Neutral Citation Number: [2021] EWHC 362 (Comm)

Case No: CL-2020-000079

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

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

Date: 23/02/2021

Before :

SIR MICHAEL BURTON GBE
SITTING AS A HIGH COURT JUDGE

- -

Between :

DE HAVILLAND AIRCRAFT OF CANADA LIMITED	**Claimant**
- and -	
SPICEJET LIMITED	**Defendant**

- -
- -

Jasbir Dhillon QC and Tom Wood (instructed by **Pinsent Masons LLP**) for the **Claimant**
Akhil Shah QC and Laurentia De Bruyn (instructed by **K & L Gates LLP**) for the **Defendant**

Hearing dates: 8 - 9 February 2021

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Approved Judgment

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SIR MICHAEL BURTON GBE :

1. This has been the hearing of claims and cross-claims for summary judgment and/or strike out between the Claimant (De Havilland Aircraft of Canada Ltd) and the Defendant (SpiceJet Ltd), arising out of a Purchase Agreement (the PA) dated 8 September 2017 for the sale by the Claimant to the Defendant of 25 Q-400 series aircraft, governed by English law. The Claimant was represented by Jasbir Dhillon QC and Tom Wood, and the Defendant by Akhil Shah QC and Laurentia De Bruyn.

2. The Defendant paid for and accepted delivery of Aircraft 1 to 5, but failed to pay the pre-delivery payments (PDPs) in respect of Aircraft 6–20 and to take delivery of Aircraft 6 to 8. The Claimant served notices terminating the undelivered aircraft and the PA, and claims liquidated damages in respect of all the undelivered aircraft in the sum of US $42.95m, alternatively damages for breach of the PA.

3. The issues between the parties were as follows:

   i) Were the Defendant's obligations in respect of making the PDPs for Aircraft 9–20 suspended by agreement of the parties? This depends upon the question of construction of one of the agreements amending the PA, Change Order 6, dated 15 April 2019 (CO6). Both parties invite me to decide this issue summarily in their favour. The Claimant says that CO6 did not suspend the obligation of the Defendant to make payment of the PDPs for Aircraft 9–20. On that basis, on non-payment of those PDPs it was entitled, after giving due notice, to terminate the PA in respect of Aircraft 9–20 and, since it was also entitled to terminate in respect of Aircraft 6 to 8 for non-payment, therefore, by virtue of Article 15.6 of the PA it was entitled (again after due notice) to terminate the PA in its entirety, because there was a breach of a total aggregate of (more than) 4 aircraft. Thus summary judgment. The Defendant submits that its obligation to pay the PDPs was suspended by the Claimant by CO6, and so it was not in default in respect of Aircraft 9–20: thus the Claimant was not entitled to terminate in respect of those aircraft, and was also not entitled, whatever the position in relation to Aircraft 6 to 8 (discussed below), to terminate the PA, since any default was only in respect of three aircraft , which was not enough to justify termination of the PA under Article 15.6. Hence summary judgment for the Defendant on that issue. There is no dispute as to the various notices, but the question depends wholly upon the construction of CO6 as to whether the Claimant was entitled to terminate. I shall call this “the CO6 issue”.

   ii) The Defendant failed to make payment of the PDPs or take delivery in respect of Aircraft 6 to 8, and the Claimant seeks summary judgment, as there is no defence, both as to termination in respect of those aircraft, and, on the basis of the consequent impact of the issue above, by virtue of the Defendant's thus being in default in respect of (more than) four aircraft. The Defendant submits that it should be entitled to leave to defend on this issue, by reference to its case as to breach by the Claimant of its obligation, under a Letter Agreement of even date with the PA (LA 13), to provide Assistance in Arranging Finance, as defined in LA 13. This alleged breach is asserted to be sufficient to amount to a defence, in that the Defendant's compliance with its obligations under the PA in respect of those aircraft was rendered impossible or prevented by the Claimant’s alleged

breach: alternatively it has a defence of set-off by reference to a counterclaim for damages for such breach. This is the "LA 13 issue".

iii) The third issue, although for obvious reasons it is a sub-issue of the second, is whether, if the Defendant is able to establish such a breach of LA 13 as would otherwise entitle it to a defence or to set-off a counterclaim, it is excluded by the "no set-off" Article at 5.6 of the PA (the "set-off issue").

iv) The fourth issue is whether the Claimant is entitled to claim liquidated damages of US$42.95m, or whether Article 15.4(c) of the PA amounts to an unenforceable penalty, in accordance with the principles recently authoritatively addressed in **Cavendish Square Holding v Makdessi** [2016] AC 1172 ("**Cavendish**") (the "penalty issue").

v) Finally, if such liquidated damages are not recoverable by the Claimant, can it recover damages at common law ("the common law damages issue").

4. The Articles in the PA which were in issue are as follows (the references to Bombardier are to the Claimant's predecessor in title):

*"**ARTICLE 1 - INTERPRETATION***

1.3 *"**Scheduled Delivery Month**" means the month as set out in Appendix II (as may be modified from time to time in accordance with this Agreement) in which each Aircraft shall be offered to Buyer for ground inspection and acceptance flight;*

ARTICLE 5 - PAYMENT

5.1 Payments

5.1.1 Bombardier acknowledges having received from Buyer a payment in the amount of $50,000 USD to be applied pro rata (that is $2,000 USD against each of the 25 Firm Aircraft) against the balance of the Aircraft Purchase Price in accordance with Article 5.1.2(e).

5.1.2 Buyer shall make further payments or cause payment to be made for each Aircraft as follows:

(a) $2,500,000 On execution of the Agreement (to be returned or netted off the Aircraft Purchase Price, at Buyer's option on a pro rata basis at delivery of 21st Aircraft through 25th Aircraft);

(b) $2,500,000 On December 15th, 2017 (to be returned or netted off the Aircraft Purchase Price, at Buyer's option on a pro rata basis at delivery of 21st Aircraft through 25th Aircraft);

(c) 10% *of the estimated relevant Net Configured Price for 1st Aircraft through 5th Aircraft 8 months prior to its Scheduled Delivery Month;*

(d) 10% *of the estimated relevant Net Configured Price for 6th Aircraft through 25th Aircraft 12 months prior to its Scheduled Delivery Month;*

(e) *the Aircraft Purchase Price (less the $1,000 USD payment received against such Aircraft as referenced in Article 5.1.1 and the amounts paid or applied as set out in (a), (b), (c) or (d) above, as applicable) on or before the Delivery Date of the relevant Aircraft.*

All payments referred to in paragraphs (c) and (d) above are to be made on the first day of the applicable month….

