Neutral Citation Number: [2021] EWHC 1063 (Comm)

**IN THE HIGH COURT OF JUSTICE** Claim No CL-2019-000562
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL
Friday 30 April 2021

BEFORE:

**MR RICHARD SALTER QC**
Sitting as a Deputy Judge of the High Court

BETWEEN:

**OLYMPIC COUNCIL OF ASIA**

Claimant

- and -

**NOVANS JETS LLP**

Defendant

- - - - - - - - - - - - - - - - - - - - -

**Mr Michael McLaren QC and Ms Deborah Horowitz**
(instructed by *The Air Law Firm*)
appeared for the Claimant

**Mr John A Kimbell QC**
(instructed by *Bargate Murray Ltd*)
appeared for the Defendant

Hearing date: 19 April 2021

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**.....**

# 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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**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 30 April 2021.**

**MR SALTER QC:**

## Introduction

1. On 31 August 2018 the Claimant, Olympic Council of Asia ("**OCA**") entered into an Aircraft Lease to Purchase Agreement ("**the ALPA**") with the Defendant, Novans Jets LLP ("**Novans**"). Under the ALPA, Novans as Lessor agreed to provide to OCA as Lessee a total of 1515 "block hours for priority usage" on a Bombardier Global Express 5000 business jet aircraft ("**the Aircraft**") in the period from 1 October 2018 to 31 December 2022 for a total price of USD 14,400,000. That total price was to be paid by an initial payment of USD 8,100,000 on 3 September 2018, and thereafter by four annual payments of USD 1,575,000 each, payable not later than 15 January in each of the years 2019, 2020, 2021 and 2022 "or payable as per operational demand upon agreement". The ALPA also included options granted by Novans to OCA to purchase the Aircraft, either during or at the end of the lease term, at a price to be mutually agreed, and the right to participate in the profits of any charters of the Aircraft to third parties during the term of the lease.

2. OCA paid the initial payment and the first annual payment, and began to use the Aircraft. Under the ALPA, OCA was also responsible for paying for certain ancillary expenses incurred by Novans in the operation of the Aircraft. On 8 April 2019, Novans rendered Invoice GL 112/19 for USD 282,134.43 ("**the Disputed Invoice**") in respect of what Novans claimed were such Lessee's expenses. OCA disputed the contents of the Disputed Invoice, and did not pay it. Negotiations between the parties did not produce a resolution. By letter dated 11 June 2019, Novans purported to suspend OCA's right to use the Aircraft if the Disputed Invoice was not paid by 14 June 2019. OCA still did not pay the Disputed Invoice. On 18 September 2019, Novans gave notice purporting to terminate the ALPA.

3. In this action, begun by a Claim Form issued on 9 September 2019, OCA claims (inter alia) declarations that no money was or is owed by it to Novans, that Novans was accordingly not entitled to suspend OCA's use of the Aircraft or to terminate the ALPA, and damages for breach of contract. Novans counterclaims for declarations to the opposite effect, and for the amount of the Disputed Invoice. Directions for trial were given by Mr Simon Salzedo QC (sitting as a Deputy Judge of the High Court) on 7 December 2020, which were varied by the Order of Andrew Baker J dated 19 March 2021. The action is fixed for a five-day trial, which is due to start on 13 December 2021.

4. OCA, however, seeks to pre-empt that trial by seeking summary judgment on another of its pleaded claims in the action. The ALPA states that the total price has been calculated on the basis of a price of USD 9,505 per "block hour". It is common ground that OCA had used only 234 "block hours" up to the date of suspension. At the rate of USD 9,505 per "block hour" that usage would have cost a total of only USD 2,224,170. OCA accordingly asserts, in paragraphs 41 to 46 of its Particulars of Claim, that Novans has been unjustly enriched at OCA's expense by the difference

between that amount and the total of USD 9,675,000 which OCA has paid under the ALPA.

5. By its CPR Part 24 application, first issued on 26 June 2020, OCA seeks summary judgment for that difference. OCA accepts that, for the purposes of this application, I must assume that, as claimed by Novans, the Disputed Invoice should have been paid and that Novans was entitled to act as it did in suspending OCA's use of the Aircraft and in terminating the ALPA. OCA also accepts that the sum for which it seeks judgment must therefore be reduced by the amount of the Disputed Invoice, leaving a balance claimed of USD 7,168,695.57. In relation to that reduced sum, however, OCA asserts that that the issues involved in its claim are primarily issues of law which are suitable for summary determination, and that Novans has no real prospect of successfully defending the claim.

6. OCA's application is supported by the witness statements of its solicitor, Mr Christopher Smith made on 26 June 2020 and 26 November 2020. Novans' opposition is supported by the witness statement of its solicitor, Mr Quentin Douglas Freer Bargate. At the hearing of this application, OCA was represented by Mr Michael McLaren QC and Ms Deborah Horowitz. Novans was represented by Mr John A Kimbell QC.

## The ALPA

7. In order to explain the arguments deployed by the parties on this application, it is first necessary for me to set out the central provisions of the ALPA which form the background to those submissions.

8. It is common ground that the ALPA was drafted without the professional assistance of lawyers on either side. In a number of respects, its drafting is less than perfect. For example, its clause numbering is inconsistent. It begins with clauses lettered (a) to (f). Its remaining clauses are then numbered, the first such clause being numbered 3 (rather than 2 or 7). Each of the initial six lettered clauses has its own heading. Most of the sub-clauses within the numbered clauses which follow are themselves lettered, but do not have headings. Clause 7, however, has sub-clauses which are numbered 7.1 and 7.2.

