific to the operation area in Türkiye (i.e., Antalya as agreed under WLA [i.e., the Lease]) to DGCA during the application process, DGCA shall not give the necessary wet lease approval to conduct flight operations to or from Türkiye"

145. Ms Baltacı Hatay did not state what previous experiences she had had. Under cross-examination by Mr Dawid, she acknowledged that there was nothing in writing in SHT Leasing regarding how a lessor's compliance with Annex 6 (1)(ı) was to be proved. She said, however, that in practice, an applicant for approval of a wet lease in had to provide an original wet-ink signature version of a line maintenance contract; and that contract had to show an agreement with a provider of line maintenance in Turkey.

146. Ms Zuvin considered this question in her second report. She observed, correctly, that SHT Leasing imposes no express requirement beyond that maintenance of the aircraft is to be carried out by an organisation approved under SHY 145, EASA 145 or equivalent.

147. She also gave evidence that members of her organisation had telephoned the acting head of Flight Operations at the DGCA, Mr Mahir Onur Şener, and been told by him that DGCA requires only to be given some evidence that a maintenance agreement is in place with an approved organisation, not necessarily a copy of any particular contract.

148. At the outset of the trial, Mr Dawid indicated that Just Us wished to put in further evidence relating to the telephone call referred to by Ms Zuvin. I directed that she prepare a witness statement exhibiting the attendance notes and the translations of them; Fibula consented to that evidence being admitted. The exhibits to Ms Zubin's statement were entirely consistent with what had been stated in her report.

149. I address the hearsay evidence first. Fibula' solicitors had written to the Turkish DGCA and, it seems, put before them a copy of what Ms Zuvin had said in her report about the conversation with Mr Mahir Onur Şener and an earlier conversation referred to in her first report, with a Mr Adam Keten (I address this below). On 17 September 2024, the Head of the Flight Operations Section of DGCA had replied, saying that he had "discussed the matter with" Mr Mahir Onur Şener and Mr Adam Keten and that both had "denied making any such statements. They have assured that they have not conducted any transactions that do not comply with SHT-KIRALAMA (i.e., SHT Leasing) instruction".

150. Mr Bradley asked Ms Zuvin whether there was any basis to disbelieve what had been said in that email, to which she replied that she had the record of the conversations referred to in her report. She also did not consider the statement in the email was inconsistent with what had been recorded in the attendance notes. Mr Bradley asked if she was suggesting that Mr Mahir Onur Şener and Mr Adam Keten were lying, to which Ms Zuvin fairly responded that she was not suggesting anything.

151. In my judgment, there was nothing to undermine Ms Zuvin's evidence that the contemporaneous attendance notes made by junior lawyers at her firm were accurate. I accept Ms Zuvin's evidence regarding what was said by Mr Mahir Onur Şener and Mr Adam Keten. Far more important than the comments attributed to Mr Mahir Onur Şener in any event is the fact that there is nothing in SHT Leasing which says that a copy of any maintenance contract needed to be provided to DGCA in support of an application for approval of the Lease. The notion that a copy should be provided arose from Ms Baltacı Hatay, who argued that this must be necessary because (she said) Corendon Turkey had to prove that Just Us had entered a line maintenance agreement with a provider based at Antalya airport. The key issue is whether that contention has any basis.

152. Ms Zuvin was vigorously cross-examined by Mr Bradley regarding her substantive evidence that there was no requirement under SHT Leasing for maintenance to be carried out by Just Us in Turkey as opposed to anywhere else. She remained unmoved: as she put it during one exchange with Mr Bradley:

> "A. Because it is clearly stated in the legislation that the maintenance is lessor's responsibility. So Just Us should do the maintenance. If it is certified to do it, it will do it. If it needs to outsource, it will do it. But it is Just Us responsibility. It doesn't talk about Antalya or Turkey"

153. In answer to a question from me, Ms Zuvin acknowledged that if Just Us were to land the Aircraft at Antalya and it were to require line maintenance there, then the provider of line maintenance would need to have SHY-145 or EASA 145 or equivalent approval. As she said, however, that this is so does not alter the position that nothing in SHT Leasing actually requires that maintenance be carried out in Turkey.

154. I accept Ms Zuvin's evidence on this question:

i) There is no requirement in SHT Leasing that maintenance be carried out in Turkey. The requirement is only that whatever maintenance is carried out, wherever that might take place, it be carried out by an approved organisation.

ii) There is no requirement in SHT Leasing that a person applying to DGCA for approval of a wet lease supply a copy of the contract or contracts that the lessor might have with providers of maintenance.

iii) It makes little sense for the Turkish DGCA to require maintenance of an aircraft in a specific location. What matters is obviously and only that maintenance be carried out by an approved organisation, wherever the maintenance be undertaken.

iv) What Mr Mahir Onur Şener told Mr Zuvin's colleague as recorded in the attendance note is consistent with that. I do not place a great deal of reliance on the attendance note itself, but the fact of consistency with my principal analysis adds a few further grains to the scale.

155. In my judgment, what DGCA requires when considering an application for approval of a wet lease in is merely proof that maintenance of the aircraft planned to be leased will

be performed by an organisation approved under SHY 145, EASA 145 or equivalent wherever that maintenance is to be performed.

Who is to apply for approval from the DGCA?

156. Ms Zuvin's evidence in her first report (for which, of course, Just Us had permission) was that:

i) In practice, it is the domestic lessee which submits the application, not the foreign lessor;

ii) This practice is consistent with the provisions of Annex 6 (1)(g);

iii) The practice was confirmed to a junior lawyer employed by Ms Zuvin's firm by a Mr Adam Keten at the DGCA.

157. Based on the foregoing, Ms Zuvin concluded that it would have been for Corendon Turkey to apply to the DGCA for approval of the Lease.

158. Ms Baltacı Hatay's evidence did not address this question. That is perhaps not surprising, in that the questions she had been asked to answer were the two Expert Issues.

159. Mr Bradley repeated Ms Zuvin's evidence on this point to her in cross-examination and she confirmed it. There was no direct challenge to it: as I have noted above, Mr Bradley suggested to Ms Zuvin that perhaps Mr Adam Keten had not said what he was recorded to have said in the attendance note made by a member of Ms Zuvin's firm, but in my judgment the attendance notes were likely to be an accurate record. Given that Fibula had clearly been aware of the substantive evidence since the time of Ms Zuvin's first report, did not challenge it, and even adverted to it in cross examination without adverse comment, I consider it fair to both parties to take it into account.

160. I accept Ms Zuvin's evidence that as a matter of Turkish law and practice the party under a wet lease in who applies to the DGCA for approval is the domestic lessee, not the foreign lessor. That makes perfect sense to me and is indeed what I would have expected, given that the purpose of SHT Leasing is to regulate precisely the position where a domestic carrier (regulated in Turkey) wishes to enter a wet lease in with a foreign carrier as lessor.

161. I note that of course the construction of the Lease might mean that the obligations imposed on the parties regarding the making of an application to the DGCA or any other regulator might not be consistent with the actual practice. I address this below when construing the Lease.

The effect of Annex 6 Article (1)(n)

162. In the course of answering Expert Issue 1, Ms Baltacı Hatay mentioned the provisions of Article (1)(n), which says that an application for approval of a wet lease in must be submitted to the Turkish DGCA at least 30 days before the planned operation start date. In this case that would mean 30 days before 1 April 2020, i.e., 2 March 2020. In the joint report, she said "Further, if the approval of the Turkish DGCA cannot be obtained

by the time of 1st April 2020, then the suspensive condition of the Lease shall be considered become impossible and the Lease becomes invalid according to Turkish law".

163. Ms Zuvin joined issue with this proposition of Turkish law in the joint report, saying (on the basis of her own previous experience) that the mere existence of the 30-day time period would not have prevented DGCA from considering applications submitted after the 30-day deadline.

164. I reject Ms Baltacı Hatay's evidence about this and accept Ms Zuvin's. Firstly, as I have already said, I do not consider that anyone who knew SHT Leasing would consider that the Lease could become invalid as a matter of Turkish law. The consequences of the absence of approval would have been that Corendon Turkey could not have operated flights to and from Turkey, but the effect on the Lease of that state of affairs is a matter of construction of the Lease under English law. Secondly, Ms Zuvin's evidence – that the DGCA would take a common-sense approach to considering applications rather than mulishly refusing to look at them if the starting date of operations fell less than 30 days after the application was received – strikes me as inherently plausible; and the opposite contention inherently implausible in the absence of an express legal provision that the 30 day deadline was to be strictly enforced.

9. Expert evidence on the "Pre-agreed successful audit"

165. The order made by HHJ Pelling KC on 24 May 2024 was as follows:

> "The parties have permission to adduce expert evidence in the field of aviation auditing as to the construction of the words 'pre agreed successful audit' in the Lease"

166. The scope of that permission is clear: the experts were to assist with whether these words had a customary meaning in the air transport industry. If they did, then arguably that customary meaning is the one parties to the Lease had in mind when they agreed those words.

167. The other issues on which the parties instructed the auditors to give evidence were recorded in their joint report:

> "(i) The meaning of 'audit', particularly whether or not it includes corrective actions;
>
> (ii) The understanding of 'pre-agreed audit';
>
> (iii) The understanding of 'successful audit';
>
> (iv) Meaning of 'scope/ criteria' of an audit;
>
> (v) Scope/ criteria of the audit in this case;
>
> (vi) Meaning of an audit 'finding';

(vii) Implications of levels/ categories of finding;

(viii) Purpose of a 'remediation period';

(ix) Implications of length of the remediation period, particularly on operations;

(x) Meaning of audit 'observations';

(xi) Implications of audit 'observations' in terms of corrective actions and remediation period;

(xii) Implications of the audit finding in this case (JUS-20-01) with reference to the Dangerous Goods labelling in the Cabin Crew Manual;

(xiii) Implications of the audit report reference to Just Us Air not having Romanian Part 145 approval for line maintenance at the time of the audit

(xiv) Implications of the audit report reference to Part 145 Line Maintenance in Antalya; and

(xv) Implications of the audit report reference to Aircraft Reliability Monitoring Programme (ARMP)"

168. Even on a broad reading of the order granting permission for expert evidence from aviation auditors, I find it difficult to discern permission for any of this evidence beyond items (i), (ii) and (iii).

