Neutral Citation Number: [2020] EWHC 339 (Comm)

Case No: CL-2017-000227

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before :

MR JUSTICE BUTCHER

- -

Between :

Wallis Trading Inc	**Claimant**
- and -	
(1) Air Tanzania Company Limited (a company incorporated under the laws of Tanzania)	
(2) The Government of the United Republic of Tanzania	**Defendants**

- -
- -

Philip Shepherd QC and Bajul Shah (instructed by **Thomas Miller Law**) for the **Claimant**
Prof Adelardus Kilangi, Gabriel Malata, and Mussa Mbura for the **Defendants**

Hearing dates: 2, 4, 5, 9-12, 16 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BUTCHER

Mr Justice Butcher :

1. This is a claim by Wallis Trading Inc. (to which I will refer as 'Wallis'), a Liberian company which carried on the business of acquiring and leasing aircraft, against Air Tanzania Company Ltd ('ATCL') and the Government of the United Republic of Tanzania ('the Government') (and collectively 'the Defendants') in respect of sums which Wallis says are due to it from the Defendants arising out of a lease of an aircraft by Wallis to ATCL.

2. Wallis's primary case is that it is owed a sum of US$30,114,230.73, plus contractual or statutory interest, as a debt pursuant to a settlement agreement dated 4 October 2013 between it and the Defendants. That settlement agreement, it claims, compromised and settled the Defendants' liabilities arising out of an aircraft operating lease made between Wallis as lessor and ATCL as lessee dated 9 October 2007 and a guarantee dated 2 April 2008 by which the Government guaranteed the obligations of ATCL under the lease.

Procedural History and Representation

3. It is necessary, at the outset, to say something about the procedural history of this matter.

4. The Claim Form in these proceedings was issued in April 2017. Case Management Conferences were held in November 2018 and July 2019. An Amended Defence and Counterclaim was served on behalf of the Defendants on 26 July 2019, and in September 2019 witness statements were exchanged, and subsequently expert reports served.

5. In October 2019, Wallis made an application for specific disclosure of ATCL's Board minutes and Board papers for the period 2007 to 2014. On 13 November 2019 ATCL disclosed 16 Board minutes.

6. A Pre Trial Review was conducted on 15 November 2019 in preparation for the trial which was due to commence on 2 December 2019. At that stage the Defendants were represented by English solicitors and by both leading and junior counsel. On 25 November, however, Wallis's representatives learned that counsel previously instructed on behalf of the Defendants were no longer instructed, and also that the Court had permitted the Defendants' solicitors to come off the record.

7. An application was made in writing by the Attorney General of Tanzania, and also orally on 2 December 2019 by Mr Mussa Mbura, who is a state attorney seconded to the Tanzanian High Commission, for the trial to be adjourned for at least four months. This was opposed by Wallis and on 2 December 2019 I refused to adjourn the trial, for reasons I gave at the time. The Defendants sought, in the light of this, that they should be permitted to be represented at the trial by the Attorney General of Tanzania, and that the start of the trial should be put back to allow him to appear. In the unusual circumstances of this case I acceded to both of these applications. The result has been that the Defendants have been represented by the Attorney General of Tanzania, Prof. Adelardus Kilangi, together with Mr Gabriel Malata, the Deputy Solicitor General of Tanzania and Mr Mussa Mbura. Wallis has been represented by Mr Philip Shepherd QC and Mr Bajul Shah.

8. All the witnesses, factual and expert, for whom statements or reports had previously been served on behalf of either side were called and gave evidence. Prof. Kilangi cross-examined Wallis's witnesses, and made oral opening and written and oral closing submissions. I was very grateful to him and the Tanzanian team for the careful way in which the case was presented. I was left in no doubt that the issues in the case had been fairly and fully put before me.

Narrative

9. Most of the factual history and the chronology of the case is apparent from the documents and was not in dispute. What follows was either undisputed or, in relation to such minor points as were in dispute, represents my findings on the evidence.

10. Wallis is part of a group of companies, which is referred to as Abbotswood, which carries on business in a number of fields, including shipping, mining, aircraft financing and aircraft leasing. Mr Nemr Diab was the ultimate director of Wallis, and represented it in relation to the transactions at issue.

11. ATCL was established in 1977 as Air Tanzania Corporation. In 2002, the Government began the process of privatising Air Tanzania Corporation, which became registered as a limited company, and the Government entered into a joint venture with South African Airways ('SAA') under which SAA acquired 49% of the shares in ATCL. The joint venture with SAA did not succeed, however, and in 2006 the Government reacquired SAA's 49% shareholding and terminated the joint venture. At that point, ATCL had only a few functioning aircraft, including two old Boeing 737-200A aircraft which were leased from a California-based aircraft lessor called Celtic Capital Corporation ('Celtic').

12. In 2007, the Government wished to revivify ATCL, and to expand and modernise its fleet. In early 2007 the Board of ATCL approved a five-year business plan for the growth of ATCL, to include buying and leasing aircraft. To support its business plan ATCL required outside investment. To this end, ATCL sought to partner with a Chinese company, called China Sonangol International Holdings Ltd ('China Sonangol') and ATCL and China Sonangol entered into a Heads of Agreement dated 13 March 2007.

13. In March 2007, ATCL invited Boeing, Airbus and Embraer to present options for modern short-haul and regional aircraft for ATCL to consider. Each made a presentation, but at least by May 2007 ATCL had only received a commercial proposal from Airbus. That proposal was reported to ATCL's Board on 29 March 2007. Airbus's proposal was that ATCL should acquire a fleet of five Airbus aircraft (two A330 and three A319 aircraft) and Airbus would grant various 'credit memoranda' for the purchase of these aircraft. These proposed aircraft would be available in 2011/2012 if the manufacturing slots were secured. Airbus would seek to facilitate the leasing of Airbus aircraft in the interim.

14. The minutes of ATCL's Board meeting of 29 March 2007 recorded that:

'Lease rates of A 319 aircraft depends on age, configuration and other aspects desired by the lessee. Generally the lease rates are relatively high, and on average lease rate

of A319 aircraft is USD 350 000 per month. This calls for outright purchase, if the Organization has proper financing for the required aircraft.'

15. ATCL's Board resolved on that occasion that:

'ATCL should pursue the A319 and A330 route in terms of leasing and acquiring the aircraft. In the interim the Management may procure any type of new generation aircraft for leasing pending availability of the A319 aircraft.'

16. On 5 April 2007, Airbus's Vice President of Sales, Mr Hadi Akoum, contacted Mr Diab to see if he was interested in the possibility of leasing aircraft to ATCL. In an email of that date, Mr Akoum informed Mr Diab that Airbus had located two Airbus A319 aircraft formerly operated by Air Canada which could be purchased and leased to ATCL. Mr Diab was interested in the transaction and various emails and discussions took place between him and Airbus. At this stage, Mr Diab did not have contact with ATCL.

17. In early May 2007 Mr Akoum provided Mr Diab with a draft proposal for leasing three A319 aircraft to ATCL. Mr Diab and Mr Wettern, an adviser to Wallis, reworked the proposal, which was for leasing each aircraft to ATCL on an operating lease for a period of 72 months, with a rent of US$315,000 per aircraft per month plus maintenance reserves. The proposal also stated that a guarantee from the Government was required. Mr Wettern provided the proposal to Mr Akoum, who provided it to ATCL on or about 11 May 2007.

18. In the meantime, ATCL's Board had not made a decision on Airbus's commercial proposal, but at its meeting on 7 May 2007[1] decided that its Managing Director and CEO, Mr David Mattaka, should write to the Principal Secretary in the Ministry of Infrastructure Development ('MOID'), which was the ministry with relevant responsibility for ATCL, in relation to the offer from Airbus for five aircraft, and an offer from China Sonangol to pay the deposits for the aircraft to secure delivery slots in 2012.

19. Mr Mattaka sent such a letter on 10 May 2007. That letter stated in part:

'[ATCL's Board had resolved:]

i) That in terms of procurement guidelines and the dictates of good governance, the Board has solicited presentations and commercial proposals from the major manufacturers of aircraft namely Airbus, Boeing and Embraer and received presentations from all of them.

ii) That the Board was generally impressed by all presentations but have so far received only one commercial proposal from Airbus; and that it was awaiting commercial proposals from the other manufacturers for evaluation and final selection.

[1] The letter of 10 May 2007 says that the meeting was on 7 April 2007, but this does not accord with the indication that the decision was in response to a request made on 3 May 2007.

iii) That the offer by [China Sonangol] … to effect payment for the offer already received from Airbus is a welcome idea because of retaining early delivery slots.

iv) That despite its intention to follow the procurement guidelines to the later (sic), the Board is willing and ready to go ahead with Airbus commercial proposal subject to getting clearance from the Government as the sole shareholder.

This letter is therefore to request your clearance for us to work out and sign contracts with Airbus as a prerequisite for [China Sonangol] to effect the required payments and for us to be able to use credit offers from Airbus for training of crew and maintenance staff as well as for lease of aircraft to be used in the interim period.'

20. On 22 May 2007 the Permanent Secretary of the MOID informed Mr Mattaka that the Government had granted permission to ATCL to proceed with the process of leasing aircraft.

21. On 24 May 2007 Mr Diab travelled to Tanzania and met with personnel from MOID and from ATCL, having been introduced to them by Mr Akoum of Airbus.

22. After that, Wallis submitted a revised proposal in relation to the leasing of three Airbus A319 aircraft. That proposal lapsed and a further revised proposal came to nothing.

23. On or about 31 August 2007, Mr Akoum informed Mr Diab that an Airbus A320-214 with MSN 630 ('the Aircraft') was available for purchase from Deutsche Bank's aviation leasing and finance division. The Aircraft was ten years old. It had been leased to Air Jamaica since manufacture.

24. On 18 September 2007, Mr Wettern sent a proposal by email to Mr Mattaka's secretary for the leasing of the Aircraft as well as two more A320 aircraft. Attached to this proposal was a draft form of guarantee to be provided by the Government. The proposal required an inspection of the Aircraft by ATCL and Wallis within seven days, and for them to confirm within seven days thereafter that they accepted that the Aircraft complied with the specifications and to record its condition. On 19 September 2007 the proposal was signed by Mr Mattaka and by Mr Diab. Mr Mattaka requested that Airbus should transfer a sum of US$350,000 to Wallis, as a deposit for the lease of the Aircraft, from a sum which China Sonangol had previously paid to Airbus. Wallis then signed a proposal for the purchase by it of the Aircraft from DB Leasing.

25. The Aircraft was at that time in San Salvador, undergoing a re-delivery check by Aeroman. On 21 September 2007 Wallis was informed that ATCL had arranged for Airclaims, who were aircraft surveyors, to carry out an inspection of the Aircraft. Airclaims inspected the Aircraft, completing the inspection by 23 September 2007. Airclaims provided a summary of their conclusions on or about that date. That inspection had been carried out for Airbus, but the summary was promptly provided to ATCL. The conclusion of this summary was 'Overall, the aircraft was considered to be in average condition, with no significant defects noted. There appeared to be good control of records and all information was readily available and well presented.'