9. Clause 5(h) provides another example of imperfect drafting. It states that "Lessor shall assume no responsibility, if ..". Unfortunately, although the clause contains detailed definitions of the expressions "Force Majeure Event" and "Act of God", it fails to specify the particular occurrence for which the Lessor will not be responsible in the event that it happens. The words "force majeure event" (without capitals) are used again in clause 10(h): but clause 14 then also deals separately with force majeure, without using either of the capitalised expressions defined in clause 5(h). Various unconventional uses or omissions of the definite and indefinite articles and a number of grammatical and verbal infelicities (for example, the non-agreement of the subject and the verb in "the Block Hours Prices includes" in clause (d); and the reference in

clause 10(b) to "The hereby agreement") also indicate a less than complete fluency in formal English and/or a lack of attention to detail on the part of those who drafted the ALPA.

10. The main operative provision of the ALPA are clauses (a) to (e) and clause 3. These provide as follows.

> **a) Lease Term, Priority and Block Hour Amount**
>
> **The Lessor agrees to provide Lessee, or any other natural or legal person appointed, the requested total amount of 1515 (One Thousand Five Hundred Fifteen hours) block hours for priority usage on aforementioned Aircraft starting from 01st October 20-18 until 31st December 2022. Lessor is obliged to perform flight operations for requested flight schedule of Lessee under certain terms and conditions stated below. The lease term starts on 01.10.2018 until 31.12.2022 when this agreement extinguishes. An extension of the period of service is to be agreed not later than six months prior to end of this agreement.**
>
> **b) Price per Block Hour and Total Price**
>
> **9,505 USD (nine thousand five hundred five US Dollar) per block hour whereby total amount for 1515 block hour** [sic] **is 14,400,000 USD (fourteen million four hundred thousand US Dollar).**
>
> **c) Block Hour Utilisation**
>
> **Each flight leg shall be minimum 4 hours unless several flight legs are performed over a period of 5 days whereby the total shall average 4 hours.**
>
> **d) Price includes**
>
> **The Block Hour Prices includes aircraft, crew consisting of 2 pilots and 1 flight attendant, AOC expenses, flight planning, navigation fees fuel, insurance, aircraft wifi, crew remuneration, airport landing/takeoff and handling fees of 1000 USD per leg, flight preparation.**
>
> **e) Price excludes**
>
> **All Expenses, not expressly mentioned as being included in clause 2E shall be payable by the Lessee and include, but are not limited to, the following: parking, catering, overnight fees, scheduled and unscheduled maintenance, crew accommodation, crew transportation, crew visas, schedule changes, aircraft de-Icing and/cold weather hangarage charges, VIP lounges, war risk insurance, Italian luxury tax, UK Air passenger duty, passenger transfers, special overflight or landing permits.**
>
> **..**
>
> **3. Payment**

> **On 03rd September 2018 the Lessee shall make an initial payment of 8,100,000 USD (Eight Million One Hundred Thousand US Dollar) of the total 14,400,000 USD to Lessor. The remainder amount shall be paid in four partial payments equal to 1,575,000 USD (One Million Six Hundred Thousand US Dollar) not later than 15.01.2019, 15.01.2020, 15.01.2021, 15.01.2022, respectively or payable as per operational demand upon mutual agreement between Lessor and Lessee.**
>
> **Payment by Lessee to Lessor shall be made upon issuance of an invoice within two (2) working days after invoice is received. Payment paid to Lessor is non-refundable and non-transferable to any other private aviation service or alternative aircraft, even in case of force majeure events (including but not limited to acts of civil unrest or adverse weather) .**

11. Clause 7 provides for Novans to charter the Aircraft to third parties when not required by OCA for OCA's own use, and to share any profits from such charters with OCA. It states:

> **7. Third party charters**
>
> **7 .1. Whenever Lessee will not use the assigned aircraft, it may be used by Lessor to offer charter flights, charged at charter market prices to international third parties. The Lessor agrees to share with Lessee partial net profit margin that has been generated from aircraft charter sales at market prices. Aforementioned profit share can be executed as per below options:**
>
> > **a. Discount on the Price per Block Hour specified in clause B Price per Block Hour and Total Price**
> >
> > **b. Transfer of Net Profit Margin share sixty (60) days after the completion of 3rd party charter operation.**
>
> **7.2. All 3rd party charter flight expenses are charged directly to clients of Lessor and are not deducted from Lessee Block Hour balance.**

12. Clause 11 is the clause which provides for OCA's options to purchase the Aircraft, and for OCA's option to extend the term of the ALPA. It is in these terms:

> **11. Extension of Lease Term and Aircraft Purchase Option**
>
> **It has been agreed that Lessee receives the priority option to extend the aircraft lease term and priority right to purchase the Aircraft.**
>
> **a) Purchase During Lease Term**
>
> **Lessee shall have the option, at any time after the 31.12.2020 and prior to 31.12.2022, to purchase the Aircraft. To purchase the aircraft Lessee shall**