5.2 Failure to Pay

5.2.1 If Buyer fails to pay when due any amount payable by it under this Agreement, Buyer shall pay Bombardier, immediately upon demand, interest on such late payment, from the last day of the cure period prescribed in Article 15.6 up to and including the day of payment, at the applicable three-month LIBOR rate plus two hundred (200) basis points. Bombardier's right to receive such interest is in addition to any other right or remedy Bombardier has under this Agreement as a result of Buyer's failure to make payments when due including the right to terminate this Agreement in accordance with Article 15.6 subject always to Article 5.2.2 below. Without limiting the foregoing, in the event that Buyer fails to pay, within the cure period prescribed in Article 15.6, any amount payable by it under Article 5.1.2, Bombardier shall have an automatic right to defer the Scheduled Delivery Month of the applicable Aircraft in accordance with Article 15.6. Upon receipt of all amounts then owed under Article 5.1.2 in respect of such Aircraft (together with interest thereon due under this Article 5.2.1, unless such interest is waived by Bombardier) and provided Bombardier has not exercised its right of termination under Article 15.6, Bombardier shall confirm to Buyer the revised Scheduled Delivery Month for such Aircraft, as determined by Bombardier acting reasonably within three (3) Business Days of receipt of such amounts. The

parties shall execute a Change Order to reflect such new Scheduled Delivery Month for such Aircraft.

5.2.2 Notwithstanding 5.2.1 above, for as long as Bombardier has not exercised its right to terminate this Agreement, in whole or in part, in accordance with Article 15.6 and Buyer cures its payment default by sending to Bombardier all amounts then due and payable under 5.1.2 in respect of such Aircraft (together with interest thereon due under Article 5.2.1), then Bombardier shall no longer be entitled to exercise any right or remedy under Article 15.6, excluding the right to automatic deferral in Article 5.2.1.

5.3 Buyer shall make all payments due under this Agreement in immediately available funds by deposit on or before the due date to Bombardier's account detailed below or such other bank account as Bombardier may notify to Buyer from time to time:

….

Buyer acknowledges that all payments made by Buyer under this Agreement, including all payments specified in Article 5.1 herein, are unconditional payments by Buyer to Bombardier for the purchase of Aircraft and such payments will be applied by Bombardier against the balance of the Aircraft Purchase Price due on or before the Delivery Date for the relevant Aircraft.

5.4 All other amounts due from Buyer, including any Taxes then due and payable, with respect to each Aircraft shall be paid on or prior to the Delivery Date of the respective Aircraft.

5.5 …

5.6 Buyer shall make all payments hereunder without set-off, deduction or counter claim of any kind and Buyer shall have no legal, equitable or reversionary interests in any such payment.

…

15.4 In case of termination of this Agreement, in whole or in part, by Bombardier pursuant to this Article 15:

….

(c) Bombardier shall be entitled to recover from Buyer liquidated damages for Buyer's default in the amount of $2,500,000 USD

(Two Million and Five Hundred Thousand United States Dollars) for each terminated Aircraft. Buyer agrees that such liquidated damages do not constitute a penalty and are a reasonable and agreed amount of the anticipated or actual harm or damages to be suffered by Bombardier as a result of or in connection with Buyer's default. Bombardier shall give credit for any payments in respect of such terminated Aircraft which have been paid by or on behalf of Buyer, and the parties agree that Bombardier shall be entitled to recover under this Article 15.4(c) only the amount stipulated under this Article 15.4(c) after allowing such credit.

The parties agree that the remedies described in this Article 15.4 are exclusive of and in substitution for any and all other rights and remedies provided by law or otherwise for any termination of such Aircraft by Bombardier under this Article 15.

....

15.6 In the event of a default or breach by Buyer of any payment obligation under this Agreement, Bombardier may (without any obligation to do so), issue a Notice of such payment default to Buyer, and following receipt by Buyer, Buyer shall have twenty (20) calendar days in which to cure such payment default (which for the purposes of this Article 15.6, shall include the payment of all interest applicable to such defaulted payment, if any).

If such payment default has not been cured by Buyer within such twenty (20) calendar day period, Bombardier shall have an automatic right to defer the Scheduled Delivery Month for the Aircraft to which the payment default relates, it being understood that such deferral right shall survive any subsequent cure of such payment default by Buyer in accordance with Article 5.2.1.

Furthermore, if such payment default has not been cured by Buyer within such twenty (20) calendar day period, Bombardier may, in its discretion issue to Buyer a Notice of Bombardier's intent to terminate the Aircraft to which the payment default relates, and following such issuance, Buyer shall have three (3) additional Business Days in which to cure such payment default, following which Bombardier may, at its

> *discretion and subject to Article 5.2.2, terminate the relevant Aircraft*
>
> *Once Bombardier has terminated a total aggregate of four (4) Aircraft, Bombardier shall be entitled to additional remedies hereunder, namely that Bombardier may issue a Notice of its intent to terminate the Agreement with respect to any or all undelivered Aircraft, and following such issuance, Buyer shall have ten (10) additional calendar days in which to cure such payment default, following which Bombardier may, at its discretion exercise its right to terminate the Agreement with respect to any or all undelivered Aircraft and the provisions of Article 15.4 shall apply.*
>
> *…*
>
> *23.1 This Agreement constitutes the entire Agreement between Bombardier and Buyer, and supersedes and cancels all prior agreements, negotiations, drafts, representations and communications, whether oral or written, between Bombardier and Buyer or their respective agents, with respect to or in connection with the subject matter of this Agreement."*

5. The payment dates for the PDPs under Article 5.1.2 (c) (as amended by CO6) were helpfully set out in Appendix 1 to the witness statement of Mr Hawthorne for the Claimant dated 16 June 2020: –

SpiceJet's payment obligations under Article 5.1.2 (c) and (d) following Change Order 1