The summary indicated that 'There was no significant structural damage or corrosion visible on the airframe.' It stated that there were three areas of unaddressed damage, numerous repairs noted, and that the cabin and interior were 'unkempt and in a generally fair to poor condition'.

26. On 24 September 2007 in an email which was actually sent by Mr Tarimo, Mr Mattaka confirmed to Mr Diab that having seen the Airclaims report, 'the aircraft is in a fairly good state' and that ATCL was willing to proceed with the lease of the Aircraft, with some of the shortfalls in relation to the Aircraft to be addressed in the detailed contract negotiations.

27. A first draft of the lease was sent by Mr Wettern by email to Mr Mattaka on 30 September 2007, copied to a number of other people within ATCL, including Mr Amini Mziray, the company secretary, Mr Fidelis Tarimo, Mr Mark Manji, Mr Eliasaph Mathew and Mr Sadiki Muse. Mr Mziray provided the draft lease to the Government's Presidential Parastatal Sector Reform Commission ('PPSRC'), with amendments, on 2 October 2007. It was considered by the Divestiture Technical Team of the PPSRC.

28. Negotiations over the terms of the lease ensued between ATCL and Wallis, and a number of changes were made.

29. On 8 October 2007 a meeting of the Board of ATCL took place. This has become clear as a result of the late disclosure by the Defendants to which I have already referred. The minutes record, in part:

> '3. A320-214 Aircraft Operating Lease
> REPORTED: That
> (i) The signing of the operating lease was set for the 9th October, 2007 and given this deadline, the Management resorted to bring to the attention the subject lease document for the Boards scrutiny and further guidance.
> (ii) Prior to bringing to the attention of the Board all the agreements relating to leasing and outright purchase went through the Divestiture Technical Team which is under [PPSRC] and were vetted by the [PPSRC] before being sent to the Attorney General Chambers for final approvals and a no objection to execution of the subject agreements.
> (iii) The subject agreements included the following:-
> - A 320-214 Operating lease
> …
> OBSERVED: That given the tight time lines of executing the operating lease for ATCL operations; the Board has not objection for the Management to execute the referred lease, subject to ascertaining that the following Board's concerns are taken on board before the intended execution:-
> (i) The Management should ensure that all authorities concerned, and in particular the [PPSRC] and the Attorney General Chambers have given a no objection to the signing of the subject agreements.
> (ii) Clauses 16.8(b) regarding lessee meeting costs of the lessor is unreasonable and the Management should re-negotiate the clause; like wise clause 8.8(d) should be clarified as it contains a number of continuous (sic) issues.
> RESOLVED: That the Management be and is hereby authorised to execute the Operating Lease of A.320-214 aircraft after seeking clarification and re-negotiating

the clause which the Board has raised concern and subject to obtaining the Attorney General no objection to the signing of the subject agreement.

FURTHER RESOLVED: That:-

(i) The Board approval is premised on the comfort given to it, that there is a financier who has already started to pay the relevant deposits;

(ii) The [Government] has undertaken to issue a guarantee to the lessor for the operating lease transaction between ATCL and the lessor.

(iii) The Management will present before the Board a business case which will justify that the contemplated transaction will be profitable and afford to meet the monthly rental payments of USD 370,000.'

The meeting, which had begun at 2.15 pm adjourned at 10.20 pm on 8 October 'for purposes of giving time to the A.G. Chambers to comment the agreements'.[2]

30. By letter dated 8 October 2007, the Attorney General of the United Republic of Tanzania provided comments on the draft lease. That letter was not provided to Wallis at the time. It stated, in part, as follows:

'We have gone through the copy of the draft Lease Agreement between [ATCL] and [Wallis] and wish to make the following comments:

a. General comments

i.That this matter is being dealt with under pressure of time. The respective Agreement needs to be signed urgently so as not to miss the opportunity of getting the plane, which indeed, is urgently required for the operations of ATCL. While we appreciate the urgency, we recognize and wish to point the harm that may be caused by finalizing an Agreement so hurriedly….

iii.Generally, the Agreement appears to have too many disclaimers and waivers of liabilities on the part of the Lessor while placing a lot of duties on the Lessee. Ordinarily, parties to an agreement are supposed to have duties that balance with their rights.

…

[23 Specific Comments]

You are advised to act on the above comments before the Agreement is signed.'

31. Mr Mattaka sought to negotiate further as to the terms of the lease on 9 October 2007, including in relation to a number of the points raised by the Attorney General. An amendment was made at his request to clause 3.3, and he also suggested a change to clause 8.8(b). He made an attempt to renegotiate clause 16.8(b), but Wallis was not willing to change it, Mr Wettern describing it as 'totally standard'. The process of negotiation went on into the evening of 9 October 2007. Ultimately the final version of the lease ('the Lease') was signed by Mr Mattaka for ATCL as Lessee either late on 9 October 2007 or early on 10 October 2007. Mr Wettern signed the Lease on behalf of Wallis as Lessor on 10 October 2007 in London.

32. The Lease contained, amongst many detailed provisions, the following terms:

'REPRESENTATIONS AND WARRANTIES

[2] The minutes record that there were other agreements for the purchase of aircraft which were considered at the meeting.

2.1 Lessee's Representations and Warranties: Lessee represents and warrants to Lessor that:-
…
(b) **Power and authority**: Lessee has the corporate power to enter into and perform, and has taken all necessary corporate action to authorise the entry into, performance and delivery of, this Agreement and the transactions contemplated by this Agreement;
(c) **Legal validity**: this Agreement constitutes Lessee's legal, valid and binding obligation;
(d) **Non-conflict**: the entry into and performance by Lessee of, and the transactions contemplated by, this Agreement do not and will not:-
(i) conflict with any laws binding on Lessee
…
(e) **Authorisation**: all authorisations, consents, registrations and notifications required in connection with the entry into, performance, validity and enforceability of, this Agreement and the transactions contemplated by this Agreement, have been (or will on or before the Delivery Date have been) obtained or effected (as appropriate) and are (or will on their being obtained or effected be) in full force and effect…
…
3. CONDITIONS PRECEDENT
3.1 **Conditions Precedent**: Lessor's obligation to deliver and lease the Aircraft under this Agreement is subject to satisfaction of each of the conditions set out in Schedule 7 within the periods of time therein specified.
…
4.1 Leasing
(a) Lessor will lease the Aircraft to Lessee and Lessee will take the Aircraft on lease in accordance with this Agreement for the duration of the Term [which was defined to be approximately 72 months after delivery of the Aircraft]
…
4.2 Delivery
(a) The Aircraft will be delivered to and accepted by Lessee at the Delivery Location or such other location as may be agreed.
(b) The Aircraft will be delivered to and accepted by Lessee immediately after the Aircraft is acquired by Lessor. … Completion of the purchase of the Aircraft by Lessor shall be conclusive evidence of the commencement of the Term. …
(c) Lessee will effect acceptance of the Aircraft by execution and delivery to Lessor of the duly completed and executed Certificate of Acceptance in the form of Schedule 2 …
…
5. PAYMENTS
5.1 Aircraft Commitment Fee: Lessee will pay to Lessor Aircraft Commitment Fees as follows:
(a) $370,000 before signing this Agreement, the receipt of which is hereby acknowledged; and
(b) $740,000 no later than 5 days after the date of this Agreement; and
(c) $1,080,000 no later than the Delivery Date.
…
5.3 Rent:
(a) Lessee will pay to Lessor or to its order Rent in advance on each Rent Date.
…

(c) Subject to Clause 5.3(d), the amount of Rent to be paid on each Rent Date shall be $370,000. This figure is calculated on the basis of a 30 day month, and Rent will in fact be payable by reference to the actual number of days in each month.
(d) The amounts due in respect of Rent shall be increased by 3% per annum, such increases to take effect on the 2nd and 4th anniversaries of the Delivery Date.
…
5.11 Default Interest: If Lessee fails to pay any amount payable under this Agreement on the due date, Lessee will pay on demand from time to time to Lessor interest (both before and after judgment) on that amount, from the due date to the date of payment in full by Lessee to Lessor, at the rate calculated by Lessor to be the one month Dollar LIBOR rate plus 500 basis points per annum. All such interest will be compounded monthly and calculated on the basis of the actual number of days elapsed and a 360 day year.
…
5.15 Guarantee
(a) Within three (3) Business Days after signing this Agreement, and in any event no later than close of business on 10 October, 2007 Lessee will provide Lessor with the Guarantee, duly issued by the Guarantor [defined as 'the Government of Tanzania'], in form and substance acceptable to Lessor, effective at any time or times until 60 days after the Expiry Date.
(b) In case, by such date, the requirement of Clause 5.15(a) shall not have been fulfilled then, if Lessor agrees to give a temporary waiver in writing of such conditions … until the Guarantee is provided:
(i) Lessee shall pay an additional Rent of $60,000 for each complete month as from the Delivery Date in respect of which the Guarantee remains outstanding …
…
13. DEFAULT
13.1 Events: Each of the following events will constitute an Event of Default and a repudiation of this Agreement by Lessee:-
(a) Non-payment: Lessee fails to make any payment under this Agreement on the due date …
…
13.2 Rights: If an Event of Default occurs, Lessor may at its option (and without prejudice to any of its other rights under this Agreement), at any time thereafter:-
(a) accept such repudiation and by notice to Lessee and with immediate effect terminate the letting of the Aircraft (but without prejudice to the continuing obligations of Lessee under this Agreement), whereupon all rights of Lessee under this Agreement shall cease; and/or
(b) proceed by appropriate court action or actions to enforce performance of this Agreement or to recover damages for the breach of this Agreement …
…
16.8 Expenses
…
(b) Lessee will reimburse to Lessor all expenses (including legal, professional, travel and out-of-pocket expenses incurred or payable by Lessor and Lessor's Representative in connection with the negotiation, preparation, and execution of this Agreement.
….
16.11 Law and Jurisdiction

(a) This Agreement is governed by the Governing Law [which was defined as 'the laws of England'];
(b) For the benefit of Lessor, Lessee agrees that the English courts (the 'Designated Courts') are to have jurisdiction to settle any disputes in connection with this agreement and submits to the jurisdiction of the Designated Courts in connection with this Agreement…

33. One of the Conditions Precedent set out in Schedule 7 was 'Receipt by Lessor from Lessee not later than 5 Business Days prior to the Delivery Date of the following in form and substance satisfactory to Lessor: … (ii) Resolutions: a copy of a resolution of the board of directors of Lessee approving the terms of, and the transactions contemplated by, this Agreement, resolving that it enter into this Agreement, and authorising a specified person or persons to execute this Agreement and accept delivery of the Aircraft on its behalf…'

34. After the signing of the Lease, Wallis's representatives sought the documents required under clause 3.1 and Schedule 7 of the Lease, including that specified in (b)(ii) of Schedule 7. On or shortly after 22 October 2007 Wallis's Tanzanian lawyers, Mkono & Co, were provided by Mr Mziray with what was stated to be a copy of a resolution by the Board of ATCL.[3] It was in the following terms:

'Certified Board Resolution
Resolved: That:-
1. Management be and is hereby authorized to dry lease two (1) (sic) A. 320-214 aircraft, … from [Wallis], under the terms and transactions contemplated under the dry lease agreement.
2. The CEO and MD, Mr David Mattaka, be and is hereby authorised to execute the dry lease agreement for the one (1) A. 320-214 aircraft, and accept the delivery thereof on behalf of the Board of Directors.
I certify that the above is a true and correct extract of the Board Resolution issued by the Board of Directors of [ATCL] on 16th October 2007'.
That was signed by Mr Mziray as 'Secretary to the Board.'