**inform Lessor not less than sixty (60) days prior to the commencement of third (3rd} year by written notice of its intent to purchase the Aircraft, specifying the proposed purchase date. After delivery of such notice, Lessor and Lessee shall engage in the sales and acquisition process. The Lessor and Lessee will mutually agree the aircraft sales price. Beside the sales price, an allowance for will legal , marketing and other professional fees will be mutually agreed.**

**b) Purchase At End of Lease Term**

**Lessee shall have the option, at the end of lease term on 31.12.2022, to purchase the Aircraft. To purchase the aircraft Lessee shall inform Lessor not less than sixty (60) days prior to the end of lease term by written notice of its intent to purchase the Aircraft, specifying the proposed purchase date. After delivery of such notice, Lessor and Lessee shall engage in the sales and acquisition process. The Lessor and Lessee will mutually agree the aircraft sales price. Beside the sales price, an allowance for will legal, marketing and other professional fees will be mutually agreed.**

**c) Extension of lease term**

**Lessee shall have the option, at the end of aforementioned agreed lease term, to extend the Aircraft lease term and mutually agree the terms and conditions for the extension . To extend the aircraft lease the Lessee shall inform Lessor not less than sixty (60) days prior to the end of lease term by written notice of its intent to extend the Aircraft lease.**

13. Clause 10 provides for termination, as follows:

**10. Termination of Agreement**

**a) A termination notice may not be given within the first two (2) years of this Agreement; the Agreement may not be cancelled before 31.12.2020.**

**b) The hereby agreement shall be deemed canceled** [sic] **by the lessee's fault in case of (i) any breach of the payment obligations set forth in section "Payment" (clause 3) of the hereby agreement.**

**c) In the event of any negligent or intentional breach by either party of any provision of this agreement, such breach remaining uncured for a period of four ( 4) weeks , then the other party shall be entitled to terminate this agreement with the expiration of minimum term duration, unless another exit solution is agreed on . If either Party becomes insolvent, goes into liquidation or is declared bankrupt, the other party shall have the right to terminate this Agreement immediately and seek compensation within insolvency, liquidation or bankruptcy proceedings. In the event of a force majeure event not attributable to a party and beyond a party 's reasonable control , parties shall discuss forthwith any amendments required to the**

> **terms of this agreement in order to reach an equitable solution, failing which either party may terminate this agreement with immediate effect upon a four (4) weeks' notice.**

14. Finally, clause 14 provides for English law and jurisdiction.

## The arguments of the parties

15. Mr McLaren, for OCA, founded his argument on the summary of the elements of a claim in unjust enrichment given by Lord Clarke of Stone-cum-Ebony JSC in *Menelaou v Bank of Cyprus Plc*[1], that:

> .. **it is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?**

16. In Mr McLaren's submission, there could be no dispute as to the first two of these four elements. As to the third, Mr McLaren argued that failure of consideration (or "failure of basis") is an accepted unjust factor in the law of restitution, where

> .. **[f]ailure of the consideration for a payment . . . means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself** ..[2]

17. Mr McLaren argued that this principle extended not just to cases of total failure but also to cases where a claimant's contractual obligations to benefit the defendant can be apportioned and there is a total failure of basis of an apportioned part[3], such as "cases where the total amount paid has been calculated as a cost per unit"[4]. Given the terms of clause (b), it was clear (Mr McLaren submitted) that this was just such a case. OCA's contractual obligation to pay for "block hours" can clearly be "apportioned" because the payment that it undertook to make was calculated on the basis of a unit price per "block hour". OCA has therefore paid (within its overall total payments) an identifiable sum for an identifiable number of "block hours" that it has been unable to use. As a result, there has been a total failure of basis in relation to that apportioned (or severable) part of its total payments, sufficient to found a claim in unjust enrichment for the return of that part.

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1 [2015] UKSC 66, [2016] AC 176 at [18].

2 *Barnes v Eastenders Cash and Carry Plc* [2014] UKSC 26, [2015] AC 1 at [107], per Lord Toulson JSC, citing a well-known passage from Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1989) p 223.

3 Andrew Burrows, *Principles of the English Law of Obligations* (OUP, 2015) at [3.90].

4 Charles Mitchell, Paul Mitchell, Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell, 2016) at [12-26].

18. In Mr McLaren's submission, it is no hindrance to such a claim that the ALPA has (as he agreed that I should assume) been validly terminated for breach, and that OCA was (on this assumption) the contract breaker rather than the innocent party. As is stated in *Goff and Jones*[5]:

> .. **If a contract has been terminated for breach, it is no longer subsisting, and, therefore, no longer prevents a claim in unjust enrichment from being brought. The fact that a party has committed a breach of contract does not deprive him of the right to claim in unjust enrichment. This holds true even where the claimant has committed a repudiatory breach, which has led to the contract being terminated** ..

19. On behalf of Novans, Mr Kimbell took issue with these submissions, both as to the law and as to its application to the facts of the present case. As the law, Mr Kimbell submitted that, where a claimant relies upon total failure of consideration as the unjust factor, the basic rule is that it is necessary to show that there has been a *total* failure of consideration. A partial failure will not suffice. As is stated in *Burrows*[6]:

> **This remains the basic rule: benefits are not recoverable if the basis on which they were transferred has only partially failed.**

20. In Mr Kimbell's submission, the question in each case is:

> **.. whether or not the party claiming total failure of consideration has in fact received *any part* of the benefit bargained for under the contract ..**.[7]

As Lord Goff said, in *Stocznia Gdanska SA v Latvian Shipping Co*[8]

> **.. the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed *any part* of the contractual duties in respect of which the payment is due ..**

21. In support of these submissions, and by way of illustration of these principles, Mr Kimbell relied on 5 further cases:

    21.1 *Whincup v Hughes*[9] in which money was paid for a six-year apprenticeship to a watchmaker. The watchmaker died after one year. The claim for restitution failed.