Aircraft	Scheduled Delivery Month	Payment Due Date
Under Article 5.1.2(c) – 8 months before Scheduled Delivery Month		
1	September 2018	January 2018
2	October 2018	February 2018
3	November 2018	March 2018
4	December 2018	April 2018
5	December 2018	May 2018
Under Article 5.1.2(d) – 12 months before Scheduled Delivery Month		
6	January 2019	January 2018
7	February 2019	February 2018
8	March 2019	March 2018
9	April 2019	April 2018
10	May 2019	May 2018

Aircraft	Scheduled Delivery Month	Payment Due Date
11	June 2019	June 2018
12	July 2019	July 2018
13	August 2019	August 2018
14	September 2019	September 2018
15	October 2019	October 2018
16	November 2019	November 2018
17	December 2019	December 2018
18	January 2020	January 2019
19	February 2020	February 2019
20	March 2020	March 2019
21	April 2020	April 2019
22	May 2020	May 2019
23	June 2020	June 2019
24	July 2020	July 2019
25	August 2020	August 2019

Invoices were rendered in respect of those PDPs as the dates fell due, in respect of each aircraft up to Aircraft 20 in the months to April 2019, the date of the CO6.

6. CO6 provided in material part as follows:

> *"REASON FOR CHANGE:*
>
> *To incorporate changes to Purchase Agreement PA-958 (the "**Agreement**") relating to the First through to and including the Eighth Aircraft, as described below.*
>
> *DESCRIPTION OF CHANGES:*
>
> *1.0 The parties hereby agree that the Scheduled Delivery Months for the First through to and including the Eighth Aircraft shall be as follows:*
>
> *First Aircraft* *April 2019*
>
> *Second Aircraft* *April 2019*
>
> *Third Aircraft* *April 2019*
>
> *Fourth Aircraft* *April 2019*
>
> *Fifth Aircraft* *May 2019*

Sixth Aircraft	*June 2019*
Seventh Aircraft	*August 2019*
Eighth Aircraft	*September 2019*

With respect to the delivery positions for the Ninth through to and including the Twenty-Fifth Aircraft, the parties agree that the Scheduled Delivery Months for such Aircraft are suspended and that they shall make good faith efforts to find an amicable solution to revised terms and conditions for such Aircraft.

…

6.0 With respect to the Fifth through to and including the Eighth Aircraft set out in Article 1.0, the concessions set out in Articles 3.0 and 4.0 above are contingent on (i) the receipt by Bombardier of $2,000,000 USD on March 29, 2019 in accordance with Article 2.0 above, (ii) the delivery of the First through to and including the Fourth Aircraft in accordance with Article 5.0 above, and (iii) Buyer taking delivery of the Fifth through to and including the Eighth Aircraft in the Scheduled Delivery Months set out in Article 1.0.

7.0 Buyer shall pay to Bombardier on or before April 30, 2019 the ten percent (10%) payment required in accordance with Articles 5.1.2 (c) and (d) of the Agreement, as applicable, for the Fourth through to and including the Eighth Aircraft set out in Article 1.0.

8.0 Other than Buyer's payment obligations under item (i) of Article 5.0, item (i) of Article 6.0, and Article 7.0 above, Bombardier hereby acknowledges that Buyer is not liable to pay to Bombardier any other amounts under Article 5.1.2 and Article 5.2.1 of the Agreement with respect to the First through to and including the Eighth Aircraft other than the amount payable under Article 5.1.2 (e) of the Agreement.

…

ALL OTHER TERMS AND CONDITIONS OF THE AGREEMENT AS AMENDED, RESTATED OR SUPPLEMENTED SHALL REMAIN UNCHANGED AND CONTINUE TO BE BINDING ON THE PARTIES."

7. I shall set out the terms of LA 13 when I come to deal with that issue below.

The CO6 Issue

8. The CO6 issue is simply stated. The Claimant says that in respect of Aircraft 9–25 (unlike Aircraft 6-8) all that was suspended were the Scheduled Delivery Months (SDMs), and payment remained due in respect of the invoices which had already been

delivered and the sums so accrued due. There was no agreement to suspend the payment dates in respect of Aircraft 9–25. The Defendant submits that liability for the PDPs was dependent upon the SDMs, and by suspending the SDMs the Claimant automatically suspended liability to pay the PDPs. Although Mr Shah made reference to the fact that, in emails dated 8 November 2018 and January 29 2019, when the Claimant issued its invoices for the relevant PDPs, it referred to the fact that it was doing so "*for administrative purposes"*, I am quite satisfied that this had no impact upon the Defendant's liability to pay those invoices at the time, nor in any way cast doubt upon the fact that the debts under the invoices had already accrued and were payable, prior to CO6. Accordingly the issue depends upon whether, upon the proper construction of CO6, that liability was suspended or stayed. Each party asserts that it is right as to its case on construction, and each seeks summary judgment. I agree that there is no halfway house as to whether one side or the other is right, and I accept the guidance in the authorities, and most recently enunciated by Lewison J in **Easyair Ltd v Opel Telecom Ltd** [2009] EWHC 339 (Ch) at [15], and subsequently approved by the Court of Appeal in **AC Ward & Sons Ltd v Catlin (Five) Ltd** 2010 Lloyd's Rep IR 301, namely that, where there is a short point of law or construction, if the Court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, I should grasp the nettle and decide it. I shall do so.

9. There was no dispute as to the correct approach to construction. I was referred to a number of authorities, in particular the recent analysis by Lord Hodge in **Wood v Capita Insurance Services Ltd** [2017] AC 1173 at [8]-[15]. I must look at the whole agreement: I must apply an objective test: I must take into account that the agreement was handled, negotiated and prepared by skilled professionals: particularly in the event of any ambiguity I should apply a commercial approach to it, but always subject to bearing in mind the possibility that one side may have agreed to something which with hindsight did not serve its interest. There is no case made that there was any mistake made which requires rectification.