35. On 24 October 2007 Mkono & Co provided a letter of advice to Wallis on Tanzanian law in connexion with the least transaction. Mkono & Co stated that they had reviewed a number of documents, including the Lease. In paragraph 3.0 the letter said this, amongst other things:

'Having considered the documents listed in paragraph 1 above, having made all necessary searches at the Tanzanian central registry of companies and having regard to the relevant laws of Tanzania we are pleased to advise that in our opinion:-
…
(c) the entry into and performance by Lessee of, and the transactions contemplated by, the Lease do not and will not:-
(i) conflict with any laws binding on Lessee
…

[3] Wettern Witness Statement para. 10.

(d) all authorisations, consents, licences, approvals and registrations have been obtained … that are necessary or desirable to be obtained from any governmental or other regulatory authorities in Tanzania to enable Lessee:-
(1) to enter into and perform the transactions contemplated by the Lease
…'

36. In the meantime, on or about 14 October 2007 Mr Mattaka instructed a team of technicians at ATCL to re-inspect the Aircraft. A draft of an acceptance certificate was then negotiated between the parties, in particular over the extent to which Wallis would be responsible for making good any defects in relation to the condition of the Aircraft and whether Wallis would pay for certain repairs and refurbishment of the interior of the Aircraft. The result of these negotiations was agreement on the terms of a Lease Certificate of Acceptance. The Certificate of Acceptance included as clause 2, a provision for Delivery Exceptions as set out in Appendix 4. Appendix 4 contained a List of Reserved Items as at the Delivery Date, with in each case the 'Open Issue' identified and the agreed 'Corrective action' specified.

37. The Certificate of Acceptance also provided, as clause 3:

'Lessee confirms to Lessor that, at the Delivery Date:
(a) The representations and warranties contained in Clause 2 of the [Lease] are hereby repeated
…
(d) Lessee's authorised technical experts have inspected the Aircraft to ensure the Aircraft conforms to Lessee's requirements. The Aircraft is in the condition required by Schedule I of the [Lease], save for the items listed in Appendix 2 (sic) to this Certificate;
(e) the Aircraft is in all other respects satisfactory in every way, and that the Lease Period commences as from time indicated above on the Delivery Date, and that all of Lessee's obligations under the Agreement apply from that date and time.'

38. On 30 October 2007 Mr Tarimo, Technical Director of ATCL, and a member of the team which had gone to re-inspect the Aircraft, sent an email to Mr Mattaka enclosing a report of the team, and in his email stated:
'We wish to emphasise: ATCL Team at Aeroman is fully supportive of the aircraft lease subject to lessor making the aircraft fit for acceptance by ATCL.
This is in the best interests of ATCL. Repeated: the aircraft may have work required to be carried out in a time span of more than TWO months. Will ATCL be paying Lease costs of $370,000 per month while defects which are required to be rectified by Lessor are carried out? And, with all these items outstanding are there any ground for the Technical Representatives of ATCL to sign the Acceptance Certificate?'

39. On the same date Mr Mattaka received an email from Mr Akoum, suggesting that he should proceed to sign the Certificate of Acceptance. Mr Akoum made, amongst others, the following points:
'- Aircraft technical acceptance has been done by ATC end of September based on Airclaims report that confirmed that no major issues have been noticed on the aircraft.
-Test flight result was quite positive with only minor issues to be corrected and these have already been cleared.

-Wallis trading is buying this aircraft and they are as much concerned as ATC to make sure the aircraft status is in proper order.
- latest issues highlighted by fidelis [Tarimo] and ringo are rather secondary issues …
-New generation Aircraft availabilities is very limited in these days and so far this is the only one available and only through a complexe (sic) operation of buying and leasing. The risk on Air Tanzania is very high when compared to other airlines. I dought (sic) we can attract other investors to follow us in such operation. …'

40. It appears that it was later on 30 October that Mr Mattaka signed the Certificate of Acceptance 'based on what I consider to be my best judgement given the profile and flow of information from Airbus, Airclaims and [the re-inspection team].'

41. The Guarantee had not been provided at the time of the execution of the Certificate of Acceptance. In November 2007 Wallis began charging the additional rent of US$ 60,000 per month, while the Guarantee was delayed. On 5 March 2008 Wallis threatened to terminate the Lease if the Guarantee was not provided.

42. In the meantime, the Ministry of Finance of the Government became aware that the Lease had been signed and was considering the issue of the Guarantee. On 10 March 2008 Mr Eliasaph, Acting CFO of ATCL, sent an email to Mr Diab stating that ATCL had not complied with the Tanzanian Public Procurement Act 2004 ('the Procurement Act') and that a ratification process was required, and it was expected that this 'may take a couple of days'. On 13 March 2008 Mr Mattaka wrote to Dr Mlinga at the Government's Public Procurement Regulatory Authority ('PPRA') explaining why the Procurement Act process had not been followed and stating that retrospective approval was being sought from the Paymaster General. In a letter dated 19 March 2008 from the PPRA, which was said to embody the results of a meeting of the PPRA in collaboration with the Stock Verification Department and the Technical Audit Unit of the Ministry of Finance held at the PPRA's offices on 19 March 2008, it was stated that the matter had been considered and that the PPRA recommended that retrospective approval should be given, noting that 'further delay in the implementation of the contract would result into further loss of income to ATCL'.

43. The Paymaster General granted such retrospective approval by letter which also bore the date of 19 March 2008. His letter stated that ATCL's application for retrospective approval had been reviewed in line with Regulation 42 in G.N. No. 97 of 2005. It identified the weaknesses which had been found in the procurement process. These included in particular that there had not been the approvals from a Tender Board required under the Public Procurement Act 2004. The letter stated that 'this would only have authenticated the procurement process but would not have changed the approach that was adopted by the ATCL Management and Board in view of the operational nature of the aviation industry in lease of aircraft.'

44. On 31 March 2008 the Permanent Secretary of the Ministry of Finance wrote to the Attorney General saying that following advice from the National Debt Management Committee ('NDMC') the Minister of Finance had approved the issue of the Guarantee, worth US$60 million. A draft of the Guarantee was included. The Guarantee was executed on 2 April 2008, being signed by Mr Mgonja for and on behalf of the Government.

45. The Guarantee, which defined the Government as 'the Guarantor', ATCL as 'the Lessee' and Wallis as 'the Beneficiary', contained the following provisions:

'2.0 Guarantee. Guarantor hereby absolutely, unconditionally and irrevocably as primary obligor and not as surety, guarantees to the Beneficiary the due and punctual payment by Lessee of the Rent and each and every amount which Lessee is or at any time may become obliged to pay to the Beneficiary under the Lease (the 'Payment Obligations'). The Guarantor further hereby absolutely, unconditionally and irrevocably guarantees that should the lessee default in its payment obligations under the Aircraft Lease Agreement, the Guarantor shall step in and settle such payment obligations.

…

8.0 Further Representations, Warranties and Covenants of Guarantor

Guarantor hereby represents and warrants that:

(i) it has the governmental power and authority to enter into, and perform its obligations under this Guarantee;

(ii) the execution and delivery by Guarantor of this Guarantee have been duly authorized by all requisite action and proceedings of Guarantor;

(iii) this Guarantee had been duly executed and delivered by Guarantor;

(iv) this Guarantee is the legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms;

(v) the execution and delivery by Guarantor of this Guarantee shall not … (C) constitute a violation by Guarantor of any law or regulation applicable to Guarantee

…

(vii)the execution and delivery of this Guarantee by Guarantor shall not violate any provision of, or create a relationship which would be in violation of, any Tanzanian laws, orders or regulations.

…

13.0 Miscellaneous

13.1 Any provision of this Guarantee which is prohibited or unenforceable in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

…

15.0 Law

This Guarantee shall in all respects be governed by, and construed in accordance with, the laws of Tanzania including all matters of construction, validity and performance…..

…

16.0 Enforcement

This Guarantee shall come into force on the date of delivery to the Lessee of [the Aircraft] and remain in force until all payment obligations to the Beneficiary are made.'

46. The Aircraft did not leave Aeroman until late April 2008. This delay appears to have been at least in part as a result of delays in paying Aeroman. The Aircraft arrived in Tanzania on 1 May 2008. It began operating flights later that month. It was grounded in December 2008. The Aircraft was flown to Mauritius in March 2009 for maintenance work to be carried out by Air Mauritius. In about July 2009 the Aircraft

was flown to Sabena Technic's facility in France for a 12-year check. The Aircraft never returned to Tanzania.

47. The sums which the Lease provided to be payable by ATCL were not paid in accordance with the terms of the Lease. There were a number of meetings between Wallis and a Government Negotiating Team ('GNT') to discuss the sums due under the terms of the Lease and Guarantee and to find solutions. There were meetings on 26-27 January 2010, 17 March 2011 and 25-26 October 2011.

48. The minutes of the meeting on 26-27 January 2010, which are signed as a true record of the meeting on behalf of both the GNT and Wallis, include the following:

'2.1 The [GNT] leader requested Wallis to confirm the outstanding debt on the transaction as at 30th January 2010, so that the debt amount after being verified can be the basis for discussion.
…
3.0 RESOLVED that:
3.1 The [GNT] proposed the following payment schedule subject to agreeing the outstanding amount and default interest:

- 1st instalment: payable in July-September 2010
- 2nd instalment: payable in October-December 2010
- 3rd instalment: payable in January 2011-June 2011
- 4th instalment: payable in July-September 2011'

49. The minutes of the meeting on 26 October 2011 appear to record an agreement in principle on the sum payable to Wallis (which was in the region of US$39 million), the rate of default interest, payment by monthly instalments over a period of two years and a discount if payments had been made by particular dates.