169. The experts were agreed that they had never come across the phrase "successful audit" in practice; and in truth their reports could have stopped there, since if those words did not have a specialist meaning recognised as such in the industry, then the construction of them in the Audit Clause simply falls to me in the usual way: see *The Interpretation of Contracts*, Lewison, 8th Edition, para 5.83 and the case cited in footnote 206:

> "However, where a word or phrase does not have a customary meaning in a particular trade or industry, no assistance is gained by admitting evidence from those practising in the industry of what they think particular words or phrases mean"

170. Each expert nevertheless gave his opinion as to what a "successful audit" might be. Mr Gillespie said that in view a successful audit was a process that met the definition of an audit; Mr Ozdilek said that to be successful in this case, the audit would have had to resulted in a conclusion that Just Us met all the requirements to be found in SHT Leasing.

171. I am not prepared to accept the experts' opinions on the meaning of the phrase "successful audit". This is purely a question of construction of the Lease and is therefore a matter for me: cf *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, [2016] 1 WLR 597, at [49]. I consider, however, that even if there is no common definition of a "successful audit", the business of conducting an audit of the nature conducted here is

a specialised one and whatever the parties can be taken to have meant by "successful" can only be determined by understanding what the audit they intended to have undertaken involved.

The standards against which Just Us/the Aircraft were to be audited

172. There is no dispute that the purpose of the Audit was to assess whether Just Us was in compliance with such of the requirements of SHT Leasing as applied to it. That assessment process is likely to be connected to Corendon Turkey's obligation pursuant to Annex 6 Article (1)(g), i.e.,

> "In accordance with the [DGCA's] requirements, the foreign lessor's safety, security, and leasing agreement responsibilities must be monitored by the domestic operator, and a monitoring report must be submitted to the [DGCA]"

173. As is to be expected, the Audit Report prepared by Corendon Turkey stated that it had been prepared by reference to two Turkish air safety regulations, "SHT Kiralama" (i.e., SHT Leasing) and SHT-M; and two European Aviation Safety Agency regulations, "Air OPS" and "EASA Part M".

174. "Air OPS" is a shorthand for Commission Regulation (EU) No 965/2012, the regulation that lays down technical requirements and administrative procedures related to air operations.

175. EASA Part M is a reference to the section of that name within Commission Regulation (EU) 1312/2014, which contains regulations on the continuing airworthiness of aircraft and aeronautical products (above, paragraph125). I assume that SHT-M is the Turkish equivalent of EASA Part M.

The audit process

176. The experts were agreed that:

i) An audit in this context is "a formal process for identifying and analysing evidence to determine whether the subject of the audit meets the specified requirements".

ii) An audit will specify the requirements against which the subject is to be audited;

iii) When the audit subject does not meet an element of the specified requirements, the auditor will raise a "finding" regarding that element of non-compliance;

iv) Findings are usually categorised by auditors into levels. The levels represent degrees of seriousness.

v) That the normal components of the audit process include an opening meeting between the auditors and those in control of the subject of the audit; a closing meeting; and then an audit report.

vi) Where a finding has been made, one option open to the auditors is to suggest a period within which the non-compliance identified in the finding can be remediated. This period is known as the remediation period.

177. There was disagreement between the experts regarding the significance of the remediation period. Mr Ozdilek's view was that there was a final stage of the audit process called "audit closure"; he described that at paragraph 15 of his report as follows:

> "Audit closure is an administrative action performed by the auditor at the point in the audit process when all findings have been closed by the auditee and such closure has been verified"

178. He did not refer to any external material in support of this conclusion in his first report, but in the joint report he suggested that his position was supported by what he referred to as "the IOSA documents". Fibula relied on this evidence in support of its proposition that there was no "successful" audit.

179. Mr Gillespie, by contrast, maintained that corrective actions were beyond the control of the auditor. In his first report, he referred to guidance contained in a document published by EASA termed "Acceptable Means of Compliance and Guidance Material to Part-ORO". A commonly-used acronym for Acceptable Means of Compliance is "AMC" and I shall use that hereafter. The AMC guidance provides[3]:

> "'Audit' means a systematic, independent and documented process for obtaining evidence and evaluating it objectively to determine the extent to which requirements are complied with."

180. In any event, Mr Gillespie's evidence was that the mere fact an audit report contains a finding requiring corrective action does not make that audit an unsuccessful audit. He said that in his experience most audits included such findings; and he pointed to the fact that the EASA guidance definition of audit makes no reference to the role of corrective actions.

181. IOSA is the International Air Transport Association ("**IATA**") Operational Safety Audit. The "IOSA documents" which apparently formed the basis of Mr Ozdilek's view were not in evidence and whatever precise provisions of any documents that can be described as "IOSA documents" were not identified. Mr Gillespie had extensive experience of undertaking IOSA Audits because he had previously, in his role as Vice President of Flight Safety at Emirates, been as he put it "instrumental in the preparation of the airline for the biennial International Air Transport Association Operational Safety Audit from its inception in 2003".

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[3] In his report, although Mr Gillespie quoted accurately from AMC document, he in fact did not refer to that document itself accurately. The explanation is this: Commission Regulation (EU) No 965/2012 – the Air OPS regulation – contains technical requirements and administrative procedures related to air operations. Annex III of that regulation contains Organisational Requirements for Air Operations – "ORO". Annex III is broken into sections, one of which is called General Requirements. Paragraphs in that section are named ORO.GEN.100, 200 etc. ORO.GEN.200(a)(6) provides that an operator shall establish a function to monitor compliance with relevant requirements. The AMC document from which Mr Gillespie quoted contains guidance on how to comply with the requirements of ORO.GEN.200(a)(6); in his report, Mr Gillespie accidentally referred to the Regulation rather than to the AMC guidance.

182. I note that the IOSA audit appears from both Mr Gillespie's and Mr Ozdilek's description of it to be an audit of an airline – i.e., the entire organisation which operates all the moving parts on the ground and in the air necessary to conduct air transport – whereas the Audit Report refers to audits being conducted against SHT-M/EASA Part M (as noted above, the Part Ms contain regulations on the continuing airworthiness of aircraft and aeronautical products); Air OPS (the regulation that governs technical requirements and administrative procedures related to air operations) and SHT Leasing. Although I had very little evidence about IOSA, it appears from what I did have that an audit against its criteria covers much more ground than one against the criteria particularised in the Audit Report.

183. Mr Bradley cross-examined Mr Gillespie on the proposition that audits ended with a phase called "audit closure":

> Q. Looking at Mr Ozdilek's use of the term "audit closure" as derived from the IOSA programme, the truth is that the definition he adopted simply reflects industry understanding of what "audit closure" means, isn't that right?
>
> A. It is what IOSA interprets it as. It is certainly not industry-wide in my experience.
>
> Q. What does the industry understand by "audit closure"?
>
> A. Well as I say, it is not a word that I intentionally us. I must have mistakenly missed disagreeing with it in the joint report.
>
> Q. Just have a look at [page] 339. This is Mr Ozdilek's report. He sets out these definitions and "audit closure" is the one that we are looking at at paragraph 15. Do you see that?
>
> A. Yes
>
> Q. You didn't take any issue with this in the joint report, did you?
>
> A. As I say, I think I must have overlooked it.
>
> Q. Well, why wouldn't that reflect industry understanding of what "audit closure" is?
>
> A. The industry that I'm most familiar with, that of Europe and the UK, the definition of an audit does not include the term "closure" at all in the regulatory framework.
>
> Q. But isn't the most audit-specific regulatory guidance the IOSA programme?
>
> A. Most certainly not.
>
> Q. What's more audit specific than that?

A. EASA regulation 965. EASA regulation 1341[4]".

184. Mr Bradley did not take Mr Gillespie to the specific "IOSA documentation" that might contain a definition of "audit" which included a concept of "audit closure" as used in the sense that Mr Ozdilek used that term. I cannot place a great deal of weight on Mr Gillespie's apparent acceptance that the IOSA documentation did indeed contain the guidance it is said to contain given that he was not shown it; and in any event, his clear evidence was that he rejected the proposition that the "IOSA programme" contained the "most audit-specific regulatory guidance". That rejection seems to me consistent with the proposition that the IOSA audit is aimed at ensuring a different outcome to the type of audit undertaken in this case.

185. Ms Gonin cross-examined Mr Ozdilek. Having established that there was no reference in the Audit Report to the audit being conducted to standards set by IOSA, Ms Gonin took Mr Ozdilek to Corendon Turkey's Safety Management Systems Manual. That manual contained reference to the Acceptable Means of Compliance and Guidance Material to Part-ORO guidance on how to comply with ORO.GEN.200(a)(6) (i.e., the AMC document relied on by Mr Gillespie in support of his definition of "audit"). Corendon Turkey had used a slightly different form of words to describe an audit in its manual:

> "An audit is a systematic and independent process to objectively review and evaluation management systems, procedures, processes and practices, against established criteria and communicating the results to interested parties with the aim of identifying areas for improvement and assisting in the development of mitigation strategies".

186. Mr Ozdilek agreed with Ms Gonin that nothing in that definition supports the general proposition that an audit is not completed until any findings identified in an audit had been remediated to the satisfaction of the auditor.