10. The Claimant submits:

i) There is no mention whatsoever of the Defendant's obligations as to payment being suspended, but merely the SDMs.

ii) The debt in respect of Aircraft 9–20 had already accrued due, and invoices rendered, expressly in accordance with the terms of the PA. Mr Dhillon refers to a number of significant authorities which make it clear that, where a contractual obligation has accrued, it requires clear words in a contract to remove that obligation. He refers to Lewison Interpretation of Contracts (7th Ed 2020) at 7.173 and 12.151, to **Culross Global SPC v Strategic Turnaround Master Partnership** [2010] UKPC 33 at [25] per Lord Mance and **Strategic Value Master Fund Ltd v Ideal Standard** [2011] 1BCLC 475 at [49] per Lewison J. Not only were clear words not used, but there was no provision which could arguably be so construed.

iii) The invoices had also been rendered and debts incurred in respect of Aircraft 1–8. Those accrued debts in respect of Aircraft 1-8, and the obligation to make payment, were expressly dealt with in CO6, whereas in respect of Aircraft 9–20 they remained unchanged. Article 7.0 and 8.0 of CO6 deal expressly with the

fact that there is to be no liability in respect of Aircraft 1–8, save as there provided. Thus in respect of Aircraft 1–8 there was express provision in Article 1.0 for suspension of the SDMs and in Articles 7.0 and 8.0 for the payment obligations: there was a further amendment of the payment obligations in respect of the PDPs for Aircraft 4-6 in Article 3.0 of a subsequent Change Order, CO8, and a yet further amendment of the payment dates for Aircraft 5–8 in CO9. There is however no similar treatment in respect of suspension of payment of the PDPs for Aircraft 9–20, as there could and would have been if such had been intended.

iv) The only provision in relation to the aircraft other than Aircraft 1-8 was that their SDMs were suspended, and by Article 1.0 there would be good-faith efforts to find an amicable solution to revised terms and conditions for such aircraft. No other agreement was reached, and there was an express provision at the end of CO6 that "*all other terms and conditions of the PA as amended, restated or supplemented shall remain unchanged and continue to be binding on the parties*". This thus also included the impact of the entire agreement Article in Article 23.1 of the PA.

11. The Defendant submits as follows: –

i) There was no need for express agreement to be recorded in CO6 as to suspension of the date for payment of the PDPs, because this was dependent upon the SDMs, and by virtue of the PA the PDPs were prescribed expressly as being due 8 months (Article 5.1(c)) or 12 months (5.1(d)) prior to the SDMs, so because of this link the time for the PDPs would be automatically extended. If the relevant SDMs were suspended, so were the PDPs.

ii) It would not make business sense for the Defendant to be obliged to pay the PDPs if the deliveries were suspended.

iii) The provision in Article 1.0 that there would be good faith efforts to find an amicable solution in respect of all aircraft other than Aircraft 1-8, whose SDMs were now fixed as were the dates for the PDPs, meant that there should be good-faith efforts to agree new SDMs, and consequently new dates for the PDPs, in respect of Aircraft 9–25.

iv) No invoices were subsequently rendered for Aircraft 9–25, consistent with the Defendant's case that the obligation to pay PDPs was suspended.

12. The Claimant's response was as follows:

i) As to (iv) above, this is a good example of why the rule in **Miller v Whitworth Street Estates** [1970] AC 583 ordinarily prevents evidence as to subsequent events in relation to construction of an earlier contract. There was no need for any invoices to be rendered in respect of Aircraft 9–20 because they had already been issued and not suspended (insofar as Aircraft 21–25 is concerned, invoices in respect of those Aircraft had not been issued prior to CO6).

ii) The invoices for Aircraft 9–20 were issued in accordance with the PA before the contractual SDMs, and the debts were and remained due and were not suspended.

iii) Payment for Aircraft 1–8 is expressly varied and provided for, as set out in CO6 (as subsequently amended in COs 8 and 9). There was no such variation for Aircraft 9–20. The capitalised rubric at the end of CO6 made it clear that, save for the amendments in CO6 there were no other changes to the PA, and hence the liability to pay the PDPs, other than those altered by CO6, remained (as did the obligation to pay interest on late payment under Article 5.2.1)

iv) There is no injustice or lack of business sense. The Claimant remained under the obligation to manufacture and deliver the aircraft and still required the security of the PDPs, even if they were not any longer tied by reference to 12 months prior to the SDMs. Significantly there was by Letter Agreement 4 (also of even date with the PA) a long stop date for delivery of the aircraft of August 2023, so that the Claimant still remained bound to deliver, and by Article 2 (i) no SDM could be deferred beyond August 2023. Thus, there was no open-ended obligation, and it was perfectly commercial for the parties to leave the obligation to make the PDPs as they were.

13. I am persuaded by the arguments of Mr Dhillon for the Claimant, and for the reasons he gives, particularly his answer in (iv) above, I am satisfied that, although there was an agreement for variation of the SDMs, there was no agreement to excuse payment of the invoices in respect of those PDPs which had already accrued due. I am further influenced by the fact that the "Reason for Change" expressed at the outset of CO6 was to incorporate changes relating to Aircraft 1-8, not 9-20. I am therefore satisfied that there should be summary judgment for the Claimant on this issue. That entitled the Claimant to terminate the PA by reference to Article 15.6, because there was a default in respect of more than four aircraft, but I shall return to this when I have addressed the LA 13 issue and of course the question of liquidated damages.

The LA 13 issue

14. The PDPs in respect of Aircraft 6–8 were not paid by the new due dates provided by CO8 and CO9 or otherwise, and due notices were served in respect of such default, thus entitling the Claimant to terminate in respect of those Aircraft and indeed, in tandem with its entitlement in respect of the CO6 issue, to justify the termination of the PA and the entitlement to liquidated damages. The Defendant denies this in reliance upon the terms of LA 13, which reads as follows: –

> *"**Letter Agreement No. LA-958-13 ("Letter Agreement") Assistance in Arranging Financing***
>
> *Reference is made to Purchase Agreement No. PA-958 (the "**Agreement**") between Bombardier Inc. as represented by Bombardier Commercial Aircraft ("**Bombardier**") and SpiceJet Limited ("**Buyer**") relating to the purchase of twenty-five (25) Bombardier Q400 Aircraft (the "**Aircraft**").*