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5 Fn 4 above at [3-36]. See also *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 at 928-932 and 936; and *Newland Shipping and Forwarding Limited v Toba Trading FZC* [2014] EWHC 661 at [75], per Leggatt J: "It is in any event clear law that a party who commits a repudiatory breach which leads to a contract being terminated is not thereby deprived of the right to claim in unjust enrichment".

6 Fn 3 above at [3-89].

7 *Rover International Ltd v Cannon Film Sales Ltd* (fn 5 above) at 923H, per Kerr LJ (emphasis added).

8 [1998] 1 WLR 574 at 588 (emphasis added).

9 (1871) LR 6 CP 78.

21.2 *Kelly v Lombard Banking Co Ltd*[10], in which a claim to recover an initial payment under a hire-purchase agreement for a car failed even though the contract ended before the hirer could exercise his option to purchase.

*21.3* *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras*[11], which (like the *Stocznia Gdanska*[12] case) was a claim in relation to instalment payments under a terminated shipbuilding contract. In the *Pournaras* case, however, the Court of Appeal assumed (without deciding) that "as a matter of English law, the buyers can, in principle, recover from the yard the difference (if any) between the amount of the instalments and that sum which represents the loss or damages that the yard has suffered"[13]. Unlike the decision of the House of Lords in *Stocznia Gdanska*, this case therefore does not seem to me to advance Mr Kimbell's argument.

21.4 *Baltic Shipping Co. v Dillon*[14] in which a holiday maker's claim for restitution of the money she had had paid in advance for a 14-day holiday failed, even though the cruise was cut short after only 8 days, when the ship sank.

21.5 *Giedo Van der Garde v Force India*[15], in which a racing driver who was promised 6000km track time but received only a part of that brought a claim for restitution of a proportionate part of the USD 3m fee. Stadlen J dismissed the claim because the claimant had received part of what he had bargained for (which included but was not completely limited to track time) and there was therefore no total failure of consideration.

22. Applying those principles to the facts of the present case, Mr Kimbell submitted that to permit OCA to reclaim any part of the payments made by it would undermine the terms of the contract. The two payments received by Novans were due under the express terms of the ALPA before the ALPA was terminated, in return for Novans making the Aircraft available on the terms of the ALPA, which Novans did. There has therefore been no total failure of consideration. Both sides have received what they bargained for. In that connection, Mr Kimbell relied upon the decision in *Costello v Macdonald*[16], where the Court of Appeal held that an unjust enrichment claim must fail because it would undermine the contractual arrangements between the parties, and Etherton LJ observed that:

> **.. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and**

10 [1959] 1 WLR 41.
11 [1978] 2 Lloyd's Rep 502
12 Fn 8 above.
13 At 508, per Roskill LJ.
14 [1993] HCA 4; 67 ALJR 228.
15 [2010] EWHC 2373 (QB)
16 [2011] EWCA Civ 930 at [21] to [30]

> **circumscribed the consequences of non-performance. That general rule reflects a sound legal policy, which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation** ..

23. In Mr Kimbell's submission, OCA has received (as it was entitled to do) benefits under the ALPA which go beyond the specific "block hours" which it has actually used. Novans was obliged to maintain the Aircraft at all times in a ready to fly state, so that it was available on request. Novans was therefore constantly performing the ALPA by keeping the Aircraft airworthy, insured and crewed. In addition, from the moment that the ALPA took effect, OCA has had the benefit of (a) the right under clause 7 to share in the profits from charters of the Aircraft to third parties[17], and (b) the options under clause 11 to purchase the Aircraft, either during or at the end of the lease term.

24. Mr Kimbell drew attention to the two-working-day payment terms in clause 3 of the ALPA, and to the specific provision in that clause that "Payment paid to Lessor is non-refundable .. even in case of force majeure events". In Mr Kimbell's submission there can be no serious argument about the meaning of "non-refundable". He submitted that, in accordance with standard market practice in the jet charter market, the ALPA was subject to a strict invoicing and payment mechanism designed to give Novans security of receipt, enabling it to use the money received by it as its own to meet its other commercial obligations as they fell due.