50. On 26 October 2011 Wallis accepted early redelivery of the Aircraft and termination of the Lease. This was documented by a Return Certificate dated 27 October 2011, signed by Mr Mziray on behalf of ATCL and by Mr Wettern on behalf of Wallis. That Certificate stated

'1. It is hereby agreed that yesterday, 26th October 2011 the Aircraft … was redelivered by the Lessee to the Lessor …
…
3. Yesterday, 26th October, 2011, unpaid Rent and Supplemental Rent and other costs remain outstanding ('OA'), the agreed amount of which is $32,659,316.12 …
Additionally, a lump sum compensation ('TA') is payable to the Lessor for early termination and for failure by the Lessee to redeliver the Aircraft in the condition required under Schedule 3 … of the Lease… The OA and TA amounts and the period and other terms for payment have been agreed today between us, you, the Ministry of Finance and the technical committee appointed by the Government/CHC, subject to signature of the letter being signed by the Permanent Secretary of the Ministry of Finance as per the discussion between him and Wallis at the Ministry on October 27, 2011 at 09.30.'

51. A payment of US$1,553,450.23 was made on or about 28 December 2011, but no further payments were made by the Defendants. Discussions continued intermittently.

Wallis chased for payment. During this period the Defendants did not deny that they were liable to Wallis. On 11 July 2013 the Attorney General of Tanzania advised the Ministry of Finance as follows:

'The claim by [Wallis] is based on a Government guarantee on ATCL's Leasing of Air Craft Agreement. According to the records emanating from your office and several legal opinions that have been issued by this office, the claim and liability again (sic) the Government is not denied. It is a fact that the liability uncontestable and this fact has been communicated to the claimant…'

This letter itself was not seen by Wallis at the time.

52. A further meeting took place on 4 October 2013. The agreed minutes of this meeting indicate that it was treated as a continuation of the meeting of 26 October 2011. The minutes record the following:

'3.0 **DELIBERATIONS ON THE OUTSTANDING DEBT AND ITS RESPECTIVE REPAYMENT SCHEDULE**

The GNT made proposals to Wallis Team as regards the outstanding debt and other charges by ATCL which relate to the leasing of A320 aircraft. The following is the summary of the GNT proposals and the response from Wallis Team:

The GNT noted that, as per the statement of account issued by Wallis on 26th August 2013, the outstanding debt is US$45,103,838.80. The GNT made the following proposals as regards the debt:

- The Government is in a position to settle USD 39,000,000.00 as agreed in 27th October 2011 and the accrued interest should be waived. The respective Government approval was not obtained in time as was expected at the time of negotiations. Therefore this explains our inability to implement the payment schedule as agreed.

…

4. **RESOLVED** that:

i. The debt as at 26th August, 2013 is USD 45,103,838.80.

ii. If the Government will be able to pay USD 42,103,838.80 plus an interest of 5% p.a by 30th August, 2014, Wallis hereby agrees to give the following concession:

a. A discount of USD 3,000,000, plus,

b. An amount equivalent to the difference between the interest calculated at 10% p.a. and 5% p.a. on the USD 45,103,838.80.

iii. In the event of default the Government as per above, Wallis will demand full settlement of the full debt of USD 45,103,838.80 and interest of 10% p.a. from 26th August 2013.

…'

53. Six payments were made following the meeting of 4 October 2013, as follows: US$4,965,461.85 on 16 December 2013; US$5,076,858.05 on 9 January 2014; US$2,812,135 on 10 June 2014; US$8,691,133.53 on 24 September 2014; US$405,255.81 on 16 October 2014; and US$4,164,584.16 on 30 October 2014. These amounts total US$26,115,428.75. No other payments have been made.

54. On 15 March 2016 criminal charges were brought against Mr Mattaka in Tanzania, alleging abuse of position, in that he signed the Lease without complying with the relevant procurement legislation; abuse of office, by signing the Acceptance Certificate 'in disregard of the advice of the Re-Inspection team'; and three counts of

causing loss to a specified authority. Those proceedings are still ongoing and have led to no finding of guilt or innocence.

55. The Claim Form in these proceedings was issued on 4 April 2017.

The pleaded cases in outline

56. Wallis's primary case, as I have said, is that the Defendants are liable for a sum of US$30,114,230.73 plus interest as a debt, pursuant to what it contends was the settlement agreement made on 4 October 2013. Alternatively it claims damages for breach of the Lease or of the Guarantee.

57. The Defendants' Amended Defence and Counterclaim put forward a number of defences, which may be summarised as follows:

(1) That Mr Mattaka had entered into the Lease 'without consulting with, let alone obtaining approval from, the Board of ATCL, and he did not have the approval of the Board of ATCL to sign the Lease.'
(2) That in signing the Lease Mr Mattaka had committed a breach of his fiduciary duties to ATCL.
(3) That in signing the Lease: Mr Mattaka had not obtained the approval of the Minister of Finance, which it was said he should have done because of the provision of the Lease for ATCL to obtain a Government Guarantee; and had acted in breach of the requirements of the Procurement Act and the Public Procurement (Goods Works Non-Consultant Services and Disposal of Public Assets by Tender) Regulations GN No. 97 of 2005 ('the Procurement Regulations') (collectively 'the Procurement Legislation'), in particular by failing to implement a competitive and transparent tender process and failing to seek approval from a 'Tender Board'.
(4) That the failures to comply with the Procurement Legislation rendered the Lease illegal as a matter of Tanzanian law, and meant that ATCL had no power to enter into the Lease.
(5) That Wallis itself acted in breach of the Procurement Act in signing a contract in circumstances where it had not been approved by a Tender Board.
(6) That as a result of (1)-(4) Mr Mattaka had lacked actual authority to sign the Lease.
(7) Further that Wallis knew of Mr Mattaka's breach of fiduciary duty and / or his lack of authority to sign the Lease, rendering the Lease void for want of authority, alternatively voidable.
(8) Alternatively, that performance of the obligations under the Lease would be illegal under Tanzanian law and that the Lease was as a result unenforceable, under the principle that the English Court will not enforce an obligation which requires a party to do something which is unlawful under the law of the country of performance.
(9) That the relevant Minister had not had authority to issue the Guarantee.
(10) Alternatively, that the Guarantee was unenforceable because: there were no enforceable primary obligations; the English Court will not enforce an ancillary or collateral contract where the purpose of the rule which invalidates the main contract (the Lease) also invalidates the Guarantee; and on a true construction the

Guarantee only applied to sums which the Lessee was obliged to pay under the Lease.

(11) The agreement of 4 October 2013 was not a free-standing agreement, but a variation of the Lease and the Guarantee and that as those agreements were void or voidable, the variation was equally void, voidable or unenforceable. If, however, it was a free-standing agreement, it was unsupported by consideration and unenforceable for reasons of illegality.

58. The Amended Defence and Counterclaim also included a counterclaim for restitution of sums paid after the agreement of 4 October 2013, to the extent and on the basis that Wallis had been unjustly enriched.

59. In its Amended Reply and Defence to Counterclaim Wallis took issue with all the Defendants' defences. In particular it was pleaded that Mr Mattaka had had actual or ostensible authority to enter the Lease; that the Board and the Government had ratified the Lease; and that ATCL was contractually estopped from advancing the case as to lack of authority. It was said that the allegations that Mr Mattaka had acted in breach of duty were inadequately pleaded; and in any event denied that Wallis had known that Mr Mattaka had acted in breach of duty. It was also denied that any contravention of the Procurement Legislation rendered the Lease void, voidable or invalid, or any performance thereunder illegal.

The Witness Evidence

60. As is very frequently the case, none of the major issues in the present action depended, for its resolution, mainly on disputed oral evidence, but instead on a consideration of the contemporary documentation and the inferences which could be drawn from what it showed (or did not show). I should nevertheless record my assessment of the various witnesses who were called to give evidence at the trial.

61. Two factual witnesses were called on behalf of Wallis, of which the first was Mr Nemr Diab. Mr Diab and his brother are the ultimate shareholders of Wallis. He and his brother had inherited significant business interests, managed from Beirut. Wallis was part of a wider family-based trading group. Mr Diab described himself as Wallis's ultimate director. He had represented Wallis in relation to the Lease and, I concluded, had taken all the important decisions in relation to it as far as Wallis was concerned. I formed the view that Mr Diab was an astute businessman; and that he was a generally reliable witness. I should specifically record that no case was put to him that he or Wallis had paid any bribe to Mr Mattaka or to anyone in relation to the conclusion of the Lease, and equally no case was put to him that he knew of or was privy to any corrupt inducements relating to the Lease.

62. The other witness called by Wallis was Mr Andrew Wettern. He has worked for Mr Diab and his group of companies for upwards of 25 years. Initially this was as a partner in a firm of solicitors, but after his involvement in a Russian shipping dispute he was struck off as a solicitor. He continued to be used as a consultant, including by Mr Diab. His role in relation to the Lease transaction was to advise Wallis on the contents of the various documents and to draft the same. I considered Mr Wettern a careful and accurate witness.

63. Six factual witnesses were called on behalf of ATCL. Only one of them had been a member of the Board of ATCL in 2007/08, and that was Mr Paul Peter Kimiti. He is a retired Tanzanian politician. He was a member of ATCL's Board of Directors between 2007 and 2009, having been appointed to it by the Minister of Infrastructure Development. I considered that Mr Kimiti was an unreliable witness. Significantly, he sought in chief to make a very important change to his evidence. He had stated in his witness statement: '… there was never any discussion at board level of the A-320 aircraft before entry into the lease with Wallis' and 'We [the Board] certainly did not have any discussions on the terms of any lease with Wallis, nor did we discuss whether ATCL should enter into a lease with Wallis. There were never any discussions by the directors at Board Meetings of the length of the lease, the rental and other payment obligations that ATCL was committing to, the rights and obligations of ATCL or Wallis itself. We had never come across Wallis, and never discussed the suitability of Wallis as a supplier.' In examination in chief he sought to change this evidence to statements that there had been no 'conclusive' discussions, which was plainly an attempt to tailor his evidence in light of the recently disclosed Board minutes. Furthermore, I found implausible his suggestion that he had resigned from the Board of ATCL because the Lease was signed. He resigned some considerable time after the Lease was entered into, and there was nothing in the documentation to suggest that his resignation was connected with the signature of the Lease. There was also no documentary support for his suggestion that he had voiced any concerns at Board meetings about Mr Mattaka entering the Lease, or that Ambassador Mpungwe had resigned because of the entry into of the Lease. I concluded that I could place no reliance on Mr Kimiti's evidence unless it was supported by documentary evidence.