> *This Letter Agreement, when accepted and agreed to by Buyer together with the Agreement, will evidence our further agreement with respect to the matters set forth herein.*
>
> *All defined terms used herein and in the Agreement, but not defined herein, shall have the same meanings as in the Agreement.*
>
> *In consideration of Buyer having entered into the Agreement, subject to the terms and conditions noted below, Bombardier shall provide the following Financing Assistance.*
>
> *Bombardier would be pleased to assist Buyer in developing, in consultation with Buyer and its aircraft finance specialists, third party financing structures for the financing of Buyer's acquisition of the Aircraft. Such third party financing may include commercial banks, lessors, and/or Canada's export credit agency, Export Development Canada. Such assistance shall not include any responsibility on the part of Bombardier for any fees, charges, disbursements or expenses of Buyer, any financiers or any other person (including Bombardier) in connection with sourcing and implementing any financing facility. Such amounts are the responsibility of Buyer, whether or not the financing transaction is completed.*
>
> *The provisions of this Letter Agreement are personal to Buyer and shall not be assigned or otherwise disposed of by Buyer without the prior written consent of Bombardier, unless such assignment is made in accordance with Article 19 of the Agreement.*
>
> *This Letter Agreement constitutes an integral part of the Agreement and is subject to the terms and conditions contained therein.*
>
> *Should there be any inconsistency between the Letter Agreement and the Agreement with respect to the subject matter hereof, this Letter Agreement shall prevail."*

15. The Defendant submits that the Claimant was in breach of its obligations to provide Assistance in Arranging Financing under LA 13, and that by virtue of such breach the Defendant was prevented from complying with its obligations to make payment for Aircraft 6-8, and thus says that it was not in default: alternatively it can offset its losses by being unable to take delivery of the aircraft by way of set-off against the Claimant's claim. The Defendant relies particularly upon the fact that it was unable to obtain financing, as a result, as it submits, of such breach by the Claimant, from Chorus Aviation Capital (Ireland) Ltd (Chorus), who had participated in the financing of the earlier aircraft, and, when Chorus dropped out, from TrueNoord Ltd (TrueNoord). Mr Shah submits that he needs further disclosure of documents to make good the case that he relies upon, by reference to 2 emails: –

i) 3 August 2019 from Chorus to the Defendant: "*We received news from De Havilland this afternoon that they are unable to fulfil a key commercial commitment they had made to us for these deliveries. As a result we are unable to proceed with the deliveries at this time."*

ii) 4 November 2019 from TrueNoord to the Defendant: "*TrueNoord will buy the 3 aircraft from de Havilland… for onward leasing to … SpiceJet… Provided we come to acceptable commercial terms with De Havilland, we will issue a binding Letter of Intent to SpiceJet...."*

16. All this depends of course upon what obligation (if any) the Claimant was under, of which it was allegedly in breach. I accept the submission of the Defendant as to whether LA 13 was capable of and did constitute a contractual document from which an intention to enter into legal relations can be deduced, especially by reference to the title of LA 13 "*Letter Agreement"*, the fact that "*This letter agreement.....will evidence our further agreement*" and reference in it to the defined terms having the same meanings as in the PA and to the fact that the Claimant entered into LA 13 in consideration for the Defendant having entered into the PA: and further the provisions that "*This Letter Agreement constitutes an integral part"* of the PA and "*Should there be any inconsistency between this Letter Agreement and the PA, this Letter Agreement shall prevail*." But that of course is only a starting point, and the Claimant further denies that the agreement constituted by LA 13, if such it be, is sufficiently certain to be enforced; indeed the Claimant denies that there is any enforceable obligation under it. I am content to apply, consistent with such well-known authorities as **Hillas & Co Ltd v Arcos Ltd** [1932] 147 LT 503 (and more recently **Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD** [2001] 2 AER (Comm) and **Barbudev v Eurocom Cable Management Bulgaria EOOD** [2012] 2 AER (Comm)) the Latin maxims 'certum est quod certum reddi potest' and 'ut res magis valeat quam pereat': I shall be ready to be persuaded that there is within this Letter Agreement an obligation upon the Claimant that can be regarded as certain, in the sense of sufficiently clear to be enforced.

17. It is not clear whether the Defendant relies on any factual matrix evidence for the purpose of construction of LA 13 (save for a plea in paragraph 82 of its Defence and Counterclaim as to factual background which is not asserted to be one known to both parties). But if it does so rely, it has not pleaded any, contrary to the Commercial Court Guide paragraph C1.3(h), to which the Claimant refers to disentitle any such reliance: see two judgments of Cockerill J in **Aquila WSA Aviation Opportunities II v Onur Air Tasimacilik AS** [2018] EWHC 519 (Comm) and **Towergate Financial (Group) Ltd v Hopkinson** [2020] 2 BCLC 649. However I must remind myself, as did Mr Richard Salter QC in **TKC London Ltd v Allianz Insurance Plc** [2020] Lloyds Rep IR 631 at [89]–[91], that this is a summary judgment application, and if the Defendant were to rely upon any matter, albeit not yet properly pleaded, which appeared to give rise to an arguable doubt, then I might be persuaded to pay attention to it. In any event Article 21 of the PA (of which LA13 is an integral part) rules out reliance on any prior agreements, negotiations and communications being relied upon.

18. I turn to see what obligation is relied upon as either being contained in or spelt out of LA 13, and the starting point is that the Defendant's case has developed and seemingly moved away from the words of LA 13. In its letter of 17 November 2019 in which its case was first set out, the assertion is that the Defendant "*is of the considered opinion*

that [the Claimant] *has failed to comply with its obligations pursuant to* [LA 13], *whereby* [the Claimant] *undertook the obligation to assist* [it] *in developing (and by implication, implementing) third-party financing structures for the financing of* [its] *acquisition of the aircraft*". In its Defence and Counterclaim the case is now put as follows:

> *"81. On a true construction of Letter Agreement 13, De Havilland was required to work with SpiceJet and its financiers and/or guarantors to procure finance for the purchase of each aircraft under the Purchase Agreement. Further or alternatively a like term was implied (on the grounds of being necessary for business efficacy and/or because the same represented the obvious, common and unexpressed intentions of the parties, in the sense of being so obvious that it goes without saying).*
>
> *82. It was necessary for De Havilland to provide the Finance Assistance because procuring finance for the Bombardier Q400 aircraft was known to be difficult given its position in the market."*

The alleged obligation is put in a still different way in the Defendant's Skeleton Argument, and is said (obviously with an eye to the emails referred to in paragraph 15 above) "*to include, for example, not preventing the conclusion of a financing agreement and co-operating with financiers to fulfil key commercial commitments it had made*."