Conclusion regarding the point at which an audit is completed

187. I do not accept Mr Ozdilek's opinion that an audit such as the Audit remains uncompleted until such time as any findings have been remediated. In my judgment, the position is as follows:

    i) Commission Regulation (EU) 965/2012 (i.e., "Air OPS") provides by Article 5 that "Operators shall only operate an aircraft for the purposes of commercial air transport operations as specified in Annexes III and IV". Commission Regulation EU 1321/2014 provides by Article 3(2) that "Organisations and personnel involved in the continuing airworthiness of aircraft and components, shall comply with the provisions of Annex I (Part M)…". The responsibility for complying with Air OPS or Part M is placed on the regulated person: when he

[4] I understand Mr Gillespie's reference to EASA regulation 965 as being to Commission Regulation (EU) No 965/2012; and his reference to EASA regulation 1341 as a mistaken reference to Commission Regulation (EU) No 1321/2014 (the one containing Part M and Part 145) (he made the same mistake in answering questions from Ms Gonin in re-examination).

becomes aware that he is not complying with the applicable regulations, then he is obliged to bring himself into compliance.

ii) In the absence of evidence to the contrary, and on the basis that Part M is very similar to SHT-M, I assume that the responsibility for compliance with SHT-M is placed on the regulated person in much the same way as under Part M.

iii) There is no evidence to suggest that auditors commonly accept a responsibility to police compliance by the audited party;

iv) The very fact that the auditors can and do provide a remediation period for such instances of non-compliance as they identify suggests that they consider the audit is over at the moment of signing the audit report. In identifying an area of non-compliance and indicating how serious it might be, the auditor is giving the parties for whom it is preparing the audit the information they require to ensure that the audited party will come into compliance within a reasonable time period.

188. Against that background, I turn now to the construction of the Lease.

10. The construction of the Lease

Principles of construction

189. In *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645, Carr LJ (as she then was) said this:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900*; Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;
>
> ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the

importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an

> iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated".

190. Those are the principles I shall apply below.

10a. Were references to the "Lessee" to one or other or both of Corendon Turkey and Corendon Malta, or did such references also encompass Fibula?

191. The recitals clearly provided that:

> "For the purposes of this Agreement, Lessee (B) and Lessee (C) shall be defined as the party requiring Wet Lease (ACMI) capacity, Lessor shall be the party that supplies and operates the Aircraft on an Wet Lease (ACMI basis, and collectively shall be defined as the Parties"

192. In my judgment, the first part of this issue is straightforward: references to "the Lessee" were to both Corendon Turkey and Corendon Malta, who were together "defined as the party requiring Wet Lease capacity".

193. Corendon Turkey, Corendon Malta and Just Us were expressly defined as "the Parties"; Fibula, by contrast was defined as the Charterer, for whose benefit the Parties had entered the Lease:

> "Parties herein, decided to get into a Wet Lease Agreement to provide charter flights in the benefit of Fibula… herein as Charterer".

194. The distinction between the Corendon companies on the one hand and Fibula on the other is maintained throughout the Lease: there are no obligations even arguably placed jointly on the Lessee and Fibula. There is one area of slight confusion in the "Lessee Responsibilities" clause: as noted above, there is an apparent contradiction between the roles of Lessee and Charterer, in that the first clause under the heading reads:

> "- Commercial control of the Aircraft during the Lease Period shall be vested in the Charterer. The Lessee shall, subject to operational and technical considerations as specified in Article 11 [the Lease does not contain any numbered Articles, so this reference appears erroneous], be solely competent to cancel, delay or re-route a Flight for commercial reasons".

195. Such confusion as exists in that clause, however, is over which of the Lessee and Fibula has the power to control the Aircraft in certain circumstances: there is no suggestion here that the definition of Fibula and the Lessee might overlap.

196. As I noted above, one of the arguments made by Just Us is that since HHJ Pelling KC and then Males LJ elided Fibula and the Lessee, therefore it has already been determined that the definition of Lessee must encompass Fibula.Mr Dawid did not press this argument particularly hard in his oral submissions, but in any event I cannot accept it:

i) The Approvals Defence turns on the proposition that Just Us was obliged to obtain certain documentation necessary for an application to the DGCA, i.e., it cuts across the statements made by HHJ Pelling and Males LJ;

ii) Dias J held in terms that Fibula was not prevented by issue estoppel from running the Approvals Defence;

iii) It has thus already been decided that Fibula can run this argument: the judgment of HHJ Pelling KC had not already and does not now determine the outcome to that argument.

197. In my judgment, the definition of "Lessee" does not encompass Fibula. Fibula is the Charterer. It has powers and obligations in that capacity, it can instruct the Lessee to behave in certain ways, and it must pay Just Us the consideration which might in other circumstances have been paid by the Lessee. But it is not the Lessee.

10b. What is the true construction of the Audit Clause?

198. In my judgment, it is not possible to understand what the audit referred to in the Audit Clause is from the mere terms of the Lease. There is no definition that casts any light; no contractual provision requiring any such audit to performed; and no guidance as to the timing of any such audit.

199. Despite the absence of any terms in the Lease containing any details of the audit, the fact is that both Corendon Turkey as auditor and Just Us as audited party got on with the Audit without demur: it seems therefore that they must both have been expecting to conduct the Audit. No-one has ever suggested that the Audit was not the "pre agreed audit". All parties to the lease knew that Corendon Turkey was going to apply for approval from the DGCA. From these surrounding circumstances, including the behaviour of Corendon Turkey and Just Us in connection with the Audit when it actually took place, it seems to me, and I so hold, that what the parties can be taken to have intended in the Lease was that an audit would be performed of broadly the type which was in fact performed, for the purposes that the Audit was actually undertaken.

200. In order to determine how that pre-agreed audit might be "successful", it is accordingly necessary to consider what the parties may be taken to have understood about the audit they were agreeing should be performed before the Due Payment became due from Fibula.

201. Mr Bradley submitted that an audit, to be successful, had to involve the correction by the audited party of any findings made during the audit.

202. Mr Dawid pointed to the fact that the Lease provided that any aircraft delivered for use pursuant to the Lease "shall meet international airline standards" and submitted that a successful audit was one which did not result in any findings that would prevent the Aircraft from commencing operations on 1 April 2020.

203. Given that the purpose of the intended audit was to provide assistance to Corendon Turkey in making its application for approval of the Lease to the Turkish DGCA, in my judgment a "successful audit" for the purposes of the Audit Clause must be taken to mean an audit that permitted Corendon Turkey to make its application for approval to

DGCA with the legitimate expectation that there were no grounds for concern that approval would not be forthcoming. In other words, a successful audit viewed from the point in time the Lease was concluded would be one that reassured Corendon Turkey that Just Us complied with such requirements of SHT Leasing as applied to it. Such audit would permit Corendon Turkey to prepare its own report to DGCA regarding "the foreign lessor's safety, security, and leasing agreement responsibilities".

10c. What is the true construction of the Approvals Clause?

What approvals had to be obtained?

204. The first sentence of the first paragraph of the Approvals Clause refers to the obtaining of approvals from the Turkish, Romanian and Maltese Civil Aviation Authorities.

205. I have already addressed above what was required from the Turkish DGCA: approval pursuant to SHT Leasing. I address now what was required from the Romanian CAA.

206. The second sentence of the first paragraph of the Approvals Clause refers to an obligation on Just Us:

> "Lessor will provide Romanian CAA acceptance letter but not later than 30 days after agreement execution together with all requested docs for Turkish CAA application"

207. The second paragraph of the Approvals Clause, it will be recalled, provides:

> "Lessor will provide a statement from its own Civil Aviation regulatory which confirms all operational responsibilities will on Lessor account and all operational and technical surveillance will be done by themselves according to EASA/ ICAO rules during the lease term"

208. Mr Bradley termed this statement "**the Operational Responsibilities Statement**" and I adopt that label. It closely follows the wording of SHT Leasing Annex 6 Article (1)(l), which requires an applicant for approval to submit "a letter from the foreign operator's civil aviation authority addressed to the [DGCA], indicating that all operational responsibilities under the signed agreement will be with the foreign operator, and that technical and operational supervision will be carried out by them in accordance with ICAO rules during this period".

209. Fibula's case, introduced by the Defence and Re-Amended Reply to Amended Counterclaim para 9B(e2), is that on the proper construction of the Approvals Clause the Romanian CAA Acceptance Letter referred to in the first paragraph is the same document as the "Operational Responsibilities Statement". Mr Bradley submitted that one could reach this conclusion from the general context, and also from the way the term "Romanian CAA Acceptance Letter" had made its way into the Lease:

    i) In an earlier draft, what was referred to was a "Romanian CAA approval letter";

    ii) Someone from Just Us had then amended that to "Romanian CAA acceptance letter".

iii) There was no dispute that the Romanian CAA does not provide any kind of approval to lessors of wet leases out (i.e., a wet lease where the lessor is a Romanian carrier and the lessee is from a third country); therefore the amendment must reflect a mutual understanding that what was required was a letter containing the Operational Responsibilities Statement.

210. Mr Dawid did not strenuously object to the proposition that there is only one document from the Romanian CAA being referred to the Approvals Clause. In my judgment, the Approvals Clause places an obligation on Just Us to obtain one thing: a letter from the Romanian CAA containing the Operational Responsibilities Statement. The drafting of the two separate paragraphs of the clause suggests at first glance that there were two separate documents required, but the context shows that this cannot be right. There was no need for a Romanian CAA approval for the wet lease, because no such approval mechanism exists.

211. As to what approvals might be required in Malta, I heard no expert evidence on this, and the parties were content to have their dispute resolved by reference to the requirements of the Turkish DGCA and Romanian CAA only. I note in passing only therefore that Regulation (EC) No 1008/2008 Article 13(2) provides that "a wet lease agreement under which the Community air carrier is the lessee of the wet-leased aircraft shall be subject to prior approval in accordance with applicable Community or national law on aviation safety".

212. In summary, having regard to the regulatory background concerning the approval of wet leases in, the approvals required under the Approvals Clause were as follows:

i) From the Turkish DGCA, approval pursuant to SHT Leasing.

ii) From the Romanian CAA, no approvals were required; but a letter containing the Operational Responsibilities Statement was required.

iii) From the Maltese CAA, approvals probably would have been required for Corendon Malta in its capacity as lessee under a wet lease in, pursuant to Article 13(2) of Regulation (EC) No 1008/2008.