64. Mr Sadiki Muze had been Operations Director for ATCL between May 2007 and 2009. Insofar as he was able to give evidence from his own knowledge it principally related to his participation in the 're-inspection' of the Aircraft in El Salvador in October 2007. I considered that, in some respects, Mr Muze tried in his evidence to support ATCL's position even when the facts did not bear out what he was saying. This I thought was so in relation to his knowledge of the terms of the proposed lease before it was signed. There is no doubt that it was sent to him, and that he could have commented to Mr Mattaka on it if he had had any comments he wished to make. I considered that this was also the case in relation to his evidence that his expectation had been, on going to El Salvador, that he would find an aircraft which was fully operational and where everything was ready, whereas in his witness statement he had referred to the Airclaims report as having recorded a number of items which needed to be dealt with before the Aircraft was fully operational. I considered that Mr Muze's evidence was to be treated with caution.

65. Mr Ladislaus Matindi is the current Managing Director and CEO of ATCL. That was a role to which he was appointed only in 2016. Although I considered that he was generally a reliable witness, there was only limited relevant evidence that he could give.

66. Mr Peter Vitalis is an advocate of the High Court of Tanzania. He currently works as a Director of the National Bank of Commerce. He had previously served as State Counsel / Prosecutor and Financial Investigator with the Prevention and Combating of Corruption Bureau. His witness statement contained the surprising error (twice

repeated) to the effect that Mr Mattaka had been found guilty of offences under the Prevention and Combating of Corruption Act, distinct from those with which he is currently charged relating to the Lease, before he signed the Lease. It emerged that this other conviction was actually in 2017. Mr Vitalis's admissible evidence was essentially confined to testimony that Mr Mattaka faces criminal proceedings in Tanzania, which were commenced in 2016. I did not consider that it included any relevant evidence that Mr Mattaka was guilty of those offences. Indeed Mr Vitalis disclaimed the suggestion that the purpose of his evidence was to say that Mr Mattaka was guilty. Mr Vitalis did, however, confirm that the criminal charges against Mr Mattaka do not include allegations that he was bribed; that there was no evidence that Mr Mattaka received any sort of corrupt payment; that he had not seen any evidence that Wallis made any corrupt payments to anyone; and that the Tanzanian criminal charges were premised on Mr Mattaka's having caused loss to ATCL in the amounts claimed in the present action.

67. Mr John Ringo is an aircraft engineer. Most of the first hand evidence which he gave related to the fact that there had been non-compliance by ATCL with Tanzanian procurement law, and to the re-inspection of the Aircraft and the concerns of the re-inspection team as regards its condition, he having been a member of the re-inspection team which went to El Salvador in October 2007. Mr Ringo confirmed that in 2007 he had had no experience of Airbus aircraft; and that his experience in relation to aircraft leases was confined to ATCL's three leases (under two agreements) of its Boeing 737s. Mr Ringo's evidence was in some respects defensive and unforthcoming, as with his evidence as to whether he had seen a draft of the Lease; and his witness statement was drafted to suggest that he had more criticisms of the steps leading up to the Aircraft arriving in Tanzania than he had.

68. Dr Likwelile, who was Deputy Permanent Secretary of the Ministry of Finance of the Government between 2010-2013 and Permanent Secretary of the Treasury 2013-2016, was an impressive and generally reliable witness. He had had no involvement with the Lease at the time it was made, or with the Guarantee at the time it was provided by the Government. The first he heard of the Lease was in 2011.

Tanzanian law

69. Expert evidence was given of Tanzanian law, on behalf of the Defendants, by Prof. Nditi. Counsel for Wallis told me that it had not been able to find an expert in Tanzanian law who was willing to act against the Government.

70. There were some areas of debate as to the relevance and effect of Tanzanian law. I will consider those below when I deal with the issues which I have to decide. At this juncture, however, it is of importance to note the following matters as to Tanzanian law, which were common ground or were accepted by Prof. Nditi:

    (1) That the common law and equitable doctrines in force in England on 22 July 1920 apply in Tanzania, save where they have been subsequently modified by statute in England or Tanzania.
    (2) Further, in the absence of Tanzanian case law on a particular matter, English case law on the common law and on the doctrines of equity (including how

they have developed since 1920) and on the interpretation of statutes which are based on English statutory provisions is highly persuasive in Tanzanian courts.

(3) The principles of Tanzanian law in relation to the interpretation of statutes are the same as those of English law.

(4) Tanzanian law principles of the construction of contracts follow those of English law closely. No differences were identified by Prof. Nditi.

Analysis

Overview

71. In their written and oral closing submissions, the Defendants put at the forefront of their case what they contended was the invalidity of the Lease by reason of breaches of the Procurement Legislation. While they did not abandon their case in relation to lack of authority on the part of Mr Mattaka (or the Board of ATCL) to sign the Lease, it received less emphasis. They also raised issues as to there having been fundamental breach of the Lease coupled with misrepresentation, non-compliance with certain conditions precedent in the Lease, and unconscionability. Wallis contended that these points had not been pleaded, and objected to them. I will consider them and the objection below. The Defendants pursued a case that there had been unjust enrichment of Wallis by the Lease arrangements, but indicated that they were not contending that there should be restitution of sums already paid to Wallis, confining themselves to contending that Wallis should be paid no more.

72. Wallis's primary case in closing was that it was entitled to succeed on the basis of what it contended was the settlement agreement of 4 October 2013, and that the Court did not need to consider whether the Lease or the Guarantee were or would have been enforceable; but if that were wrong, it maintained its position that all the Defendants' objections to the validity of those agreements were unfounded.

73. As I set out below, I consider that Wallis is correct that it can successfully found its claim on what it describes as the Settlement Agreement. I will, however, consider the cases made in relation to each of the Lease, the Guarantee and the Settlement Agreement in turn.

Issues relating to the Lease

Alleged invalidity by reason of non-compliance by ATCL with the Procurement Legislation

74. The Defendants contend that the Lease is invalid, and 'null and void' because it was entered into in breach of the Procurement Legislation. The Defendants' case is that as ATCL had (and has) the status of a public corporation (or parastatal) it was a 'public body' or 'public authority' under s. 3 of the Procurement Act and as the lease of the Aircraft was 'procurement', it should not have been negotiated or entered into by ATCL without the approval of a Tender Board. There was no approval of the process of considering a lease of the Aircraft, or the entry into of the Lease, by a Tender Board. It was said that this rendered the Lease 'null and void' by virtue of s. 23 of the Tanzanian Law of Contract Act CAP 345 R.E. 2002 ('the Law of Contract Act').

75. I did not understand Wallis to dispute that, as a matter of Tanzanian law, ATCL should have obtained the prior approval of a Tender Board for the entry into of the Lease, nor that it did not do so prior to entry of the Lease. Wallis did contend that the retrospective approval given in March 2008 meant that any initial non-compliance had been absolved and was not a matter which could now be relied upon by the Defendants as constituting a breach of the Procurement Legislation. Wallis's primary answer to this aspect of the Defendants' case was, however, that even if there was contravention of the Procurement Legislation this did not have the effect of rendering the Lease invalid, null or void, because the Lease was governed by English law, and the Procurement Legislation formed no part of English law.

76. In my judgment, Wallis is correct in relation to this primary submission. The Lease expressly provided that English law was to be its governing law. Pursuant to Article 8 of the Rome Convention, scheduled to the Contracts (Applicable Law) Act 1991, the existence and validity of a contract is to be determined by the law which would govern the contract under the Convention if the contract were valid[4]. That law is English law by reason of Clause 16.11(a) (taken with Clause 1.1) of the Lease. The Procurement Legislation is not part of English law, and non-compliance with it does not, as a matter of English law, render the Lease invalid, null or void.

77. I add for completeness that Article 7(1) of the Rome Convention does not have the force of law in the United Kingdom: see s. 2(2) of the Contracts (Applicable Law) Act 1991. Accordingly it is not part of English law that mandatory rules of the law of a country other than that of the governing law may be applied pursuant to that provision.

78. This is a complete answer to this aspect of the Defendants' case. I should however add that I considered that there were two further answers to it.

79. First, in my judgment ATCL is, in any event, contractually estopped from advancing arguments based on the invalidity of the Lease by reason of its non-compliance with the Procurement Legislation. This is because under clause 2.1 of the Lease ATCL represented and warranted that the Lease was a legal, valid and binding obligation on it, and that the entry into and performance of the Lease did not conflict with any laws binding on ATCL (such as the Defendants now contend the Procurement Legislation to have been). ATCL also represented and warranted that all required authorisations, consents, registrations and notifications in connexion with the entry into, validity and enforceability of the Lease had been or would by the Delivery Date have been obtained or effected, which would embrace any necessary consents or authorisations in relation to the Procurement Legislation. Those representations gave rise to an estoppel upon entry into of the Lease, in the manner explained in Peekay International v Australia and New Zealand Banking Group Limited [2006] EWCA Civ 386 at [56-57] per Moore-Bick LJ, and First Tower Trustees Ltd v CDS [2019] 1 WLR 637 at [44-48] per Lewison LJ and [91-95] per Leggatt LJ.

80. The bases on which the Defendants contested the applicability of contractual estoppel were, in my judgment, ill-founded. One was the contention that there could be no

[4] The Rome Convention is applicable to the Lease rather than the Rome I Regulation because the Lease was entered into before 17 December 2009.

estoppel if both parties had knowledge of the truth. I do not consider that that is an answer to a case of contractual estoppel, whose effect is that the parties have both accepted that a relevant state of affairs should be assumed to be true, whether it is or not. In any event, even if it were potentially an answer, I find that Wallis's representatives did not know and were not on notice of ATCL's non-compliance with the Procurement Legislation at the time of entry into the Lease. Mkono & Co's letter of advice to Wallis of 24 October 2007, of which drafts had been appended to the drafts of the Lease before its execution, had not suggested that there had been any non-compliance, but on the contrary had advised that the entry into and performance of the Lease would not conflict with any laws binding on ATCL. It was Mr Diab's evidence, which I accept, that he had first learned of the non-compliance from Mr Eliasaph's email of 10 March 2008.

81. Nor did I consider that the Tanzanian authorities to which the Defendants made reference in this regard (Income Tax Commissioner v AK [1964] EA 648 and Meghjee v Tanzania Revenue Authority Civil Appeal 49 of 2008) reflected any principle of English law which had the effect that there could be no contractual estoppel in the present case. Those cases relate to tax authorities, and reflect the rule that there can be no estoppel preventing a taxation authority from collecting tax which it has a statutory duty to collect. As I understand it, although this was not the subject of argument, that principle is nowadays, in English law, modified by the doctrine of legitimate expectations. In any event, I do not consider that the principle has been shown to have any application here. No case was cited in which it had been applied in an analogous situation to the present. In the present case, the estoppel does not exempt Wallis from or reduce any obligations which Wallis was under by reason of any statute which was applicable by reason of the governing law of the Lease (or by reason of Wallis's nationality or domicile); nor does it prevent ATCL from performing any statutory duty, but only means that as between it and Wallis, a certain state of affairs is assumed to be the case.