The breach of the obligation in paragraph 81 is pleaded in paragraph 92:

> *"92. For all aircraft which are the subject of the Purchase Agreement, De Havilland failed to work with SpiceJet and its financiers and/or guarantors to seek and procure any, alternatively satisfactory, financing Finance Assistance for SpiceJet's acquisition of the aircraft in breach of its obligation under Letter Agreement 13. In particular, De Havilland failed to seek to obtain competitive financing terms from lenders, including the EDC and/or failed to engage sufficiently with lenders and/or failed to deliver on key commercial commitments it had made to potential financiers and/or guarantors."*

It is said in paragraph 2.1 of the Defence and Counterclaim that because the Claimant "*breached its obligation to provide Finance Assistance, as pleaded in the Counterclaim, SpiceJet was not obliged to take delivery nor make any Article 5.1.2 (d) payments for these aircraft. In any event De Havilland's claim fails for circuity of action because SpiceJet will set-off the same amount by way of its Counterclaim*." I shall deal below with the 'prevention principle' there relied upon, and by reference primarily to **Roberts v The Bury Improvement Commissioner** [1870] LR 5CP 310 and **Alghussein Establishment v Eton College** 1988 1 WLR 587.

19. The Claimant submits as follows: –

i) The Defendant is tied to its pleading in paragraph 81, which cannot be read out from the terms of LA 13: the Claimant "*would be pleased to assist Buyer in*

developing… third party financing structures for the financing of Buyer's acquisition of the aircraft". If there is an obligation on the Claimant at all, there is no basis for a "*true construction*" that the Claimant "*was required to work…to procure finance*".

ii) The "*assistance shall not include any responsibility on the part of* [the Claimant] *for any fees, charges, disbursements or expenses ..… including* [its own]". This too is no basis for a possible plea such as is alleged in paragraph 81.

iii) The highest that could be spelt out by way of express or implied term would be such an agreement as was found to be too uncertain to be enforceable in **Wittmann (UK) v Willdav Engineering SA** [2007] EWCA Civ 824 and **Schweppe v Harper** [2008] EWCA Civ 442, namely an agreement to cooperate with the Defendant in obtaining finance.

iv) The assertion that a breach of the obligation rendered it impossible for the Defendant to perform its obligations to make payment of the PDPs and take delivery of Aircraft 6–8 (it is no longer so alleged in respect of Aircraft 9-20) is in fact asserting that there is a condition precedent to its obligation to make payment under the PA that the Claimant would supply the alleged assistance in arranging finance. This is wholly inconsistent with the Defendant's obligation under Article 5.3 of the PA to "*make all payments due… in immediately available funds by deposit on or before the due date….. Buyer acknowledges that all payments made by Buyer under this Agreement, including all payments specified in article 5.1 herein are unconditional payments*".

v) In an attempt to suggest a way whereby such alleged obligation under LA 13 could be rendered certain, the Claimant suggests that it would be necessary for there to be a request for assistance before the Claimant could be under any obligation. This seems to me more of an assertion that it would be impossible to prove a breach of obligation without a prior request.

20. The Defendant submits that paragraph 81 can be read out from LA 13:

i) An obligation to assist in developing third-party financing structures for the financing of the Defendant's acquisition of the aircraft means an obligation to procure finance, and the provision that such assistance shall not include any responsibility for fees etc in connection with sourcing and implementing any financing facility recognises that such activity is or forms part of developing third-party financing structures. The recitation that the Claimant "*would be pleased to assist*" is immaterial in the light of the obligation that the Claimant "*shall provide the following Financing Assistance*".

ii) The Defendant relies, in contradistinction to **Wittmann** and **Schweppe** upon the fact that the Court of Appeal found enforceable in **Jet2.com Ltd v Blackpool Airport Ltd** [2012] 2 AER (Comm) 1053 an obligation to use best endeavours to promote the claimant's business.

iii) The Defendant draws support (despite **Whitworth Estates**) from the fact that the Claimant did give some assistance (and failed to carry it through, as per the emails).

21. I am satisfied that there is no legal basis for the agreement for which the Defendant contends in paragraph 81 of the Defence and Counterclaim. Whereas I accept that there was an arguable obligation under the LA 13 to provide "*assistance in arranging financing*" I do not accept that it is arguable that this amounted to "*working with SpiceJet and its financiers and/or guarantors to procure finance*". The assistance was limited to what is said in LA 13, namely, in consultation with the Defendant etc., developing third-party financing structures. I am satisfied that such assistance did not include "*sourcing and implementing any financing facility*", but in any event any such assistance, impossible to describe, would have been very limited, considering that the Claimant had no responsibility (insofar as the sentence can be understood) to incur any expense itself. Insofar as the Claimant was obliged to do anything more than specifically consult in relation to developing third-party financing procedures, the obligation would be uncertain and unenforceable, not even approaching what was discussed in **Wittmann** and **Schweppe**, and certainly nowhere near as precise as the obligation to use best endeavours permitted in **Jet2**, nor the obligation to which Mr Shah pointed in **Novus Aviation Ltd v Alubaf Arab International Bank BSC** [2017] 1 BCLC 414. Such limited agreement might be rendered more enforceable, or at any rate might more easily be shown to be breached if a request could be established which was then not complied with, but the request could only be to assist in developing third-party financing structures for the financing. 'Developing' is plainly distinct from 'implementing'. As for the two emails referred to in paragraph 15 above, there would be no arguable obligation to enter into arrangements with Chorus or TrueNoord, and the asserted obligation in the Defendant's Skeleton Argument, going way beyond the terms of LA13, and even beyond the case pleaded in paragraph 81 of the Defence and Counterclaim, is simply wishful thinking.