25. Mr Kimbell alternatively relied upon the defence of change of position. He drew attention to paragraph 32(2) of the Amended Defence and to paragraph 14 of Mr Bargate's witness statement, in which Mr Bargate avers that:

> **Novans has suffered losses due to OCA's breach and altered its position in reliance on the repudiatory conduct of OCA by expending considerable sums of money. Novans is, and remains, liable for the payment of certain operational expenses [which] due to their nature .. cannot be recouped. They include set-up fees, insurance, operator costs, importation costs, professional fees, flight plans, etc. I understand that such expenses alone amount to approximately US$1,000,000. If relevant, a more detailed explanation of these costs and expenses will be provided as part of [the] evidence at trial and (if not agreed) by expert evidence.**

26. Mr McLaren, for OCA, had two answers to Mr Kimbell's reliance upon the terms of the ALPA. First, he submitted that, on its true construction, the "non-refundable" provision in clause 3 applied only during the currency of the ALPA, and was not intended to operate after termination. In Mr McLaren's submission, a reasonable

[17] The flight log exhibited to Mr Smith's first witness statement records that in March 2019 the Aircraft flew 3 such third-party charter legs, amounting to 7.50 "block hours". Paragraph 28 of the Amended Defence and Counterclaim pleads that "Novans attempted to book 13 third party charters but due to OCA's preferential use of the Aircraft only eleven third-party charters have been fixed."

person could not have understood the parties to have meant that OCA's payments would be non-refundable in any and all circumstances. To suggest otherwise would not be consistent with business common sense, because it could allow Novans a substantial unjustified windfall in the case of even the most minor breaches, if those breaches resulted in termination. Mr McLaren laid stress upon the poor quality of the drafting of the ALPA, and suggested three other possible constructions if (contrary to his primary submission) the non-refundable provision of clause 3 did continue to apply after termination. Those were that that provision did not apply (a) where the ALPA was terminated before its expiry; alternatively (b) where the early termination was by OCA rather than by Novans; alternatively (c) where the early termination was for non-payment of the initial payment or subsequent annual payments, and not (as here) where the termination was on the ground of non-payment of expenses.

27. Alternatively, Mr McLaren submitted that the "non-refundable" provision in clause 3, to the extent that it operated on breach, was void as a penalty. In that connection, he relied upon the following statement in *Chitty on Contracts*[18]:

> **Provision for forfeiture of sums paid may be a penalty**
>
> **If an excessive deposit is subject to the penalty rules, it might seem a fortiori that the same would be true of a clause providing that, if one party commits a breach and the other terminates the contract, the party in breach will forfeit sums that it has already paid; again there may be no relationship between the amount paid and the likely loss or the innocent party's legitimate interest in obtaining performance.**

28. As to the allegation of change of position, Mr McLaren submitted that the very brief assertions in paragraph 32(2) of the Amended Defence and in paragraph 14 of Mr Bargate's witness statement were wholly insufficient to establish any such defence. In Mr McLaren's submission, it is well established that the detriment must have been incurred in reliance upon receipt of the relevant benefit. The defendant must prove, at least on a "but for" basis that his change of position was causally linked with his enrichment[19]. Yet Mr Bargate's evidence is that the alleged change of position occurred "in reliance on the repudiatory conduct of OCA" rather than in reliance on receipt of payments. Moreover, the various items of expenditure identified by Mr Bargate are all matters which Novans would have had to have incurred in the ordinary course of things, simply as an incident of owning and operating the Aircraft. In any event, Mr Bargate's evidence of expenditure of approximately USD 1m could at best provide no defence to the balance of approximately USD 6.45m claimed.

## Summary judgment

29. This is an application for summary judgment, and not the trial of preliminary issues. Both sides were agreed that the relevant principles which I should apply are therefore

[18] Hugh Beale, *Chitty on Contracts* (33rd edn, Sweet & Maxwell, 2018) at [26-57].
[19] *Goff and Jones* (fn 4 above) at [27-33].

those explained by Lewison J in the cases of *JD Wetherspoon Plc v Van de Berg & Co Ltd*[20] and *EasyAir Ltd (trading as Openair) v. Opal Telecom Ltd*[21]. The parties were however, diametrically opposed as to how those principles should be applied in the present case.

30. The principles explained by Lewison J are well known, and I need not lengthen this judgment by setting them out in full. In the context of this application, however, it is perhaps worth recalling that in paragraph (vii) of the summary given in the *JD Wetherspoon* case, Lewison J observed that:

> **vii) The court should be especially cautious of striking out a claim in an area of developing jurisprudence, because in such areas decisions on novel points of law should be decided on real rather than assumed facts.**

In the *Easy Air* case, however, paragraph (vii) was as follows:

> **vii) It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it ..**

31. As I noted in *Hall v Saunders Law Ltd*[22], there is no tension between these different concluding paragraphs. The issue of whether a case can properly be disposed of without a trial is one of proper case management and procedural justice. In cases where the relevant law is in a state of incremental development or of uncertainty, a court will for sound practical reasons usually be reluctant to come to any final conclusion on the basis of assumed rather than actual facts. However, where a point of law or construction which is not fact-sensitive (or where the court can be confident that it is seized of all the relevant facts) is both short and likely to be determinative of the whole (or at least of a substantial part) of the case, the overriding objective under CPR 1.1(1) of dealing with cases justly and at proportionate cost will usually favour summary determination.

32. As Andrew Baker J recently observed in *Skatteforvaltningen v Solo Capital Partners llp*[23]:

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20 [2007] EWHC 1044 (Ch), [2007] PNLR 28 at [4],

21 [2009] EWHC 339 (Ch.) at [15]; approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24], per Etherton LJ, and in *Global Asset Capital Inc and another v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [27], per Hamblen LJ. See also *TFL Management Services Ltd v. Lloyds TSB Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006 at [26]-[27] per Floyd LJ.

22 [2020] EWHC 404 (Comm) at [17] – [18].