82. Secondly, even if these arguments were open to ATCL, and even if Tanzanian law is relevant, I was not persuaded that any non-compliance with the Procurement Legislation had the effect that the Lease was invalid, void or unenforceable as a matter of Tanzanian law.

83. Professor Nditi confirmed that the Procurement Legislation did not itself provide that a contract made when there had been non-compliance with the legislation was invalid, void or unenforceable. What he said was that the issue of the effect of non-compliance, as a matter of Tanzanian law, would be governed by the Law of Contract Act, and he referred in particular to s. 23 thereof[5]. As I have already set out, it was common ground that the principles of statutory construction are the same in Tanzanian as in English law. Furthermore, no Tanzanian case law was referred to in relation to the meaning or effect of s. 23 of the Law of Contract Act. While the matter was not fully debated before me, I considered that, construing s. 23:

[5] Day 5/ p. 83. Wallis interpreted this evidence as referring simply to the law of the contract and contended that that law was English law (see Closing Submissions para. 139). That was not what Prof. Nditi was saying at that point in his evidence.

(1) It was doubtful that the 'consideration or object of the agreement' was 'forbidden by law' within s. 23(1)(a) or was of such a nature that it 'would defeat the provisions of any law' within s. 23(1)(b) of the Law of Contract Act. This is so because the 'consideration or object' of the Lease could properly be said to be the leasing of an aircraft, which was not forbidden by law or of a nature to defeat the provisions of a law. This is not a matter on which I need to express any concluded view, however, because of (2) below.

(2) Even if the case fell within s. 23(1) nevertheless, in my judgment, s.23(2)(b) would be applicable, because Wallis's entry into of the Lease was induced by the representations and warranties in clause 2.1 of the Lease which, if ATCL's case as to its non-compliance with the Procurement Legislation is correct, involved misrepresentations on its part of the actual position.

84. For the sake of completeness I should make it clear that in reaching my conclusion that any non-compliance with the Procurement Legislation did not render the Lease invalid, void or unenforceable as a matter of Tanzanian law, I have not relied on the retrospective approval given to the Lease by the Paymaster General. Professor Nditi, in paragraphs 61 to 64 of his Report gave evidence that the Regulation pursuant to which the retrospective approval was granted was not applicable to a case such as the present. Given my other findings on this aspect of the case, I do not need to consider whether this was correct.

Alleged invalidity by reason of Wallis's non-compliance with the Procurement Legislation

85. The Defendants contended that Wallis itself was in breach of the Procurement Legislation, and in particular s. 31(2) of the Procurement Act, in having entered into the Lease when the requirements of the Procurement Legislation had not been complied with, and that this rendered the Lease 'null and void' or voidable. (Amended Defence and Counterclaim paras. 78E-F).

86. The essential answer to this point is the same as that which I have considered above, in relation to the case that ATCL's non-compliance with the Procurement Legislation rendered the Lease invalid and/or null and void or voidable. That answer is that the Lease was governed by English law, which governed issues of its validity. The Procurement Legislation is not part of English law. Accordingly even if it could be said that Wallis failed to comply with the Procurement Legislation as a matter of Tanzanian law, that would not affect the validity of the Lease.

Alleged unenforceability by reason of illegality

87. The non-compliance with the Procurement Legislation was relied upon by the Defendants, at least in their Amended Defence and Counterclaim, in another way: namely as giving rise to unenforceability in the English Courts on the basis of the principle that these Courts will not enforce an obligation which requires a party to do something unlawful under the law of the country of performance. (Amended Defence and Counterclaim, para. 13).

88. As to this, Wallis's claim, assuming that it has to claim under the Lease as opposed to under what it has called the Settlement Agreement, is for amounts payable by way of rent and damages for breaches of the Lease. Those payments were not to be made in Tanzania, but in Switzerland, where Wallis maintained its bank accounts. For this reason there is no claim by Wallis to enforce an obligation which requires the doing of something illegal under the law of the place of performance. There was no suggestion that payment to Wallis was illegal under the laws of Switzerland.

89. Further, and even if that is wrong, the Defendants failed to show that any performance under the Lease was unlawful under Tanzanian law, even if its entry did not comply with the Procurement Legislation. The Procurement Legislation does not provide that the performance of a contract entered into without compliance with the relevant procurement procedures is illegal. There was no evidence of any other Tanzanian legislation (or judicial authority) which indicated that such would be the result of non-compliance.

Issues as to lack of authority to enter the Lease

90. The Defendants' pleaded case is that Mr Mattaka lacked authority to enter the Lease, and also that the Board of ATCL lacked authority to do so. As I have said, issues of authority did not feature prominently in Prof. Kilangi's closing submissions, but I understood that the Defendants maintained their pleaded arguments.

91. One aspect of the Defendants' pleaded case is the allegation that Mr Mattaka negotiated the Lease without consulting with, let alone obtaining approval from, the Board of ATCL. The contention that Mr Mattaka negotiated the Lease without consulting with the Board is clearly wrong, and was shown to be so by the Defendants' late disclosure, including in particular of the minutes of the Board meeting of 8 October 2007.

92. ATCL nevertheless maintained, as I understood it, that Mr Mattaka had lacked authority to enter the Lease, on the following bases:

    (1) That in entering the Lease Mr Mattaka was in breach of his fiduciary duty to act in good faith and in what he believed to be the best interests of ATCL; and/or

    (2) That on 8 October 2007 the Board of ATCL had given only conditional approval to Mr Mattaka's entering the Lease, and the conditions had not been met; and/or

    (3) That before entering into the Lease he should have obtained the approval of the Minister of Finance, and have ensured compliance with the Procurement Legislation.

Mr Mattaka's alleged lack of authority by reason of breach of his fiduciary duties

93. As to the first of these bases, there was not established to be any material difference between Tanzanian law and English law as to the nature of the fiduciary duties which Mr Mattaka was under. Ss. 182-185 of the Tanzanian Companies Act set out the duties of directors of companies in terms which reflect the duties of directors as

established by English common law and equitable principles. Prof. Nditi confirmed that this was so, and that English case law on the ambit of these duties, how they may be breached and the consequences of breach would be looked to by Tanzanian courts given that there is little Tanzanian authority on these issues.

94. The duties of a director to act in good faith and in what he believes to be the best interests of the company are what may be described as subjective duties. The director is to act in what he considers – not what the court considers – to be the best interests of the company; and whether a director acts for an improper purpose depends on his subjective reason for acting as he did (Regentcrest plc v Cohen [2001] 2 BCLC 80 per Jonathan Parker J at [120]; Eclairs Group Ltd v JKX Oil and Gas plc [2015] UKSC 71 at [15] per Lord Sumption JSC).

95. The evidence before me did not establish that Mr Mattaka had acted dishonestly, or otherwise than in good faith, or that he had thought that he was acting otherwise than in the best interests of ATCL in entering the Lease. No case was made that Mr Mattaka had received a bribe or other corrupt inducement, whether from Airbus, Wallis or anyone else. As I have set out, no such allegations are made in the Tanzanian proceedings against him. No motive has been established for Mr Mattaka acting in bad faith and contrary to what he believed to be the best interests of the company. The evidence before me rather indicated that he had not so acted. Thus: (a) the terms and structure of the Lease were modelled on the Celtic lease which ATCL had entered into in 2006; (b) the terms of the draft Lease were considered or were provided to a number of other people within the Defendants, including Mr Mziray, Mr Tarimo, Mr Ringo, the members of the Divestiture Technical Team of the PPSRC, and the Chambers of the Attorney General. Mr Mattaka was thus not taking steps to conceal the terms of the draft Lease; (c) the letter which Mr Mattaka wrote on 13 March 2008 to Dr Mlinga appears to show that in negotiating the Lease Mr Mattaka had been attempting to further the interests of ATCL in difficult circumstances, including the very limited number of A320 aircraft available and ATCL's weak financial position and reputation.

96. I have carefully considered the expert evidence which was adduced by the Defendants from Mr Alan Robinson, who is an expert in aviation and aircraft leasing, and the evidence of Mr David Louzado adduced by Wallis. The experts were agreed that the rent stipulated in the Lease was above the range of market figures prevailing in 2007 which they had researched; and that the fixed rent escalation clause in clause 5.3(d) of the Lease was unusual. The experts agreed that the setting of the actual rent was a commercial decision for both parties based on a range of factors, including the supply and demand for the aircraft type, the finance behind the aircraft, and the status of the lessee in terms of its actual or perceived financial position and its credit, technical and operational risk. They also agreed that the maintenance reserve or supplemental rent rates were, in some but not all cases, generally higher than those indicated by their research. They also agreed that the application of two forms of escalation, US CPI plus 4%, was unusual.

97. The expert evidence demonstrated, I considered, that the terms of the Lease fully reflected the shortage of Airbus 320 aircraft, and the credit and other risks which were associated with ATCL. These had led to Wallis demanding, and ATCL agreeing, to a high rent, and other terms advantageous to the Lessor. But none of that means that the

Lease was not 'commercially negotiated', and still less that it can be inferred that in entering into it Mr Mattaka must have been acting in what he realised not to be in the best interests of ATCL. What the evidence shows is that ATCL was in a difficult market position: it had embarked on a five year plan to grow, was effectively committed to using Airbus, but in the period before the new A330s and A319s arrived, needed to lease an aircraft in circumstances where there were few available.

98. Accordingly I find that the allegations that Mr Mattaka was acting in breach of his fiduciary duties are not proved.

99. I should add here that, even had I found that Mr Mattaka had acted in breach of his fiduciary duties in entering into the Lease, that would not without more have rendered the Lease void whether as a matter of English or Tanzanian law. While there was a statement to that effect in Prof. Nditi's report, he did not seek to defend it and pointed to no authority to support it, whether English or Tanzanian. It was undoubtedly within the corporate capacity of ATCL to enter into a lease of an aircraft. I did not understand the contrary to be suggested and it would be absurd to suggest that an airline lacked the corporate capacity to enter into such leases. In those circumstances, even if Mr Mattaka had been acting in breach of his fiduciary duties the Lease would have been enforceable against ATCL unless Wallis had been on notice that he was doing so. There was no evidential basis for a conclusion that Wallis was aware or on notice of any abuse of Mr Mattaka's position or that he was acting improperly.

Mr Mattaka's alleged lack of authority because of non-fulfilment of conditions imposed by the Board

100. The Defendants further made the case that Mr Mattaka lacked authority to enter into the Lease because he required the authorisation of the Board, and did not have it. As I have said, my understanding was that, in light of the disclosure of the minutes of the meeting of 8 October 2007, this was a case that Mr Mattaka had been given conditional authority to enter into the Lease, the two conditions being that (a) the Attorney General's Chambers should have given 'a no objection' to its signing; and (b) clause 16.8(b) should be renegotiated and clause 8.8(d) clarified. The Defendants contended that condition (a) had not been satisfied, and nor had (b) insofar as it required a renegotiation of clause 16.8(b). Accordingly, their case is that Mr Mattaka had lacked authority to sign the Lease as he did on 9 or 10 October 2007.