Who was obliged to obtain these approvals?

213. The Lease contained three occasions on which "the Lessee" either stated that it had already obtained something from its regulator or promised to obtain something from its regulator:

i) In the recitals, the "Lessee" stated that it had obtained "all approvals and authorizations, if needed, to enter into this Agreement and wet lease the Aircraft from Lessor".

ii) In the "Confirmations", the "Lessee" confirmed that "all traffic rights, authorizations and clearances for entering into this Agreement and assuming obligations under this Agreement will be obtained" and that it would "obtain and maintain in full force and effect all authorizations for the time being required by all applicable laws, including the laws or regulations of the state to which/

> from which Flights to be performed or any other applicable jurisdiction, to enable Lessor to perform its obligations under this Agreement"

iii) On page 9, it promised to secure "all necessary permissions and approvals from its local authorities (unless such approvals should be obtained by Lessor under the applicable law)…"

214. In my judgment, these clauses clearly show that the party to the Lease obliged to obtain approval from the DGCA was Corendon Turkey; and (for completeness), the party obliged to obtain approval from the Maltese CAA was Corendon Malta. Insofar as concerns Corendon Turkey, this construction of the Approvals Clause also accords with the practice in Turkey. As the parties obliged to obtain the approval, in my judgment, it naturally follows that the Corendon companies were also the parties obliged to request such documents as might be needed to make the application.

215. As to the Romanian CAA letter containing the Operational Responsibilities Statement, this was to be obtained by Just Us.

By when were approvals to be obtained?

216. This breaks down into two questions:

i) By when was Just Us to obtain the letter from the Romanian CAA containing the Operational Responsibilities Statement?

ii) By when were Corendon Turkey and Corendon Malta to obtain approvals from the DGCA and the Maltese CAA respectively?

217. As is clear from the wording of the Approvals Clause, Just Us was obliged to obtain the Operational Responsibilities Statement within 30 days of the Lease being executed, i.e., by 8 January 2020.

218. There is nothing in the wording of the Approvals Clause to suggest that the 30-day period for provision of the Operational Responsibilities Statement was of the essence of the Lease. Section 41 of the Law of Property Act 1925 provides:

> "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules"

219. In *United Scientific Holdings v Burnley Borough Council* [1978] AC 904, Lord Simon said at 943 – 944:

> "I cannot read section 41 of the Law of Property Act as meaning other than that, whenever contractual stipulations as to time fall for consideration in any court, they shall not be construed as essential, except where equity would before 1875 have so construed them - i.e., only when the strict observance of the stipulated time for performance was a matter of express agreement or of necessary implication.
>
> In my view the modern law in the case of contracts of all types is correctly summarised in Halsbury's Laws of England, 4th ed., vol. 9, para. 481, p. 338:

> 'Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; ...'"

220. There is nothing about the Lease that compels the construction of the 30-day obligation on Just Us as an essential obligation. Continuing breach of it perhaps could have resulted in one of the other parties accepting that breach as repudiatory; but absent such an event, breach of that time stipulation by Just Us would, if loss could be shown, perhaps sound in damages only.

221. The more significant question is by when approvals were to be obtained from DGCA and the Maltese CAA. In my judgment, given that flying was due to start on 1 April 2020, then approvals needed to be in place by no later than 31 March 2020.

Was the Approvals Clause a condition precedent?

222. The first sentence of the first paragraph of the Approvals Clause reads:

> "Agreement will come into force when Turkish and Romanian Civil Aviation Authorities' approvals obtained, as well Malta Civil Aviation Authority"

223. Fibula had two alternative cases on how this part of the Approvals Clause is to be construed:

i) Either the effect of it was that the Lease as a whole could not come into force until all the approvals necessary had been obtained: the obtaining of those approvals was a condition precedent to the Lease coming into force (see paragraph 9B(e) of the Reply and Re-Amended Defence to Amended Counterclaim); or

ii) The effect of it was that the parties' "principal or essential obligations" under the Lease did not come into force until such time as approvals were obtained, the said obligations comprising (i) Just Us' obligation to supply and fly the Aircraft; (ii) The Corendon companies' obligations to undertake a variety of operational and regulatory matters incidental to flying the Aircraft and (iii) Fibula's obligation to pay for the charter of the Aircraft (see paragraph 9B(e1) of the Reply and Re-Amended Defence to Amended Counterclaim).

224. The building blocks of Fibula's argument were as follows. First, as a matter of law, a term in a contract is a condition precedent if it provides that the contract is not binding until the specified event occurs: see *Chitty*, 35th Edition, para 4-197, to that effect.

225. Second, before the occurrence of the specified event, there is no duty on either party to the contract to render the principal performance promised by him: *Schweppe v Harper* [2008] EWCA Civ 442 per Dyson LJ at [64].

226. Third, it was said that there is no conceptual difficulty in having a binding contract in place, which contract nevertheless serves to suspend some or all of the obligations of one of the parties, pending fulfilment of a relevant condition. The authority for this is

Gold Group Properties v BDW Properties Ltd [2010] EWHC 323 (TCC), [2010] BLR 235, per Coulson J (as he then was) at [58]. In that case it was contended by the defendant builder ("Barratt") that a development agreement contained a condition precedent: if the anticipated sale price of the houses to be constructed fell below a minimum level, then Barratt was under no obligation to build the houses at all. On his way to rejecting this argument, Coulson J said at [58]:

> "Contracting parties may enter into an immediately binding contract, but subject to a condition which suspends all or some of the obligations of one or both parties pending fulfilment of the condition: see, by way of a simple example, *Smallman v Smallman* [1972] Fam 25. Like exclusion clauses, such terms must be clear and unequivocal: see, again by way of example only, *Nelson Line (Liverpool) Ltd v James Nelson & Sons Limited* [1908] AC 16"

227. Fibula relied on the fact that Just Us's own case in the Amended Reply to the Re-Amended Defence to the Amended Counterclaim was that obtaining approvals of the type described in the Approvals Clause "was a condition precedent to [Just Us's] obligations under the Lease (i.e., the words '*Agreement will come into force*' are to be read as referring to [Just Us's] obligations coming into force)". Mr Bradley said that it could therefore be seen that the parties were in agreement that the Approvals Clause represented a condition precedent; it was simply on the ambit of the condition that they disagreed.

228. As to the ambit, Fibula's position at trial was that some parts of the Lease clearly were intended to be binding before any approvals had been obtained from any of the CAAs including the DGCA (for example, the obligation on Fibula to pay the Deposit after the "pre agreed successful audit" and the obligation on Corendon Turkey to obtain the approvals from DGCA); and, that being so, it must be the case that the parties' agreement was that unless and until approval was obtained from the Turkish DGCA, what Mr Bradley called their "principal obligations" were not binding.

229. Despite that submission (which effectively involves abandoning the case pleaded at paragraph 9B(e) of the Reply and Re-Amended Defence to Amended Counterclaim), Mr Bradley still made an argument that the effect of the Approvals Clause might be to vitiate the Lease. He pointed to the second recital:

> "Subject to the conditions and pursuant to the terms of this Agreement and subject to any applicable approvals, Lessor agrees to wet lease and operate the Aircraft with its own or [sic] cabin and cockpit crew for the term on ACMI basis"

230. He said that this recital "purports to vitiate the very contractual accord to which Just Us otherwise signed up. If the relevant approvals are not in place, then Just Us does not even agree to lease out the plane, let alone operate it". He said that this recital was entirely consistent with what he said was the "plain meaning" of the Approvals Condition.

231. Given the pleaded case and the fact that no part of it was formally abandoned, I accordingly treat Fibula's case as being that either of its two alternative contentions are possible: the Approvals Clause is either an agreement to treat the entire Lease as never having come into force; or it is an agreement to relieve the parties of any obligations that are predicated on approvals having been obtained.

232. Just Us' case on the scope of the obligations relieved if approvals were not obtained was that the Lease did not terminate; but rather that it was relieved of its obligation to put the Aircraft at (ultimately) Fibula's disposition if none of the regulatory approvals required to operate the Aircraft were obtained.

233. Just Us said that the Approvals Clause (or at least the first paragraph of it) had been inserted into the Lease only because SHT Leasing required the presence of such a clause (this contention was not controversial). Given that the clause was present to give effect to a statutory provision, said Mr Dawid, so that clause had to be interpreted in the light of the statutory provision to which it was intended to give effect: cf *Lewison*, 8th Edition, at para 4.41:

> "Thus where a contract is intended to give effect to a statutory provision, it should be interpreted in the light of the statutory provision to which it was intended to give effect. Similarly, a contract which was intended to implement a directive of the EU was construed so as to be compatible with the directive. However, although a contract will be construed in the light of the legislative background, ultimately a question of interpretation will be resolved by construing the contract itself…"

234. Mr Dawid's primary submission was that I should construe the Approvals Clause by reference to Ms Zuvin's evidence. He also said that the two alternative constructions contended for by Fibula are inconsistent with the other terms of the Lease.

235. As to Fibula's first contention, that the whole Lease did not come into force, Mr Dawid submitted as follows.

i) In the recitals, Corendon Turkey and Corendon Malta declared that they had already obtained all the approvals and authorisations necessary to enter the Lease; whereas Just Us' agreement to lease the Aircraft was expressly "subject to any applicable approvals"

ii) Fibula's obligation to pay the Deposit arose on signature; thus it cannot have been conditional upon approvals being obtained;

iii) Fibula's obligation to make the Due Payment in the specified tranches and on the specified dates was expressly stated to be due "unconditionally and without any set off" "following the pre agreed successful audit". Mr Dawid referred to this clause as a "hell or high water clause", borrowing the phrase from Foxton J's judgment in *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm), [2021] 1 CLC 795 at [8]. In that case, the dry lease of an aircraft had been drafted to ensure that the obligation to pay rent endured "in almost any conceivable circumstances"; the payment clause provided that the obligation was "absolute and unconditional irrespective of any contingency whatsoever", and for good measure the clause went on to provide a non-exhaustive list of such contingencies.

iv) The Lease expressly described the obligation to make the Due Payments as a condition precedent; but did not so describe the Approvals Clause, which appears under the heading "other conditions"; if the parties had intended the Approvals Clause to have the effect of making the entire Lease not come into force, one would expect it to say so.