23 [2020] EWHC 1624 (Comm), [2020] 4 WLR 98 at [3]. In that ruling, Andrew Baker J (inter alia) refused an application for reverse summary judgment in relation to claims on duty of care and unjust enrichment grounds against one of the many defendants to these actions by the Danish Customs and Tax Administration. By his further judgment ([2021] EWHC 974 (Comm)) handed down on 27 April 2021 following the "Revenue Rule Trial" of the preliminary issue of whether the claimant's claims were inadmissible under the rule of law stated, eg, as Dicey Rule 3 (*Dicey, Morris & Collins on the*

> .. **there is often a careful judgment to be made whether it is the occasion for "grasping the nettle", so as to decide a point that seems at the interlocutory stage to be clear-cut, or for allowing an arguable claim or defence, but one assessed at the interlocutory stage to be weak, to proceed to trial precisely because that is but an interlocutory assessment, the claim or defence is none the less arguable not completely hopeless, and (if relevant) the court has to have an eye, as best it can, to whether realistically there may be materially different or additional evidence available at a trial** ..

33. Mr McLaren submitted that this was a case which was entirely suitable for summary judgment. In relation to the points of law involved, this was an appropriate occasion for me to "grasp the nettle" and to decide them, since they have been fully argued and I am in just as good a position as the trial judge to come to a decision on them. In Mr McLaren's submission, OCA's concession that I should assume against OCA that the ALPA has been validly terminated means that there are no relevant disputes of fact. To the extent that there are any such disputes in relation to whether Novans has relevantly changed its position, I should either decide that there is no real substance in Novans' belatedly advanced, inadequately pleaded, and inadequately evidenced case, or should assume those matters in Novans' favour and still give judgment for the balance claimed.

34. Mr Kimbell, by contrast, submitted that Novans' defences to OCA's claim in unjust enrichment were reasonably arguable, and ought to be tried at the same time as the main breach of contract claims at the trial fixed for December 2021. Many of the points which Mr McLaren says should be summarily decided on this application are, in truth, difficult issues of mixed fact and law which, in Mr Kimbell's submission, would involve the court in conducting an impermissible summary mini-trial in order to resolve them.

## Analysis

35. There are, it seems to me, 3 main areas of dispute between the parties in relation to OCA's unjust enrichment claim:

    35.1 First whether OCA *prima facie* has a good claim in unjust enrichment on the grounds of a partial failure of basis (disregarding, for this purpose, both the "non-refundable" provisions in clause 3 of the ALPA and the defence of change of position)?

    35.2 Second, if so, whether the "non-refundable" provisions in clause 3 preclude any such claim?

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*Conflict of Laws* (15th edn, Sweet & Maxwell, 2012) para 5R-019), Andrew Baker J dismissed all of the claims in these actions.

35.2.1 On their true construction, do those provisions continue to operate after the expiry or early termination of the ALPA?

35.2.2 If so, are those provisions to be disregarded under the rule against penalties?

35.3 Thirdly, if OCA's claim is otherwise established, whether Novans has a defence to all or part of that claim on the grounds of change of position.

36. In relation to each of these areas of dispute, the first matter which I have to decide is whether, having regard to the principles to which I have just referred, it is right for me to deal finally with that area of dispute on this summary judgment application.

37. Having carefully considered the arguments of the parties, I have come to the conclusion that it would not be right for me to deal with the second of these areas of dispute summarily on the present application. That is because, in the words of CPR 24.2(a)(ii)), I do not consider that Novans has no real prospect of successfully defending this claim on that basis. In the circumstances, I propose to dismiss this application and to allow the matter to proceed to trial.

38. Given my decision that the action must proceed to trial, it would be unhelpful for me to say more about the issues in the case than is necessary to explain my decision to the parties. As I have said, this is not the trial of preliminary issues, and there is no cross-application under CPR Pt 24 for reverse summary judgment, such as would make my decision on any of the issues in the case final and binding. The following is therefore no more than an explanation of why I have concluded that this matter must proceed to trial. Nothing that I say here can bind (or is intended to influence) the trial judge.

39. The first part of this second area of dispute is an issue concerning the correct interpretation of the words "Payment paid to Lessor is non-refundable" in clause 3 of the ALPA. The principles of contractual interpretation which I should apply were not in dispute, established as they have been by the familiar decisions of the Supreme Court culminating (at least for the time being) in *Wood v Capita Insurance Services Ltd*[24]. I will not attempt to distil or paraphrase that learning[25].

40. Mr Kimbell's submission was straightforward - that those words simply mean what they say. It was common ground that:

> **If it is agreed that a payment shall be retained, whether or not performance occurs, there has been no failure of basis for the payment and no claim in unjust enrichment can arise.**[26]

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24 [2017] UKSC 24, [2017] AC 1173.

25 *Trillium (Prime) Property GP Limited v Elmfield Road Limited* [2018] EWCA Civ 1556 at [9], per Lewison LJ.

26 *Goff & Jones* (fn 4 above) at [12-19]

According to Mr Kimbell, clause 3 therefore provides Novans with a complete defence to OCA's unjust enrichment claim.

41. Mr McLaren's case, by contrast, was that some limitation to the effect of this language is nevertheless plainly implicit in the ALPA, as a matter of commercial common-sense. Any of the limitations set out in paragraph 26 above would, in Mr McLaren's submission, be sufficient to permit OCA's claim to succeed.