101. Wallis did not accept that the two conditions had not been complied with. It contended that the Attorney General's letter of 8 October 2007 had amounted to a 'no objection' letter; and further that ATCL had attempted to alter clause 16.8(b), but Wallis had not been prepared to make a change, and that this fulfilled the requirement for 'renegotiation' of the clause. I considered that the issue of whether the conditions had been fulfilled was far from easy. As to (a), the Attorney General's letter, although it recognised that the matter was being dealt with under pressure of time and that the Lease needed to be signed urgently, also contained a considerable number of comments on the draft, and concluded 'You are advised to act on the above comments before the Agreement is signed'. As to (b), the question of whether an attempted, but not achieved, 'renegotiation' satisfied the requirement for management to 're-negotiate' clause 16.8(b) is a nice one.

102. I do not, however, need to decide these points, because the issue of authority can be resolved without doing so. This is because there is no evidence that Wallis was aware of what had occurred at the Board meeting on 8 October 2007 or of any conditions imposed by the Board on Mr Mattaka's signing of the Lease. Mr Wettern's evidence, on the contrary, was that he was not aware of the Attorney General's letter, or its contents, or of the origins of the points on the Lease which Mr Mattaka wanted to change.[6] In these circumstances, as Wallis correctly contends, the Lease is binding on ATCL because Mr Mattaka had at least ostensible authority to enter into it. The issue of ostensible authority is governed by the governing law of the contract (see Dicey Morris & Collins on the Conflict of Laws (15th ed.) Rule 244 (1), and para. 33-436). In this case that is English law. Applying English law principles, Mr Mattaka must be regarded as having been held out by ATCL as having authority to sign the Lease on its behalf. He was its CEO and Managing Director, and would usually have authority to enter into commercial transactions forming part of the company's ordinary business – such as an aircraft lease for an airline – for the company. There is no evidence that any limitations on his usual authority were made known to Wallis, and it is apparent from the sequence of events that Wallis relied upon Mr Mattaka's apparent authority in entering into the Lease with his as the signature on behalf of ATCL. I further consider that he was held out as having authority by reason of the provisions of clause 3.1 taken with Schedule 7 of the Lease, coupled with the provision of the 'Certified Board Resolution' on or shortly after 22 October 2007 by Mr Mziray to Mkono & Co (see paragraph [34] above).

103. I also accept Wallis's case that, if I am wrong as to there having been ostensible authority, ATCL ratified the Lease. The matters which can be said to constitute ratification include the following: (1) The provision by Mr Mziray, ATCL's company secretary, to Mkono & Co. of the 'Certified Board Resolution' on or shortly after 22 October 2007; (2) ATCL taking delivery of the Aircraft and flying it; and (3) ATCL having acknowledged in the Redelivery Certificate its liabilities for arrears of rent and supplemental rent. While for there to be ratification there has to be knowledge on the part of the principal of the material circumstances in which the act (here the signature of the Lease) occurred, I consider it to be clear from the minutes of ATCL's Board meetings, including in particular that of the meeting of 8/16 October 2007, that the Board did have knowledge or must be taken to have been aware of the material circumstances in which the Lease had been entered into. While denying that there had been ratification, the Defendants did not identify any particular matters which they contended had not been known at the time of the ratificatory acts.

104. In addition, and though I was not addressed on it in any detail, I consider that the acts of the Government, which is ATCL's sole shareholder, in granting retrospective approval for the Lease, in issuing the Guarantee for ATCL's liabilities, and in acknowledging its liabilities to Wallis (see paragraph 48 above) also constituted an effective ratification of the Lease as agent for and on behalf of ATCL.

Mr Mattaka's alleged lack of authority on other grounds

105. Insofar as the case was that Mr Mattaka had lacked authority to enter into the Lease in circumstances where the Procurement Legislation had not been complied with, I

[6] Day 2/99-102.

consider that ATCL is contractually estopped from advancing this point, by reason of the representations and warranties in clause 2.1 of the Lease. Further and in any event, Mr Mattaka had ostensible authority to enter into the Lease, for the reasons I have given above.

106. As to the suggestion that Mr Mattaka had lacked authority to enter into the Lease without obtaining the consent of the Minister of Finance because the Lease contained an obligation on ATCL to obtain a Government guarantee, it was not established that there was any requirement as a matter of Tanzanian law (whether under the Government Loans, Grants and Guarantees Act 1974 (as amended in 2003) ('the GLGGA') or otherwise) that there was any such requirement. In any event the answers of contractual estoppel and ostensible authority would apply to this point.

Alleged lack of power on the part of ATCL to enter the Lease as a result of non-compliance with the Procurement Legislation

107. Insofar as it was argued that ATCL had lacked 'power or authority' to enter into the Lease because of non-compliance with the Procurement Legislation, I considered that this was untenable. As to the case that non-compliance with the Procurement Legislation meant an absence of 'power' to enter into the Lease, this was not made out as a matter of Tanzanian law. Construing it by ordinary English principles of statutory construction (see paragraph [70] above) the Procurement Legislation did not affect ATCL's power to enter into a contract. Specifically, s. 31(4) of the Procurement Act envisages that a 'contract' may have been 'awarded' notwithstanding breach of the Procurement Act or Procurement Regulations. Equally, while it may be correct that Article 42(5) of the Procurement Regulations applies directly only to a situation where an Accounting Officer has entered into a contract as a matter of urgency and of a value exceeding the Accounting Officer's authority, nevertheless the provision that the contract will nevertheless be 'valid' is, I consider, consistent with the Procurement Legislation as a whole not having deprived public bodies of the power to make effective contracts notwithstanding non-compliance with the Procurement Legislation. Even if that is wrong, however, I considered that what would be involved was an act within the corporate capacity of ATCL but in excess or abuse of the powers of the Board of directors of the company and, applying the principles in Rolled Steel Products Holdings Ltd v British Steel Corporation [1986] Ch 246, the Lease would nevertheless be enforceable against ATCL unless Wallis was on notice of the contravention of the Procurement Legislation and resulting lack of 'power' on the part of Mr Mattaka or the Board (or ATCL). That has not been shown.

That the Lease was invalid by reason of fundamental breach and by reason of misrepresentation

108. This argument was advanced by the Defendants in their closing submissions. The complaint was that the Aircraft, on delivery, had not undergone a C-7 C-Check and there were still significant outstanding defects. These, it was said, constituted a fundamental breach of the Lease, which, on the authority of Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936, meant that the Lease was invalid. Further it was said that

there were misrepresentations in relation to these matters and that this also rendered the Lease invalid.

109. The argument as to 'fundamental breach' used this concept in the sense of 'total' as opposed to repudiatory breach. The doctrine invoked in this part of the Defendants' arguments has not been recognised as part of English law since Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361 and Photo Productions Ltd v Securicor Transport Ltd [1980] AC 827. Even had there been the breaches contended for by the Defendants, they would not have rendered the Lease invalid. If established and if sufficiently serious, they might have constituted a repudiatory breach, but what is clear in the present case is that the Defendants did not accept any repudiation even if there was one.

110. In relation to the matters relied on as constituting 'fundamental breaches', I was not satisfied that there had been no C-7 Check performed. On the contrary, although the evidence was imperfect, I considered it more likely than not that a C-7 Check had been carried out. This is because the Tanzanian Civil Aircraft Authority issued an airworthiness certificate in 2008. The Checklist compiled by the Authority's Inspector states, in relation to the 'Last Major Maintenance Certificate of Release to Service', 'C7 by Aeroman, San Salvador', tending to show that the Inspector had seen a certificate of a C7 check. As to the allegations of defects in the Aircraft on delivery, in my judgment Mr Shepherd QC was correct to say that this case could not be successfully advanced in light of the terms of the Certificate of Acceptance, which created an effective contractual agreement and estoppel to the effect that the Aircraft was on Delivery in the condition required by Schedule I of the Lease save only in the respects listed in Appendix 4, and that the Aircraft was otherwise satisfactory, in the manner described in Olympic Airlines SA v ACG Acquisition XX LLC [2013] EWCA Civ 369 at [42]-[47] per Tomlinson LJ.

111. No case of misrepresentation had been pleaded and it was not, in my judgment open to the Defendants. In any event the Defendants did not put forward any basis for contending that any misrepresentations made the Lease 'invalid and void'.

Alleged non-satisfaction of conditions precedent

112. The Defendants raised a further argument in their closing submissions, to the effect that conditions precedent provided for in the Lease had not been complied with.

113. Mr Shepherd QC said, again I considered correctly, that this was a point which should have been, but had not, been pleaded.

114. Even if the point is considered, however, the case sought to be made is ill-founded. The condition relied upon was that in clause 3.1 taken with clause b(ii) of Schedule 7 of the Lease. That condition was one which was for the benefit of the Lessor, and could have been waived by Wallis. Furthermore, a copy of a resolution, complying with clause b(ii) of Schedule 7, was provided to Wallis, as I have referred to above. It may be that it was not provided five business days before the Delivery Date, but it was accepted by Wallis. No invalidity of the Lease arises from those facts.

115. ATCL's argument was, as I understood it, that what was supplied was not a copy of a valid resolution because the Board on 8 October 2007 had only given conditional approval for the entry into of the Lease and the conditions had not been fulfilled. That issue, which I have considered above in the context of authority, does not however bear on whether the condition in clause 3.1 taken with clause b(ii) of Schedule 7 of the Lease was fulfilled, not least because those provisions do not stipulate that the copy should be of a 'valid' Board resolution.

Alleged unconscionability

116. A further argument raised in the Defendants' closing submissions was that the validity of the Lease was vitiated by unconscionability, and contained unconscionable terms.

117. This was an issue which was not pleaded. In any event, there appeared no basis in English law for the case made. Duress was not alleged, nor, in my judgment, could it have been. Wallis exerted no illegitimate pressure upon ATCL to enter the Lease. ATCL could have chosen not to enter into it. If not to do so was unpalatable, that was because of pressures within ATCL and possibly from its shareholder to lease an aircraft prior to being able to take delivery of new aircraft. Insofar as there was a suggestion that the case was one of undue influence, I find that that was not established. That doctrine is not apposite to agreements such as the Lease and the Guarantee made between a commercial lessor on the one hand with a sovereign government and a flag carrier airline on the other, especially when the two sides were not in any pre-existing relationship before the Lease was entered into.