236. As to Fibula's alternative case that the Approvals Clause was a condition precedent to the parties' performance of their "principal obligations", Mr Dawid submitted:

i) The definitions of the "principal obligations" identified by Fibula were ill-defined and effectively self-serving, being those which Fibula now contends should be dependent on approvals but having no basis in the Lease itself;

ii) The only obligations that did not have to be performed in the absence of approvals were those of Just Us, as it had made clear in the recitals by saying that its agreement to lease the Aircraft was "subject to any applicable approvals". Fibula's contended for construction would make no commercial sense, as it would allow Corendon and Fibula in effect to cancel the Lease, with no consequences, by the simple expedient of not applying for approvals.

Analysis

237. It is clearly correct that contracting parties may enter an immediately binding contract that contains a condition suspending performance of some or all of their obligations to each other pending fulfilment of that condition: *Gold Group Properties* per Coulson J. at [58]. One of the examples given by Coulson J of such a contract was the well-known family case of *Smallman v Smallman* [1972] Fam 25. In that case, a divorcing couple, the Smallmans, entered an agreement dividing up their property. The letter proposing the agreement from the husband's solicitors said that the agreement was "dependent… on the approval of the court". The wife accepted the husband's terms; but then in due course the husband sought to resile from the agreement, contending that there was no agreement at all until the court approved it.

238. Lord Denning MR, with whom Phillimore and Orr LJJ agreed, said this at 31G – 32C:

> "In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow. Orr L.J. has drawn my attention to a useful analogy. Many contracts for the sale of goods are made subject to an export or import licence being obtained. Such a condition does not mean that there is no contract at all. It is the duty of the seller, or the buyer, as the case may be, to take reasonable steps to obtain a licence. If he applies for a licence and gets it, the contract operates. If he takes all reasonable steps to obtain it, and it is refused, he is released from his obligation. If he fails to apply for it or to do what is reasonable to obtain it, he is in breach and liable to damages: see *Brauer & Co (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd.* [1952] 2 T.L.R. 349 and *A. V. Pound & Co. Ltd. v. M. W. Hardy & Co. Inc.* [1956] A.C. 588. Similarly when a man agrees to buy property 'subject to the title being approved by our solicitor' there is a binding contract. There is an implied promise by the buyer that he will appoint a solicitor and shall consult him in good faith, and that the solicitor shall give his honest opinion. If the solicitor honestly disapproves, the contract does not bind. But until he does disapprove, the contract binds:

> see *Hussey v. Horne-Payne* (1879) 4 App. Cas. 311, 322 and *Marten v. Whale* [1917] 2 K.B. 480, 486. *Branca v. Cobarro* [1947] K.B. 854 is on the same lines.
>
> Applying these principles, it seems to me here that the parties reached agreement on all essential matters 'subject to the approval of the court.' On the faith of the agreement, the wife and the other man made confession statements. Thereupon it was the duty of the husband to seek the approval of the court."

239. The contracts referred to by Lord Denning MR in *Smallman* all made clear who had the obligation to apply for a license. Such clarity permits the parties to see whether the non-occurrence of the event upon which performance of the contract depends is an anticipated potential failure, for which they have made provision; or simply a breach of contract, for which damages are payable by the party in breach. I respectfully agree with Coulson J in *Gold Group* at [58]: terms having the effect of suspending a party's obligations "must be clear and unequivocal".

240. In my judgment, the absence of approvals from DGCA and/or the Maltese CAA would certainly be understood by the parties at the moment they contracted as preventing any flights. The regulatory background, which the parties knew, made that clear. Even if the Approvals Clause had not been present, the regulatory requirement for approval would have had exactly the same effect: the Approvals Clause viewed on its own does little more than describe the reality created by the regulatory position in Turkey and Malta.

241. Although the parties did not refer me to it, I note that this case has some similarities with *Galaxy Aviation v Sayegh Group Aviation* [2015] EWHC 3478 (Comm). In that case, the claimant and defendant entered a lease of four aircraft in November 2010. The lease contained no date for delivery, but in any event none of the aircraft was ever delivered to the lessee. The aircraft were registered with the CAA of Burkina Faso.

242. Shortly after the lease was entered the Burkina Faso CAA cancelled the registration of four of the five aircraft described in the lease on the grounds that there had been "persistent non-respect of operational air-worthiness procedures". The lessee was unconcerned by all this; it suited it not to take delivery of the aircraft (and, under the terms of the lease, starting to pay for them) at that time.

243. For just over a year there was relatively inconsequential and limited correspondence between lessor and lessee regarding the aircraft and their airworthiness. In December 2011, one of the aircraft obtained appropriate certification and the lessee indicated that it wished to make arrangements for delivery of it once the lessor obtained an appropriate AOC. In January 2012, the lessor indicated that it had sold the aircraft and suggested (wrongly) that the lessee had been in breach of the terms of the lease by not having paid any rent. In April 2012, the lessee purported to accept what it said was the lessor's repudiatory breach of the lease and subsequently sued for damages

244. The claim was dismissed on numerous grounds, but one of the arguments concerned whether the lessors had been in breach of these clauses:

> "[Article 2] The lease term shall be considered for minimum of 150… block hours per Month per aircraft, as from the commencement date for each aircraft will be the delivery date stated on the Exhibit A Aircraft Delivery form…
>
> [Article 3] LESSEE shall indicate the schedule to be flown prior to the execution of this agreement…"

245. The case against the lessor on this point was said by the judge, Andrew Smith J, to amount to being that the lessor failed to deliver the aircraft on time for the lessee's commercial purposes; and that the lessor did not cooperate with the lessee in ensuring that the lease agreement could be performed. Although I recognise that his judgment on this point was obiter, it is nevertheless interesting to see how the judge answered the question.

246. Article 18 of the lease provided:

> "This agreement is subject to the laws of England and it is also subject to the approval of civil aviation authorities of the countries where it operates"

247. At [138], Andrew Smith J said this:

> "What is the impact of article 18? It provides that 'the agreement' is 'subject to the approval of the civil aviation authorities of the countries where it operates', but it cannot be interpreted literally: Civil Aviation Authorities would not be expected to express approval for the terms of the lease. It must be intended to refer to them giving approval for the operation of the aircraft under the lease. I therefore would understand article 18 to provide that the performance of the lease, the provision of the aircraft and the corresponding obligation of the lessee to pay hire, did not come into force unless and until the authorisations had been obtained. This makes commercial sense in that it protects the lessee from taking delivery of aircraft, and so having to pay for aircraft, which it could not operate. But the approval of the authorities 'of the countries where it operates' could not be obtained until the lessees had provided a schedule identifying those countries. [The lessee] contends that the lease agreement should not be so interpreted because (as it is pleaded) 'the approval of the relevant civil aviation authorities would have been obtained prior to the operation of the aircraft', but that does not, to my mind, respect the wording of article 18. If this be so, then article 18 qualifies the lessors' obligation to deliver the aircraft: they were not obliged to deliver them until a reasonable time after the authorisations were obtained…"

248. In that case, then, the court found that a clause making "this agreement… subject to the approval" of regulators operated as a condition precedent to the parties' performance of their obligations.

249. The Approvals Clause in this case clearly fits into a different context, but in my judgment it is best understood as a condition precedent to the performance of obligations dependent upon the approvals being in place, not a condition precedent to the validity of the Lease as a whole:

i) The Lease imposes an obligation on Fibula at the moment of execution to pay the Deposit; but there is no clause in the Lease that addresses repayment of the Deposit in the event that approvals are not obtained.

ii) Furthermore, the obligation imposed on Fibula to make the Due Payment is expressly made conditional only upon the completion of the successful audit: one would expect that if the payment was not due at all in the event approvals were not obtained, that circumstance would be addressed.

iii) Similarly, one of the "Confirmations" given by Corendon Turkey and Corendon Malta was that "all traffic rights, authorisations and clearances for entering into this Agreement and assuming obligations under this Agreement will be obtained". It makes no sense for the Lease not to come into force in the event that Corendon Turkey and/or Corendon Malta breach their promise to obtain the very approvals that are a condition precedent to the Lease coming into force.

250. Accordingly, in my judgment, the clause here is like that in *Smallwood,* in that the Lease clearly came into effect when it was executed; but if the vital approvals were not obtained by 31 March 2020, the parties had agreed that no further performance would be required. In reaching such agreement, the parties merely accepted the reality that without the specified approvals, the Flights contracted for would not be possible.

251. The accrued rights of the parties from the time the Lease was in force would not, of course, be affected by such an arrangement absent specific provision regarding accrued rights.

10d. The Line Maintenance Clause/the Operating Base Clause

252. Fibula's arguments made in support of the Audit Defence is that there was no successful audit because Corendon Turkey was never sent certain documents referred to in the Audit Report. The documents in question include a concluded line maintenance contract with service providers in Antalya. Fibula says that the Line Maintenance Clause makes it essential that Just Us entered a line maintenance contract with someone in Antalya; it also says that the Operating Base clause shows that the parties had agreed that base was to be in Antalya, such that base maintenance also had to be carried out there. So, the argument goes, the Lease shows that maintenance of some kind had to be carried out in Turkey; and thus the DGCA would have to be satisfied that appropriate maintenance contracts were in place; but they were not, and therefore there was no successful audit.