42. It may perhaps be that one or other of Mr McLaren's submissions as to the restricted construction that should be given to clause 3 will succeed at trial. However, I am not satisfied that, on the limited evidence available to me on this summary application, I have sufficient information about the commercial context of the ALPA to enable me confidently to conclude, on the basis of commercial common sense alone, that the parties to the ALPA did not mean just what they have said in clause 3, which is that payments should be "non-refundable". That is the natural meaning of the words that the parties have used, and it is well-established that:

> **.. while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed ..**[27]

43. There are also pointers, both within the ALPA itself and in the limited evidence that I have seem, which suggest to me that the "commercial common-sense" relied upon by Mr McLaren may not be quite so obvious as he suggests. Although the terms of the ALPA show that the parties calculated the price payable on the basis of a rate per "block hour", those terms also show that the parties front-end loaded those payment, with 56% of the total being payable as an initial payment, and large lump sum payments being payable at the start of each year. It was also common ground that the initial payment was used as part of the price paid by Novans to acquire the Aircraft. Although Novans may perhaps have contracted to buy the Aircraft before the ALPA was signed[28], Mr Kimbell's suggestion that, if it did so, it was acting in anticipation of that signing (although unsupported by any direct evidence) is not implausible.

44. These matters suggest to me that the economics of this transaction, at least from Novans' point of view, may have involved a significant element of up-front costs and/or commitments, both initial and ongoing, not fairly reflected by a simple rate per "block hour" apportionment. They also suggest that both parties may have been aware of those factors, at least in general terms, at the time when they signed the ALPA. If that be the case, it could have made perfectly good commercial sense for the parties to

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27 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [20], per Lord Neuberger of Abbotsbury PSC.

28 Paragraph 6 of the Amended Defence and Counterclaim pleads that the aircraft was purchased on 17 September 2018, just over two weeks later than the date of the ALPA. However, the Novans Jets Balance Statement for September 2018 exhibited to Mr Smith's third witness statement appears to show a payment by Novans of a "Second Deposit and Moving Costs" of USD 1,140,000 on 27 August 2018, a few days prior to the date of the ALPA.

agree that the payments that were intended to fund those costs and/or commitments should be non-refundable, so as to give Novans "security of receipt"[29].

45. Simply as a matter of first impression, I am also unpersuaded by Mr McLaren's first suggested limitation. It seems to me that it is precisely after the ALPA has ended that any question of refund is most likely to arise. In the course of argument, I asked Mr McLaren if it was his case that OCA would be entitled to a refund if, at the end of the lease period, OCA had not availed itself of a significant number of the available "block hours". Mr McLaren disclaimed any such submission, arguing that, in those circumstances, there would be no "failure of basis" to found any such claim, since Novans would have done all that it was required to do under the ALPA by making the Aircraft available throughout the lease period. That seems to me to be right in principle and could well be a sufficient answer to those familiar with the law of unjust enrichment. However, the ALPA does not appear to have been drafted by lawyers. It does not seem to me to be commercially improbable that the commercial parties to the ALPA would have wanted to make that position expressly clear by the terms of their contract, and therefore to have intended the "non-refundable" provision in clause 3 to continue to apply even after the ALPA had come to an end.

46. The other, narrower, limitations suggested by Mr McLaren might perhaps produce an outcome that was more in accordance with commercial justice. However, without more evidence about the commercial background that was known to the parties when they made their contract – for example, about what commitments Novans was undertaking, how easy it was expected to be to unscramble those commitments, whether it was thought that the Aircraft was likely to appreciate or depreciate in value after purchase, and how easy it was anticipated to be to sell or re-lease the Aircraft – I cannot be confident that, were I to accede to any of Mr McLaren's interpretative suggestions, I would be giving effect to what the parties have actually agreed, rather than re-writing their bargain in the terms that, with the benefit of hindsight, I think that they should have agreed. I am reinforced in this view by the fact that Mr McLaren felt it necessary to proffer not just one, but four, different possible interpretations of this provision.

47. Mr McLaren's alternative reliance on the doctrine of penalties has the merit that it can apply only where the point becomes relevant because OCA is in breach. However, it is well established that "the Court should not be astute to descry a 'penalty clause'"[30], and that "what the parties have agreed should normally be upheld", not least because "any other approach will lead to undesirable uncertainty especially in commercial contracts"[31].

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29 Paragraph 4(e) of the Amended Defence and Counterclaim pleads that "It is standard within the private jet charter market for lease and expenses payments due under a wet lease to be subject to the same strict invoicing and payment mechanism. This provides the lessor with security of receipt".

30 *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, CA, at 1447, per Diplock LJ

31 *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41, PC, at 59, per Lord Woolf.

48. Moreover, the test for the applicability of this doctrine:

> **.. whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation ..**[32]

necessarily involves a consideration of the extent of the innocent party's legitimate interest, which again involves an enquiry into the commercial background:

> **.. the penal character of a clause depends on its purpose, which is ordinarily an inference from its effect. As we have already explained, this is a question of construction, to which evidence of the commercial background is of course relevant in the ordinary way ..**

49. In my judgment, just as I do not have the evidence available to me on this pre-trial application to resolve the issue of interpretation, so I similarly do not have the material available to make a confident judgment on the issue of whether this provision falls to be disregarded as a penalty.