118. There is some uncertainty as to the circumstances in which the court will interfere in bargains on the basis that they are unconscionable: see Chitty on Contracts (33rd ed) para. 8-132. What is clear, however, is that the circumstances in which there will be interference are limited, and do not extend to most transactions between businessmen. I do not consider that there is any basis on which there could be any such interference here. The position in which ATCL found itself was not in any way analogous to that of the 'poor and ignorant' persons and others who have been found to have 'disabling' circumstances: see Chitty op. cit., para. 8-137. ATCL was, and is, a national flag carrier, owned by the Government. It was supported in different ways by Airbus and by China Sonangol. It had access to legal advice, not least from the Attorney General of Tanzania. Furthermore, I do not consider that it can be said that Wallis acted unconscionably or reprehensibly. The evidence indicated that it made a commercial bargain with an entity which was regarded as being subject to a number of risks, and in circumstances where it is not apparent that anyone else was prepared to offer ATCL better terms.

Unjust enrichment

119. The Defendants contended that, by reason of the existence of unconscionable terms in the Lease, Wallis had been unjustly enriched. As I have found that the Lease was not unconscionable, this argument fails. More generally, no question of unjust enrichment could arise in the present circumstances unless the Lease was in some way invalid, void or had been set aside, none of which is applicable.

Conclusion in relation to the Lease

120. Accordingly I find that the Lease was a valid and enforceable contract binding upon ATCL.

The Guarantee

121. The Defendants contend that the Guarantee issued by the Government was and is not enforceable against it. The pleaded grounds for this case were, in outline, as follows:
   (1) That the relevant Minister had had no power to issue a guarantee, because he could only issue a guarantee in respect of a loan and not a lease, and because the correct procedure was not followed, with the result that the Guarantee was void.
   (2) That there was no primary enforceable obligation under the Lease and accordingly the Guarantee is unenforceable.
   (3) That the English courts will not enforce a collateral contract where the purpose and policy which invalidates the main contract also invalidates the collateral contract.
   (4) That on its proper construction, the Guarantee is only in respect of sums which the lessee, ATCL, was obliged to pay, and as ATCL's obligations under the Lease were unenforceable against it, the Government is not liable under the Guarantee.

122. Point (1), as pleaded, is a contention that, as a matter of Tanzanian law, and in particular the provisions of s.13 of the GLGGA, the Minister was only permitted to give guarantees in respect of loans; and further that the Minister failed to follow the procedure set out ss. 13 and 13A, with the result that the Guarantee was void from inception.

123. The first aspect of that case, namely that the Minister had not had power to guarantee a lease as opposed to a loan, was rendered entirely unsustainable by the evidence of Prof. Nditi. His evidence in cross-examination was that under s. 4 of the GLGGA, a lease such as the present was deemed to be a loan, and could be guaranteed by the Government pursuant to the GLGGA, and he withdrew the statements in his report which had suggested the contrary. Having seen the terms of s. 4 GLGGA I considered that this concession by Prof. Nditi was entirely appropriate.

124. The remaining aspect of the case pleaded – which was not developed to any extent at the trial – was that the procedure laid down in ss. 13 and 13A of the GLGGA had not been followed. The case was that although, as required by the GLGGA, there had been a recommendation by the NDMC that the guarantee should be given, that recommendation had been based on an understanding that the PPRA had met and recommended approval for the Lease, whereas in fact the PPRA had not made such a recommendation and the minutes of a meeting suggesting that it had were forged.

125. The short answer to this case is that, while there was evidence of the PPRA's recommendation and of the NDMC's recommendation to enter into a Guarantee, no evidence was presented to me of the minutes having been forged. In the circumstances this aspect of the case cannot be sustained. In any event, I consider that the Government is contractually estopped from relying on this argument by reason of

the warranties and representations contained in clauses 8.0(i), (ii) and (iv) of the Guarantee. While the relevant law of contractual estoppel here is Tanzanian law, because the Guarantee is governed by Tanzanian law, the law of Tanzania was not shown to be any different from English law, and Prof. Nditi had found no Tanzanian case law on the point.

126. Points (2) to (4) all depend on the Lease being invalid and/or unenforceable. Given that I have found that the Lease was valid and enforceable these points fall away.

127. For those reasons I conclude that the Guarantee gave rise to valid and enforceable obligations upon the Government.

The Settlement Agreement

128. As I have said, Wallis put the Settlement Agreement at the forefront of its case. It pointed out, correctly, that there was no dispute on the pleadings or the evidence that an agreement was reached on 4 October 2013 between it and the GNT representing the Defendants, the terms of which were set out in the minutes of the meeting which were signed on 5 October 2013. Wallis's case was that this was a compromise and agreement to settle the Defendants' liabilities and was enforceable irrespective of whether the Lease or the Guarantee or both were invalid or unenforceable.

129. The Defendants did not address the Settlement Agreement in any detail in their closing submissions. Nevertheless, I understood the Defendants to make the following arguments as to why Wallis was not entitled to succeed in its case in relation to the Settlement Agreement:

(1) That the agreement of 4 October 2013 was only an agreement as to quantum and payment;
(2) That the agreement of 4 October 2013 was only a variation of the Lease and Guarantee and not a compromise and settlement of the Defendants' liabilities;
(3) That the agreement of 4 October 2013 was unenforceable because the Lease and Guarantee were void, voidable, unenforceable or illegal;
(4) That the agreement of 4 October 2013 was unenforceable because it was illegal under Tanzanian law;
(5) That the agreement of 4 October 2013 was not binding because Wallis provided no consideration;
(6) That the agreement of 4 October 2013 was void for common mistake.

130. There are competing arguments as to whether the governing law of the agreement of 4 October 2013 was English or Tanzanian law. It contains no express choice of law. In favour of the former is that it was an agreement relating to obligations under the Lease, which was expressly governed by English law. In favour of the latter, that it also related to obligations under the Guarantee, expressly governed by Tanzanian law. In my judgment this debate does not matter because there was not shown to be any difference between the two laws relevant to the issues which have to be resolved in relation to the agreement of 4 October 2013.

131. Issues (1) and (2) depend upon a proper construction of the record of what was agreed on 4 October 2013, given that there was no suggestion that the written minutes do not accurately embody or reflect the agreement made. The relevant principles, whether applying English or Tanzanian law involve identifying 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 of the contract to mean. This involves looking at the meaning of the relevant words in their documentary, factual and commercial context. (Arnold v Britton [2015] AC 1619 at para [15]).

132. In relation to questions as to whether a subsequent agreement varies or replaces an earlier one, guidance is provided by Viscous Global Investments v Palladium Navigation Corp. (The 'Quest') [2014] EWHC 2654 (Comm) at [18]-[21]. There is no necessary requirement that the subsequent agreement be 'fundamentally inconsistent with' or 'go to the root of' an existing clause for it to replace rather than merely to vary existing arrangements. The question is simply one of construction: looking at the matter objectively and in the light of the relevant background, what meaning would the agreement convey to a reasonable person?

133. I consider that Wallis is correct to contend that the relevant background included at the following matters:

(1) Wallis had regularly chased payments under the Lease and Guarantee;

(2) In June and July 2009 the Government had acknowledged obligations under the Guarantee and said that they would be factored into the Government budget;

(3) In June 2010 the Government repeated that it was 'committed to honour and repay the outstanding amount according to Government procedure';

(4) The meetings of March and October 2011 appear from the minutes to have proceeded on the basis that it was accepted by the GNT that the Defendants were liable to Wallis;

(5) The Lease was terminated on 17 October 2011. The Return Certificate dated 27 October 2011 contained an acceptance by ATCL that sums were due to Wallis;

(6) On 23 May 2013 the Ministry of Finance of the Government wrote to Wallis to say that it was expecting Parliamentary approval for the payment of 'the debt' at the end of June 2013, and would be in a position to propose a payment schedule in July 2013, asking Wallis to 'give us more time to get prepared for payment as per our commitment';

(7) On 31 August 2013 the Ministry of Finance wrote to Wallis stating that 'the Government is ready to start paying the debt beginning from the month of November, 2013'.

134. In my judgment what a reasonable person having the background knowledge available to the parties would have understood by the 4 October 2013 agreement was that it was intended to recognise and quantify an existing debt of US$45,103,838.80, and to agree

that this could be discharged by payment by 30 August 2014 of US$42,103,838.80 together with interest at 5% per annum, but that if payment of that amount was not effected by 30 August 2014, payment of the full sum of US$45,103,838.80 would be due, together with interest at 10% from 26 August 2013.

135. I consider that it was inherent in that agreement that the obligation to pay US$45,103,838.80 was established and agreed. The reasonable person with knowledge of the relevant background would not consider that that the Defendants were reserving any question of whether they had a liability. Equally that person would understand that Wallis could not afterwards claim that the sum due as at 26 August 2013 was greater than US$45,103,838.80. Furthermore the parties could not reasonably have been understood to mean that there had to be regard to the terms of the Lease or the Guarantee to see whether there was a liability under this agreement. The terms of the agreement of 4 October 2013 were simple, establishing a set sum which was due, but providing for a discount if there was payment of a certain amount by a certain date.

136. Accordingly, I consider that the correct legal analysis is that Wallis gave up its claims under the Lease and Guarantee in return for promises of payment of the sum specified (subject to the discount), and the Defendants gave up any arguments that they might have had that there was no or a lesser liability under the Lease and Guarantee.

137. While it is not relevant to the construction of the agreement of 4 October 2013, it appears that the Defendants considered that there had been a freestanding compromise agreement, and that payments which were subsequently made to Wallis were under that agreement. Letters of 18 and 21 February 2014 from the Ministry of Finance of the Government to Wallis referred, respectively, to the ATCL Debt and to the Guarantee, and then included the language 'As per agreement made on 5th October, 2013 … on settlement of the debt above …' Similarly the letter from the Ministry of Transport of 3 September 2014 described 'the agreement arising from the [meeting of 4 October 2013]".

138. As to issues (3) and (4), I do not consider that they constitute an answer to Wallis's case in relation to the agreement of 4 October 2013. As I have held above, the Lease and the Guarantee were enforceable agreements. There was no evidence that the agreement was illegal as a matter of Tanzanian law if the Lease and Guarantee were valid and enforceable, and no case was put that it was illegal as a matter of English law if that were the case.

139. As to issue (5), in my judgment Wallis is correct to contend that it provided consideration by (a) giving up its claims under the Lease and Guarantee, which it believed were valid; and (b) by giving a discount for early payment.

140. As to issue (6), there was no common mistake because, in accordance with my earlier findings, the Defendants were liable under the Lease and the Guarantee. I do not need to consider what would have been the position if the Lease or Guarantee had been invalid or unenforceable.

Overall Conclusion

141. For these reasons, Wallis's claim pursuant to the Settlement Agreement succeeds. Wallis is entitled to the sum of US$30,114,230.73 thereunder, together with interest as to the amount of which I will hear the parties. Had I not found that the Settlement Agreement replaced their obligations under the Lease and Guarantee, I would have found that the Defendants were liable under those agreements.