253. I have already found that there is no obligation on a person applying for approval under SHT Leasing to prove that it has entered a line maintenance contract: see above, paragraph 155. That being so, I do not consider that the construction of the Line Maintenance Clause is relevant to the issues before me. In any case, the clause appears to me to mean what it says: Just Us is responsible for bearing all line maintenance costs and Just Us shall provide and bear the cost of sufficient numbers of maintenance staff both at base and abroad (i.e., sufficient numbers to carry out base maintenance and line maintenance).

254. As to the "Aircraft Base" clause, Mr Ozdilek and Ms Baltacı Hatay both suggested that the base of the Aircraft was to be Antalya; from this it could be said that Corendon

Turkey would have to satisfy DGCA that Just Us would have an appropriate maintenance contract with someone in Antalya at its base.

255. I do not accept that the Aircraft Base clause determines that the contractually appointed main base of the Aircraft for the duration of the Lease was to be Antalya. In my judgment:

i) The Flight Schedule provided that flights began and ended every day at Bucharest International Airport.

ii) The Aircraft Base clause provided that "the aircraft will be based in an airport which will be informed by charterer". It can be seen from the Flight Schedule that at the time of contracting, the base was Bucharest International Airport. That was the base "informed by charterer".

iii) Corendon Turkey/Corendon Malta had the power to change the operating base of the Aircraft on 15 calendar days' notice; but that was a latent power at the time of contracting and there is nothing to show it was ever exercised.

iv) The only wording that begins to suggest the "Operating Base" of the Aircraft was, at the time of conclusion the Lease, agreed to be Antalya is this:

> "Lessee and Lessor agree that in case the 'Operational Base' is changed after the date of this Agreement from Antalya (IATA:AYT), Turkey to any base of CAI (Corendon Airlines) or CXI (Corendon Airlines Europe) all operated flight hours with CAI/ CXI callsign with aircraft from any base will be in total 2.100 MGBH. Positioning flight from any European Airport to the Operating Base shall be operated under Lessee's call sign and cost. Positioning flights can be planned as commercial flights according Lessee's flight plan".

v) Given the wording of the Flight Schedule, it makes no sense for the Operating Base to be Antalya: flights always started and ended the day in Bucharest and the Aircraft did not even visit Antalya every day. If Antalya were the operating base, there would need to be positioning flights every single day to get the Aircraft to Bucharest ready to make its first flight with customers on board. That strikes me as commercially extremely unlikely. I can only conclude that there is an infelicity in the drafting of the clause I have just set out, quite possibly one which derived from the fact that the Lease was derived from one originally prepared by Corendon Turkey.

256. Having now construed the Lease, I turn to the Audit Defence and the Approvals Defence.

11. The Audit Defence

257. As already noted above, before undertaking the Audit on 26 and 27 February 2020, Corendon Turkey wrote to Just Us on 13 February 2020 with a suite of checklists that would be used during the audit. It requested various technical documents. In the list of requested documents, paragraph 14 provided as follows:

> "Maintenance Service Supplier Agreements for Antalya is mandatory **(This item have special importance in order to apply wet-lease operation to Turkish DGCA)**"

258. I have already found above that there was nothing in SHT Leasing which requires a foreign lessor under a wet lease in to undertake maintenance operations on Turkish soil; and there is nothing to make provision of maintenance service supplier agreements mandatory. To the extent that the audit team of Corendon Turkey thought otherwise (as appears to have been the case from paragraph 14 of their list of documents sought from Just Us), they were in my judgment acting under a mistaken belief that these requirements existed in SHT Leasing.

259. Just Us told the audit team that:

i) Just Us was expecting shortly to be approved by the Romanian CAA to undertake its own maintenance compliant with EASA 145 standards;

ii) Just Us' existing maintenance requirements were met by three EASA 145 approved contractors: Aerostar, Dedalus and MyTECHNIC; and

iii) Just Us was intending to enter a further line maintenance contract with an SHY 145 approved contractor in Turkey to cover any line maintenance requirements arising when the Aircraft was in Turkey.

260. The material parts of the Audit Report read as follows:

> "In order to verify the company is currently in compliance with Turkish wet lease-in regulations, an audit has been performed in Romania. The audit report is presented in two sections below; Section A – Operational Audit and Section B – Technical Audit.
>
> A. Operational Audit
> …
> Samplings have been performed on company manuals and procedures. It is observed that DGR Labelling and marking is not up to date which is defined in CCM Issue 03 Rev01/01.07.2018. This issue has been recorded as non-compliances. **(JUS-20-01)**.
> …
> B. Technical Audit
> …
> Firstly, maintenance activity status has been checked in Just Us Air. Company has made an application to get Part-145 approval in scope of line maintenance operation to Romanian Civil Aviation Authority. As of now, Just Us Air has not approval to perform line maintenance activity. As far as Technical Director is concerned [this seems to have been a reference to Just Us' technical director], Part-145 approval will be issued in the first part of March 2020 by Romanian Civil Aviation Authority.
>
> In accordance with Part-M requirements, Just Us Air CAMO [Continuing Airworthiness Maintenance Organisation] maintains the overall responsibility for

> the airworthy condition of the aircraft operated and shall not permit that an aircraft, engine or component be operated unless maintained and released to service by an organization appropriately approved under EASA Part 145 requirements. Therefore, contracted maintenance organization is detailed as functions contracted in CAME Part 5.4 (Attachment B1). Approved Contracted Maintenance Organizations Contracts with Just Us Air, their Part-145 Approvals and their approved MOE Part 1.9 Scope of Work sections are checked during the audit. These documents can be seen for three main approved contractors; Aerostar, Dedalus and MyTECHNIC (Attachment B2).
>
> To support the operations at AYT, Just Us Air plans to make a line maintenance agreement with the ATS Team and MyTECHNIC. The confirmation letter about this process of Just Us Air from Technical Director has been provided during the audit. Additionally, the unapproved copies of two companies' contracts have been available (Attachment B3). After wet-lease approval, they will complete the agreement approval process
>
> …
>
> As of 27 February 2020, Just Us Air has an Aircraft Reliability Monitoring Programme (Issue 00, Revision 00, Date 01.July.2019). They have already made an application to get approval for this document on 3 July 2019. However Romanian CAA has not approved yet. Therefore, confirmation letter about the all approval process about Aircraft Reliability Monitoring Programme has been prepared by Just Us Quality and Safety Manager. All details and Romanian CAA letter can be seen in the attachment (Attachment B5f)"

261. The Audit report was signed by the auditors from Corendon Turkey. The date on which the Audit Report itself was prepared is not clear: it can be seen from the face of the report, however, that the audit finished on 27 February 2020, and so it is clear that on that date Corendon Turkey knew all it needed to know about the Audit. A copy of the report was provided to Just Us on 5 March 2020.

262. The non-compliance report referred to in the Audit Report was a single sheet of paper addressed to Just Us's Compliance Monitoring Manager. It identified the non-compliance "DGR Labeling and marking is not update in Just Us Air CCM" and gave a reference for the obligation to have the appropriate labelling. Mr Gillespie and Mr Ozdilek agreed that "DGR" is a commonly used abbreviation meaning "dangerous goods": Mr Gillespie explained that the acronym derives from the IATA "Dangerous Goods Regulations". Where the DGR labelling was not up to date was in the Cabin Crew Manual – the "CCM" referred to in the Audit Report.

263. The non-compliance report "JUS-20-01" said that what had not been complied with was "IATA DGR 2020, 61th edition", i.e., the latest edition of the Dangerous Goods Regulations. It stated that the "level of finding" was "Cat 2". There was a box marked "time limitation, 27-05-2020": thus, Corendon Turkey was suggesting to Just Us that the non-compliance should be remedied within 90 days of the completion of the Audit.

264. On the premise that its construction of the Audit Clause is accepted, Fibula relies on the following issues in the Audit Report as establishing that there was no completion of a "successful audit":

i) First, there was an instance of non-compliance.

ii) Second, the status of Just Us's line maintenance arrangements was not finalised at the date of the Audit Report, in that:

a) Just Us did not have Part 145 approval from the Romanian CAA;

b) Just Us had not entered any line maintenance agreement with ATS Team or MyTECHNIC;

c) Just Us did not have approval from the Romanian CAA for its Aircraft Reliability Monitoring Programme.

265. Given my findings above on the true construction of the Audit Clause, none of these defences can succeed. Corendon Turkey signed the Audit Report after completion of the audit on 27 February 2020 and there is no contemporaneous suggestion whatever that Corendon Turkey feared from the information it had that an application for approval from the DGCA pursuant to SHT Leasing would be rejected.

266. There was in my judgment no requirement for the provision of further documents to Corendon Turkey or Corendon Malta for the purposes of obtaining a "successful audit". There might well have been a need for those two companies to have obtained further documents from Just Us to complete their applications to the Turkish DGCA and the Maltese CAA respectively, but those applications were never made (a fact that has given rise to the Approvals Defence).

267. It is also to be noted that on 15 May 2020, Corendon Turkey wrote to Just Us to enquire whether the corrective action required to the Cabin Crew Manuals had been performed. Mr Pinar Birol of Corendon Turkey asked Mr Marian Rizeanu to "share your corrective action with us for our records". On 18 May 2020, Mr Rizeanu's colleague at Just Us, Mr Dan Antonescu, replied to Mr Birol with the news that Mr Rizeanu had passed away the previous month due to Covid, adding "regardless of the above, we will do our best to close the audit finding in due time. The evidence will be sent to you for your records". On 2 June 2020, Mr Birol extended the time for bringing the manuals up to date to 17 August 2020.

268. In my judgment it is obvious from this correspondence that Corendon Turkey was not troubled by the fact that its auditing team had made a finding regarding the DGR labelling in the Cabin Crew Manual. Corendon Turkey was clearly only following up in order that its own records (regarding an aircraft which at that time, in view of the ongoing negotiations between Fibula and Just Us, it was still possible the Corendon companies might soon be operating for Fibula) should be up to date. Corendon Turkey's records would only be of any use to it in making an application to DGCA for approval for the Lease or some renegotiated variant thereof.