50. Mr McLaren, in urging me to "grasp the nettle" and to decide both the interpretation and penalty issues in his client's favour, laid stress upon the fact that these issues are, in substance, simply points of law, in relation to which any facts material to my decision should have been pleaded[33]. At trial, that submission would be cogent, if not conclusive. However, this is not the trial of the action, and the points on which I am now being asked to rule have only appeared in the parties' statements of case at a very late stage.

51. This application has been pending since 26 June 2020. The evidence was completed by the service of Mr Smith's third witness statement on 26 November 2020. However, the "non-refundable" provisions of clause 3 were not specifically relied on by Novans until they were pleaded in paragraph 31 of the Amended Defence and Counterclaim, served on 19 March 2021. OCA's Amended Reply and Defence to Counterclaim, raising (in paragraph 26) for the first time its case as to the proper interpretation of clause 3 and its alternative reliance on the penalty doctrine was not served until 26 March 2021.

52. Novans is relying on the ordinary meaning of the words of clause 3. It was only when OCA challenged that interpretation, in reliance on the commercial context, and

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[32] *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 at [32], per Lord Neuberger of Abbotsbury PSC

[33] "Where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should specifically set out in its statement of case each feature of the matrix which is alleged to be of relevance. The "factual matrix" means the background knowledge which would reasonably have been available to the parties in the situation in which they found themselves at the time of the contract/document.": *The Commercial Court Guide* (10th edn, 2017) at C1.2(h).

alternatively invoked the penalty doctrine, that it became necessary for Novans to plead anything further. If Novans now wishes to plead facts relevant to interpretation or to the penalty doctrine, in answer to the case put forward in the Amended Reply and Defence to Counterclaim, it will need either to obtain OCA's agreement or the court's permission under CPR 17.1(2) to make consequential re-amendments to its Defence and Counterclaim or to obtain the court's permission under CPR 15.9 to serve a Rejoinder.

53. Given how recently these issues have appeared expressly in the statements of case, it would, in my judgment, be unrealistic and unjust to decide this application on the basis that all relevant facts have already been pleaded.

54. In those circumstances, it seem to me that the right course (as a matter of proper case management and in accordance with the overriding objective) is for me to allow this action to go forward to trial, where all relevant matters can be properly explored.

55. Given my decision in relation to the second of the main areas of dispute, I shall say very little about the first and third of those areas. Had the first of those areas stood alone, it might perhaps have been suitable for summary determination. The relevant facts are not in dispute, and although "[t]here is a lively academic debate whether it is an accurate statement of law today that failure of consideration cannot found a claim in restitution or unjust enrichment unless the failure is total"[34], the direction in which the law is developing is clear. "Modern authorities show that the courts are prepared, where it reflects commercial reality, to treat consideration as severable."[35] The question which I would have had to decide would have been what the precise basis of the payments made by OCA was, and the extent (if any) to which that basis could (reflecting commercial reality) properly be apportioned, so as to give rise to a total failure of basis in relation to the "block hours" which had not been flown by the date of termination[36].

56. It is, perhaps, worth pointing out that, were OCA's claim on its present basis to succeed, that claim could in principle fall to be reduced by "that sum which represents the loss or damages that [Novans] has suffered"[37] as a result of the termination. Novans, however, has not presently pleaded any such loss, and so would not (without a further amendment to its statement of case) be allowed to lead evidence at trial of, or to rely on, any such loss.

57. As to the third area, I shall do no more than to point out that:

> **.. The onus of pleading and proving the change of position defence is on the defendant, who must put it forward "fairly and squarely" in his**

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34 *Barnes v Eastenders Cash and Carry Plc* (fn 2 above) at [114], per Lord Toulson JSC.

35 Ibid.

36 As in cases such as *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93 and *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516, on which Mr McLaren relied.

37 See paragraph 21.3 above.

> **statement of case so that "its factual merits can be explored at the trial"** [38]
> **..**

That requires the defendant to give full details of the particular change(s) of position relied on, of reliance, and of any facts showing that that change (or those changes) would make it inequitable for the claimant to be granted restitution. It seems to me to be unlikely that a trial judge would regard the present paragraph 32(2) of the Amended Defence and Counterclaim as anything like a sufficiently particularised pleading for these purposes.

58. It is, of course, a matter for Novans to decide whether it wishes to correct the omissions and deficiencies in its statement of case to which I have drawn attention in the preceding paragraphs of this judgment. If it does wish to do so, then it must take steps to seek the necessary agreement or permission to do so as a matter of urgency, so as not to disrupt the orderly progression of this action to trial. If it delays, or does not do so, then it must accept the likely consequences.

## Disposition

59. For these reasons, I dismiss OCA's application for summary judgment.

60. I invite the parties to attempt to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential matters. In the event that agreement cannot be reached by 4pm on Friday 7 May 2021, the parties should so inform the court and should lodge written submissions in relation to the points of disagreement by 4pm on Wednesday 12 May 2021. I will then either give a ruling by email or direct a short further hearing by video conference. Pursuant to CPR PD 52A 4.1(a), I adjourn any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR 52.12(2)(a) until 21 days after that determination.

61. In accordance with the Covid-19 Protocol, this judgment will be handed down remotely by circulation to the parties' representatives by email and release to BAILII. No attendance by the parties is necessary. I am grateful to counsel on both sides and to the teams behind them for their assistance and for the clarity and quality of their submissions.

[38] *Goff & Jones* (fn 4 above) at [27-32].