22. On the basis of this agreement to be spelt out of LA 13, it does not begin to be arguable that a breach of it could amount to a ground for not enforcing the obligations of the Defendant under the PA. The pleading at paragraph 93 of the Defence and Counterclaim is as follows: –

> "*93 In light of De Havilland's breach in failing to provide Finance Assistance, SpiceJet arranged financing for the First through to and including the Fifth Aircraft on its own and sought to arrange financing for the Sixth through to and including the Eighth Aircraft on its own.*
>
> *93.1 The First through to and including the Fifth Aircraft were successfully delivered on the efforts made by SpiceJet and Chorus without Finance Assistance from De Havilland.*
>
> *93.2 As regards the Sixth through to and including the Eighth Aircraft, as a result of De Havilland's breaches, including but not limited to its failure to engage sufficiently with lenders and/or failure to deliver on key commercial commitments it had made to potential financiers and/or guarantors, Chorus did not proceed with financing the Sixth through to and*

> *including the Eighth Aircraft. As a result, SpiceJet was unable to obtain a lease on financing terms that had been agreed with Chorus to take delivery of the Sixth Aircraft through to and including the Eighth Aircraft from Chorus or satisfactory financing to take delivery of the Sixth through to and including the Eighth Aircraft from TrueNoord Limited ("**TrueNoord**")*
>
> *93.3 On or around 19 August 2019, SpiceJet on its own sought financing with respect to the Sixth through to and including the Eighth Aircraft from TrueNoord Limited ("**TrueNoord**"). On or around 4 November 2019, TrueNoord made an offer to SpiceJet subject to acceptance of terms between TrueNoord and De Havilland. De Havilland again breached its Finance Assistance obligation including but not limited to De Havilland failing to engage sufficiently with TrueNoord and/or failing to deliver on key commercial commitments it had made to TrueNoord. As a consequence of De Havilland's breach of its obligation to procure Finance Assistance, SpiceJet was unable to proceed with the purchase of the Sixth Aircraft through to and including the Eighth Aircraft and has suffered loss and damage as pleaded below..."*

23. The Defendant prays in aid what has been called the prevention principle (see **TMF Trustee Ltd V Fire Navigation Inc** [2020] 2 Lloyds Rep 662 at [14]ff). It is best derived from **Roberts** per Kelly CB at 329: "*the rule of law ...which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party*." The prevention principle is very generously but quite inadequately pleaded by reference to the asserted obligation to procure finance or to deliver on key commitments. But it cannot possibly survive consideration by reference to a breach of an obligation to assist in developing financing structures. On the basis of the obligation to be extracted from LA 13, no arguable breach of it could begin to satisfy the prevention principle.

24. There is also no arguable counterclaim for breach of any obligation under LA 13, and certainly no sign of any arguable causation of any loss suffered. The pleading in paragraphs 97 and 98 is that the Defendant was unable to take delivery of Aircraft 6-8 "*as a result of*" the Claimant's breach of the Finance Assistance obligation, and thus lost the opportunity of putting them into service.

25. Hence the question of set-off does not arise, and I do not need to deal with the set-off issue. If there had been an arguable case of the application of the prevention principle or a counterclaim, I would then have needed to deal with the question as to whether either or both could be excluded by Article 5.6 of the PA, but that does not arise.

26. The present counterclaim has been pleaded by reference to a case in paragraph 81 of the Defence and Counterclaim, and I am satisfied that both it, and any breach or loss resulting from it, cannot be supported, so that I am persuaded that the present counterclaim must be struck out as unarguable.

The penalty issue

27. The Claimant submits, by reference to **Cavendish**, that there is no arguable case that Article 15.4 (c) of the PA amounts to a penalty clause. I refer to the seminal passages in **Cavendish**, first in the joint opinion of Lord Neuberger and Lord Sumption:

> *"32. The true test is whether the impugn provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance… But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligation…*
>
> *33. The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law. Diplock LJ was neither the first nor the last to observe that "the court should not be astute to descry a penalty clause"… As Lord Woolf said… " The court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld", not least because "any other approach will lead to undesirable uncertainty especially in commercial contracts." …*
>
> *….*
>
> *35. But for all that, the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach."*

28. In Lord Mance's speech at [152] he said:

> "*What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider… that the extent to which the parties were negotiating at arm's-length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."*

29. Lord Hodge, adopting at [220] the formulation by Lord Dunedin in **Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd** [1915] AC 79, adopts his fourth proposition in the passage at [255] in which he articulates his own definition: "*I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable*

when regard is had to the innocent party's interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable." Mr Dhillon referred to a decision of Hamblen J in **Tandrin Aviation Holdings Ltd v Aero Toy Store LLC** [2010] 2 Lloyds Rep 668, where he concluded that a clause said to be a penalty in an aviation contract was not so.

30. The onus is, as there appears, upon the party asserting that the clause is unenforceable, and the question is one of construction at the time when the PA was entered into. There is no reason why summary judgment is inappropriate, as appears from two recent decisions of the Commercial Court, **Cargill International Trading PTE v Uttam Galva Steels Ltd** [2019] EWHC 476 (Comm) and **Banco San Juan International v Petroleos De Venezuela SA** [2020] EWHC 2937 (Comm): to which fell to be contrasted a decision of Peter Smith J, **JSD Corporation PTE Ltd v Al Wahab Capital PJSC** in the Chancery Division [2009] EWHC 583 (Ch) , where he concluded that there was a "*tangled web"* which could not be resolved at the summary stage.

31. In this case, the parties were both represented at the time (and still) by sophisticated and experienced lawyers, and were themselves substantial commercial operators in the aircraft industry with a long-standing commercial relationship, and with clearly comparable bargaining power. Issues were raised by the Claimant in the evidence as to the price for the aircraft being, on its case, particularly favourable to the Defendant, and as to the frequency of liquidated damages or forfeited deposit clauses in the aviation industry. Such evidence was challenged by the Defendant, and that became a potential issue with disputed evidence from either side, but, with summary judgment in mind, Mr Dhillon abandoned reliance on that evidence, and submits that I should resolve the issue in his favour without it. He further relied on the fact that the entitlement to liquidated damages only arose after a substantial opportunity, by reference to Article 15 of the PA, for remedying the breach, and that by Article 15.4(c) credit was to be given for all previous payments made in respect of the aircraft, by deduction from the liquidated damages. The Defendant had every opportunity for advice, and indeed to use its own experience, before agreeing, as it did in Article 15.4 (c), that "*such liquidated damages do not constitute a penalty and are a reasonable and agreed amount of the anticipated or actual harm or damages to be suffered by* [the Claimant] *as a result of or in connection with Buyer's default*".

32. The Defendant submits that there is an arguable case that the clause is an unenforceable penalty:

    i) Mr Shah submits that more evidence is needed of the factual matrix before the reasonableness of the bargain can be assessed. He relied on the contested evidence as to whether the price was favourable or whether such a clause was frequent in the industry, now said not to be relied upon by the Claimant.

    ii) He asserts that evidence as to the loss suffered by the Claimant (including evidence of steps to mitigate such loss), particularly in the light of such evidence as to loss suffered to date as had already been disclosed, was required to be disclosed and considered.

iii) In particular no case had been put forward by the Claimant as to quantifying the maximum conceivable loss suffered in respect of each aircraft, so as to come within Lord Dunedin's fourth proposition and Lord Hodge's definition.