269. In my judgment, the Audit Report reflected the fact that there had been a successful audit for the purposes of the Audit Clause, which audit finished on 27 February 2020.

270. The consequence of the Audit being successful is that on 27 February 2020 Fibula came under the obligation in the Audit Clause to make the Due Payment in the tranches and on the dates provided in the Lease.

12. The Approvals Defence

271. With all due respect to those who drafted it, the Lease is not an easy read for an English lawyer: not only is the familiar scaffolding of definitions and numbered paragraphs not present, but operative provisions are not always grouped together in ways that promote rapid understanding. There are also occasional redundancies (the non-existent Article 11, for example); grammatical infelicities; internal contradictions; and the superficial oddity that even though Fibula is clearly a party to the agreement, nevertheless the wording of the Lease suggests that it does not have formal status as a one of the parties.

272. All that said, the following provisions are perfectly clear.

i) The Audit Clause provides expressly that Fibula is to make the Due Payment unconditionally and without any set off after the "successful audit".

ii) The "Due Payment" is a single amount described as a "condition precedent for [Just Us's] obligations to perform and operate the Flights and any Flight"; and the minimum guaranteed number of block hours being purchased for Flights was 2,100.

iii) The Due Payment was calculated as 2,100 block hours at €2,550 per block hour: €5,355,000 in total. The agreement was that Fibula could pay this sum in tranches, but there is nothing to indicate that the payment dates were anything other than an accommodation to Fibula, presumably to ease cashflow. Fibula's obligation was to pay the whole sum, but on terms as to the timing of tranches.

iv) The Block Hours Flown Price Adjustment Clause made provision for adjustments to the payment tranches by reference to the number of block hours actually flown during every month. The only circumstance in which Fibula could pay anything less than the sum due for the next tranche was:

> "in case that on the Date of reconciliation the actually performed Block Hours amount during the respective reconciliation period, are less than the Minimum Guaranteed BH due to Lessor default, Charterer shall have right to deduct any amount from Prepayments for Minimum Guaranteed BH"

273. Thus, once there had been a successful audit and the Due Payment obligation had accrued, the only way in which the sum payable by Fibula could be reduced was if the Aircraft flew fewer block hours than the minimum guaranteed number due to some default on the part of Just Us.

274. If the reason the minimum guaranteed block hours were not flown was that Turkish and Maltese approvals were not in place by 31 March 2020, then prima facie the responsibility for that would rest on the Corendon companies alone, as they alone had responsibility to obtain those approvals. Say, however, that it could be established that the cause of the Corendon companies' failure to obtain approvals was something amounting to a "default" by Just Us; then there might be an argument available to Fibula

for a reduction in the sum due under the Due Payment clause by application of the Block Hours Flown Price Adjustment Clause.

275. In the Approvals Defence, Fibula argues that there was indeed default by Just Us, in that, it says, the reason the approvals were not obtained was the non-provision by Just Us of the Operational Responsibilities Statement. I consider that argument below, but before doing so I observe that Fibula does not anywhere address the fact that the only way it could be released from its accrued obligation to make the Due Payment would be by operation of the Block Hours Flown Price Adjustment Clause.

276. Fibula certainly did argue before HHJ Pelling KC that the Deposit should be returned to it by operation of the Block Hours Flown Price Adjustment Clause, albeit it constructed its argument on that occasion by reference to different provisions of the Lease (see the judgment of HHJ Pelling KC at [26] – [28]). At the trial before me, however, Fibula said nothing about how, if the Audit Defence failed, it was entitled to be released from its accrued obligation to pay the Due Payment even if it could establish that the Lease had been terminated on or before 31 March 2020 as the result of the absence of approvals.

277. The key question to be answered is whether, in not supplying the Romanian CAA letter containing the Operational Responsibility Statement, Just Us made the obtaining of approvals from the DGCA/Maltese CAA impossible. In my judgment, Fibula does not succeed in showing this:

i) The mere fact that the Operational Responsibility Statement had not been provided by 8 January 2020 did not mean the die was cast. It was simply an inconvenience that needed to be cured. When Corendon Turkey asked after the Operational Responsibility Statement on 5 March 2020, it was not concerned about the fact that it had not yet received that statement. That lack of reaction reflects the reality that the late provision of the statement had not by that point had any effect on the business of applying for approvals.

ii) Just Us cooperated with Corendon Turkey in seeking from the Romanian CAA a statement that would satisfy the DGCA, sending its request for a letter on 11 March 2020.

iii) The date by which approvals had to be obtained was 31 March 2020. DGCA would have been able to grant approval in a shorter time period than the 30 days stated in SHT Leasing Annex 6, Article 1(n); the fact that an application for approval was not made by 2 March 2020 does not indicate a breach of the Lease by anyone, but even if it did, there is nothing to attribute responsibility for that breach solely to Just Us;

iv) On 17 March 2020, Fibula announced to both Just Us and Corendon Turkey that it considered the Lease terminated. Although there was no evidence from the Corendon companies, it is in my judgment hardly surprising that following Fibula's formal communication on 17 March 2020, it paused work on seeking approval from DGCA to take stock;

v) There is no evidence from Corendon Turkey or Corendon Malta to the effect that either of them was ever inhibited from making an application for approvals

to DGCA and/or the Maltese CAA by the absence of the Operational Responsibility Statement as opposed, for example, by their own views on the effect of the Covid-19 pandemic or the fact that Fibula was saying from 17 March 2020 that it considered the Lease terminated.

278. That finding is enough to dispose of the Approvals Defence, but for completeness, and in case I am wrong in that analysis, I also consider that it fails on the following further grounds:

i) Given that the Due Payment obligation had accrued, the only way for Just Us to reduce the sum payable was by operation of the Block Hours Flown Price Adjustment Clause;

ii) I heard no argument on this clause, but it seems to me that there would be good arguments available to Just Us to the effect that responsibility for the non-obtaining of approvals rested on the Corendon companies as well as on it, such that it could not be said that the non-achievement of Guaranteed Minimum Block Hours was due to the default of Just Us alone as is arguably required by the Block Hours Flown Price Adjustment Clause;

iii) In any event and more important, Fibula's position since 17 March 2020 has been that the Lease was terminated on that date. It could not rely on the Block Hours Flown Price Adjustment Clause after 17 March 2020; but the first date on which the Lease could be said to have terminated by operation of the condition precedent in the Approvals Clause was 1 April 2020;

iv) Thus, there is no way for Fibula to alter the amount of its accrued obligation to Just Us.

279. Accordingly, in my judgment Fibula was obliged to pay all the invoices sent to it by Just Us. It came under an obligation on 27 February 2020 to make the Due Payment in the tranches and on the dates provided in the Lease. Just Us was entitled to send invoices given that that the obligation had fallen due and is entitled to frame its claim as a debt claim.

280. Just Us claims damages by way of alternative to the claim in debt, and if I am wrong that it is entitled to claim in debt, it certainly is entitled in my judgment to damages for the same amounts, i.e., for the sums due on the dates specified in the Lease.

13. Just Us's application to re-amend its Amended Reply to the Re-Amended Defence to Amended Counterclaim

281. Just Us applied just before closing submissions began for permission to re-amend its Amended Reply. There were two proposed amendments, one of which was agreed and about which I say no more, and one of which was contested. The contested amendment was to paragraph 29. That paragraph had already been amended, but for the sake of clarity I indicate here by way of underlining only what the proposed new wording was:

> "29. In the premises, by its conduct from at least 24 January 2020 until the hearing before HHJ Pelling KC on 1 March 2022, the Claimant impliedly represented and/ or the parties proceeded on the basis of a shared understanding to the effect the

> Lease had come into force and that all conditions precedent thereto (and to the parties' principal obligations under the Lease) had been satisfied (including in relation to the audit and any necessary approvals). The Defendant relied upon the same in:
>
> (1) expending resources to prepare the Aircraft for operations, in not seeking alternative leasing opportunities for the Aircraft, and in defending the Claim and advancing its Counterclaim; and
>
> (2) in light of Fibula's purported termination of the Lease and/ or subsequent threat to initiate legal proceedings, not taking further steps to satisfy what the Claimant now alleges were conditions precedent to the Lease and/ or to the Claimant's payment obligations thereunder, namely (i) to execute line maintenance agreements with ATS or MyTechnic at Antalya; (ii) to follow up with Romanian CAA to obtain the 'statement' referred to at paragraph 18A(2) above, or (iii) to update the DGR labelling in its Crew Cabin Manual.
>
> In the premises it would be inequitable for the Claimant to resile from such a position".

282. As can be seen, the proposed amendment was to the section of Just Us' case to the effect that Fibula was estopped from running the Audit Defence and/or the Approvals Defence by representations it had impliedly made in the past to the effect that it believed the Lease was in force. Mr Dawid submitted that the amendments were necessary because of the way Fibula's case had developed in trial, in particular the case put to Captain Iuhas in cross-examination regarding Just Us's approach to putting in place line maintenance contracts/ensuring the DGR labelling was brought up to date within the period recommended by the auditors/chasing the Romanian CAA to provide a copy of the letter a draft of which had been emailed to it by Just Us on 11 March 2020. The concern which prompted the amendments was that, if I accepted that Fibula's argument that there had not been a successful audit due on the basis that a line maintenance contract was outstanding/DGR labelling was outstanding/the Romanian CAA Acceptance Letter was outstanding, then Just Us wished to be able to pass responsibility for the fact these documents were outstanding back to representations made by Fibula.

283. In opposition to the amendment, Mr Bradley complained that since the amendments arose from Captain Iuhas' own evidence, they could and should have been pleaded earlier as a general part of the estoppel reply. He also said that the text in the proposed amendment contradicted the plea in the chapeau of paragraph 29: in the chapeau, the case is that Just Us proceeded on the basis that all the conditions precedent had been satisfied and the Lease was in force, where in the proposed amendment Just Us wished to contend that it consciously chose not to satisfy various obligations precisely because it understood Fibula's case to be that it had terminated the Lease.