The case was accordingly not appropriate for summary determination, and particularly after such disclosure they had an arguable prospect of success in satisfying the onus.

33. The Claimant's response was persuasive:

i) No further evidence is required as to the factual matrix at the time of the PA: Mr Dhillon referred to paragraph 9 of the joint opinion of lords Neuberger and Sumption in **Cavendish**: "*The distinction between a clause providing for a genuine pre-estimate of damages and a penalty clause has remained fundamental to the modern law, as it is currently understood. The question whether a damages clause is a penalty falls to be decided as a matter of construction, therefore as at the time that it is agreed…. This is because it depends on the character of the provision, not on the circumstances in which it falls to be enforced. It is a* species *of agreement which the common law considers to be by its nature contrary to the policy of the law*." The Defendant has not begun to satisfy the onus, or to meet the "*strong presumption*" in favour of the agreed provision.

ii) No evidence is appropriate as to actual loss suffered. The whole purpose of the liquidated damages clause is to avoid the expense and time incurred in calculating the actual extent of loss, and mitigation is only relevant to estimating anticipated loss. Indeed, as it is put in Chitty on Contracts (33rd Ed 2020 Vol 1) in the passage referred to by Mr Shah at 26-202 "*The mitigation principle must be taken into account in deciding whether or not the clause was a genuine pre-estimate in the first place*", i.e. the anticipated extent of possible mitigation of loss forms part of any assessment as to what the greatest loss could be.

iii) As to Lord Hodge's test, echoing Lord Dunedin's proposition, the Defendant has not even come close to casting doubt that the stipulated sum falls below the "*highest level of damages that could possibly arise from the breach".* What the Defendant was paying for each of the 25 aircraft was approximately US$ 20m (plus contractual price inflation) with PDPs due for each aircraft of approximately $20m – thus 10%. 12.5% for liquidated damages was not surprising (and was agreed between the parties at the time) in respect of such highest possible loss: if an aircraft were manufactured, it might not be resold at all, or be sold at a considerably lesser price even after steps to mitigate, and not without substantial expenditure in respect of changing the specifications, and marketing, and after storage and depreciation: and if some were not manufactured, the opportunity of sale of those aircraft to other purchasers would be lost, at a considerable cost of loss of profit and wasted overheads, and the relevant manufacturing slots would have been wasted. The purpose of having a liquidated damages clause by way of pre-estimate of loss is to avoid the need to await and calculate the actual loss, and to insist on that very calculation being done in order to justify the pre-estimate wholly destroys the point. That is why the assessment by the Court is whether there is an exorbitant or extravagant pre-estimate.

34. The Defendant neither in evidence nor through counsel made any attempt to cast doubt on the realistic nature of this estimate, which was agreed at the time. In all the circumstances, and for the reasons given by the Claimant, I am satisfied that the sum per aircraft calculated and agreed as a pre-estimate of loss in Article 15.4 (c) is not an irrecoverable penalty.

The common-law damages issue

35. This issue accordingly does not arise, but I shall deal with it. Lords Neuberger and Sumption in **Cavendish** make it entirely clear, at paragraph 9 of their joint speech, that "[d]*eprived of the benefit of the provision, the innocent party is left to his remedy in damages under the general law*." They explain, in that paragraph and those following, the impact of equity, which is the origin of the penalty jurisdiction. The remedy of depriving the innocent party of the right to receive the penalty provided for in a contract is founded in equity, and equity will not, as I put it in argument, do a 'reverse Shylock', and deprive the innocent victim of recovery of his loss simply because he claimed what the court has concluded was an excessive pre-estimate of his loss. The 'penalty' thus imposed on him is the need to calculate the actual loss, with all the possible difficulty and expense that that would entail, not being deprived of any recovery at all.

36. The case put by the Defendant is that because in Article 15.4 of the PA the parties agreed "*that the remedies described in this article 15.4 are exclusive of and in substitution for any and all other rights and remedies provided by law or otherwise for any termination of such Aircraft...under this article 15*", the parties have therefore irrevocably contracted out of the recovery of damages at common law. Mr Shah referred to the " *presumption that the parties do not intend to abandon remedies that arise by operation of law*", which can occur by sufficiently clear language (as he submits there was here), where "the *common-law remedy is not simply excluded but replaced by a different (and valuable) contractual one*:" see **Scottish Power UK plc v BP Exploration Operating Company Ltd** [2016] 1 AER (Comm) 536 at [23] and [175] per Leggatt J. Alternatively Mr Shah submits that the Claimant has elected for its remedy, by reference to words of Moore-Bick LJ in **Stocznia Gdynia SA v Gearbulk Holdings Ltd** [2010] QB 27 at [44], and must be held to that election even if the remedy elected for turns out not to be available.

37. I am however quite satisfied that: –

    i) **Stocznia Gdynia** is irrelevant. In that case the contracting party, faced with a breach by the other party, was argued to have made an irrevocable election between alternative remedies available of affirming the contract or terminating it. That is an entirely different concept from what occurred here, with the parties agreeing a pre-estimate of the damages that were likely to be suffered in the event of a breach, which pre-estimate would not now be capable of being relied upon if the Article was a penalty. That is not an irrevocable election between remedies.

    ii) The Claimant did not '*abandon*' its right to damages. In any event notwithstanding such clause, equity would ensure that the innocent party would be compensated if the guilty party were released from the penalty.

Conclusion

38. I am accordingly satisfied that the Claimant is entitled to succeed on the first issue, namely as to the construction of CO6, and as to the second issue with regard to the unarguability of the alleged defence and counterclaim in respect of LA 13, and was thus entitled to terminate Aircraft 6-8, Aircraft 9-25 and the PA, and in relation to the recovery of the liquidated damages. I do not consider that this is a case in which on any of those issues I would very nearly give judgment but for some possible arguable case on the part of the Defendant, such as to cause me to consider the question of conditional leave on the terms of payments into court, but rather I am satisfied that the Claimant is entitled to judgment.