284. In that latter connection, Mr Bradley submitted:

> "… it is quite clear that Fibula made abundantly clear to everyone as at 17 March [2020] that it was saying that the lease is no longer in force, it is terminated, and so thereafter there can't have been a shared understanding or indeed any continuing representation that the lease was in force".

285. Mr Bradley submitted that the evidence of Captain Iuhas did not in any event fully support the amendments in terms of causation. He also said that he did not cross-examine Captain Iuhas regarding the reliance allegedly placed by Just Us on the 17 March 2020 letter and subsequent behaviour in allegedly deciding not to take any further steps to supply the documentation the absence of which Fibula said meant that the Audit had not been successful.

286. Both Mr Dawid and Mr Bradley took me to the decision of Henshaw J in *Scipion Active Trading Fund v Vallis Group Limited* [2020] EWHC 795 (Comm). That case too concerned an application to amend made at the end of the trial, there during the course of submissions in reply rather than, as here, immediately before closing. Henshaw J reviewed the principles to be found in *Swain-Mason v Mills & Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735; *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609; *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 and *CIP Properties (AIPT) v Galliford Try Infrastructure Limited* [2015] EWHC 1345 (TCC). For the purposes of this judgment, I can, as did Henshaw J, rely on the summary of the principles in *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 per Vos C at [41]:

> "The principles relating to the grant of permission to amend are set out in *Swain-Mason* and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal".

287. Having heard the submissions I declined to permit the amendment, and I now give my reasons for that decision:

i) First, the parties have devoted considerable time and effort over the entire course of this litigation to finding the best ways to put their respective cases. A final further twist in the tale shortly before closing could in my view only be justified by an extraordinary factual development, and even then it would have had to come from one of the witnesses for Fibula. Here, by contrast, the amendment sought concerns the alleged reliance of Just Us itself on things said and done by Fibula: if there was such reliance, it would have been known to Just Us throughout.

ii) On the face of the amendment, there is a contradiction between the case in the chapeau to paragraph 29 and the proposed amendment. I would have needed to hear quite a lot more evidence to decide what precisely Just Us's case on reliance actually was so that I could form a view on whether the amended case had any prospect of success;

iii) I was particularly concerned by the amount of time the application to amend was taking up. It had clearly interrupted the parties' preparations for closing submissions on the existing case. I feared had the amendment been permitted, not only would the time available for closing on the existing case been further truncated, but also the very fact the amendment had been permitted would inevitably have caused the parties to focus more energy on it than it could really have deserved.

iv) Overall, it seemed to me not to be fair to permit the proposed amendment. It was late, relatively weak, interrupted closing submissions, and could have been pleaded long before in any event.

14. Is Fibula estopped from advancing the Audit Defence and/or the Approvals Defence?

288. In view of my findings above, Just Us's case on estoppel is otiose. In case I am wrong in my conclusions about the construction of the Lease, the Audit Defence and/or the Approvals Defence, I make findings here relevant to the estoppel reply.

289. The case for Just Us was that Fibula was estopped from running its defences by, put simply, the fact that at no point before the application to admit new evidence on the appeal from HHJ Pelling KC's decision in March 2022 did Fibula contend that the Lease had not been in force at the moment it purported to terminate it on 17 March 2020. At the heart of Just Us's complaint was the proposition that it was "unconscionable for Fibula, over three years into the litigation, to change its position by 180 degrees by contending the Lease never took effect at all".

290. The legal framework for an alleged estoppel reply was this:

i) Fibula was estopped by convention, having regard to the test for estoppel by convention in *Tinkler v HMRC* [2021] UKSC 39, [2022] AC 886.

ii) Alternatively, Fibula had made representations that founded an estoppel in accordance with the requirements stated in *Chitty*, 35th Edition at para 7-005 to 7-006.

iii) Alternatively, Fibula had represented that it did not intend to enforce legal rights it had against Just Us, such that it would be inequitable for it to make a case on the Lease not coming into force: see *Kosmar Villa Holidays v Trustees of Syndicate 1243* [2008] EWCA Civ 147, applying the analysis of Rix LJ at [36] – [38].

291. The fundamental problem with Just Us's case on this point is that, while it could easily establish that both parties obviously assumed the Lease was in force up until at least 17 March 2020, what it could not show is that Fibula had any idea of the facts that founded the Audit Defence and the Approvals Defence before it obtained the evidence upon which it relied when making its application to admit new evidence on appeal from HHJ Pelling KC. In the absence of knowledge that it might have rights arising from facts that arguably showed the Lease did not come into effect, I do not see how Fibula can have assumed an element of responsibility for encouraging Just Us in a mistaken common assumption; or made any representation that it was aware of a potential argument that the Lease had not come into force; or gave any indication that it was

aware of rights it had to argue that the Lease had not come into force but had decided not to make those arguments.

292. In the absence of such facts, Just Us was seeking here to make bricks without straw. If it were relevant, I would have declined to hold that Fibula was estopped from running the Audit Defence and/or the Approvals Defence.

15. Conclusions

293. In summary, my answers to the issues on the agreed list are thus as follows.

No.	Issue/answer
	The Lease
1	Were references to the "*Lessee*" to one or other or both of Corendon Turkey and Corendon Malta, or did such references also encompass Fibula? Answer: to Corendon Turkey and Corendon Malta only.
2	What is the true construction of the Audit Clause? In particular, what is the meaning of a "*pre agreed successful audit*"? Answer: the pre agreed audit was an audit of the type actually carried out on 26 and 27 February 2020. A successful audit was one that reassured Corendon Turkey that Just Us complied with such requirements of SHT Leasing as applied to it. That would permit Corendon Turkey to apply for approval from the DGCA with the legitimate expectation that approval would be forthcoming
3	What is the true construction of the Approvals Clause? In particular: a. What approvals were required to be obtained from the civil aviation authorities of each of Turkey and Romania and whose obligation was it to obtain them under the Lease? b. Was the obtaining of such approvals a condition precedent to the Lease coming into force (and therefore Fibula's obligation to make payments under the Lease)? Or was it a condition precedent only to the Just Us' obligations under the Lease? in this respect, what is the meaning of regulation 1(k) of SHT Leasing? Answer: a. From the DGCA, approval pursuant to SHT Leasing (to be obtained by Corendon Turkey); from the Romanian CAA, no approvals but the Operational Responsibilities Statement (to be obtained by Just Us); from the Maltese CAA, probably approval under Article 13(2) of Regulation (EC) No 1008/2008 (to be obtained by Corendon Malta) b. The obtaining of such approvals was a condition precedent to the performing of all parties' obligations which could not be

No.	Issue/answer
	performed without the approvals being in place. It was not agreed that the Lease would not come into effect absent approvals; the Lease came into effect on execution but it could be determined if approvals were not obtained.
4	What is the scope and extent of Just Us's obligations pursuant to the Line Maintenance Clause? Answer: Just Us was responsible under the Line Maintenance Clause for bearing all line maintenance costs including the costs of adequate numbers of staff to perform line maintenance.
5	Which party's responsibility was it to request/provide documents for the application to the Turkish DGCA? Answer: Corendon Turkey, save for the Operational Responsibilities Statement which was to be obtained by Just Us from the Romanian CAA.
	The Audit
6	Was the Audit a "*pre agreed successful audit*" for the purposes of the Audit Clause in the light of the matters identified in the Audit Report? Answer: yes.
7	Did the completion of a successful audit require Just Us (or anyone else) to provide any further documents to Corendon Turkey/Corendon Malta? Answer: No.
8	If the Audit was unsuccessful, what are the consequences? Answer: not applicable. The audit was successful and in consequence Fibula became obliged to make the Due Payment in the tranches and on the dates stated in the Lease.
	The Approvals
9	What (if any) approvals were necessary for conducting flights using the Aircraft from the Turkish DGCA and the Romanian CAA? Answer: Flights could only be conducted by Corendon Turkey if the Lease was approved by DGCA applying SHT Leasing; flights could only be conducted by Corendon Malta if the Lease was approved applying whatever regulations were in force in Malta.
10	By when was it necessary for such approvals to be in place? Answer: by 31 March 2020
11	What was needed to be able to obtain such approvals? In particular, was the provision of a line maintenance agreement in Antalya a necessary condition to obtain approval by the Turkish DGCA?

No.	Issue/answer
	Answer: what was needed for approval by DGCA was satisfaction of the provisions set out in Annex 6 of SHT Leasing. Provision of a line maintenance agreement in Antalya was not needed by DGCA.
12	What (if any) approvals were in fact obtained and when? Answer: no approvals were obtained.
	Lease coming into force/obligation to pay
13	Did the Lease come into force? Answer: yes, on 9 December 2019
14	Did Fibula come under the obligation to pay any of the invoices Just Us sent to it? Answer: yes, the obligation to pay the Due Payment accrued on 27 February 2020 and Just Us was entitled to send invoices in relation to the tranches particularised in the Lease.
	Estoppel/Waiver
15	Is Fibula estopped by convention and/or promissory estoppel from contending that the Lease had not come into force and/or that the Audit was unsuccessful? In particular: a. Is Fibula so estopped by virtue of the steps taken in connection with planning and preparing for operations under the Lease between 24 January and 13 March 2020? b. Is Fibula so estopped by virtue of the representations it made and/or its conduct from at least 30 March 2020 until the hearing before HHJ Pelling KC on 2 March 2022? Answer: no, Fibula is not estopped from running the Audit Defence or the Approvals Defence.

294. Despite the ingenuity of Fibula's legal team, I am quite satisfied that Just Us's claim succeeds for the reasons given above. I invite the parties to prepare a form of order that shows the interest due on each tranche of the Due Payment running from the date that tranche was due to be paid. I will hear argument on the appropriate rate of interest if agreement cannot be reached. If agreement cannot be reached on costs, there will be a further hearing to deal with remaining consequential matters.