Neutral Citation Number: [2022] EWHC 2216 (Comm)

Claim No: LM-2020-000232

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

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

Date: 31/08/2022

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

- -

Between:

ALISON JAYNE COOPER	**Claimant**
- and -	
DNATA CATERING SERVICES LIMITED	**Defendant**

- -
- -

Julian Wilson (instructed by **Farrer & Co. LLP**) for the **Claimant**
Niamh Cleary (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing dates: 28-30 June 2022
Further written submissions: 15 July 2022

- -

Approved Judgment

I direct that 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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HH JUDGE KLEIN

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2:00 p.m. on 31 August 2022.

HH Judge Klein:

1. This is the judgment following the trial of the Claimant's ("Ms Cooper's") claim against the Defendant ("dnata"), for compensation on the ground that dnata's conduct as the majority shareholder in En Route International Ltd. ("En Route") whilst Ms Cooper was the minority shareholder was prejudicial to her, in particular because, when she exercised put options by which dnata acquired that minority shareholding, because of its conduct it paid £1,064,749 less than it ought to have done.

2. Ms Cooper is a successful businessperson. She founded En Route in 2002. Until the acquisition by dnata of the majority shareholding in En Route, Ms Cooper was En Route's majority shareholder and its managing director, in which post she remained during the period with which I am concerned. En Route was (and may still be) a very successful in-flight catering supplier, which built a strong relationship with Emirates Airline ("the airline") in particular.

3. Dnata is a wholly owned subsidiary of a holding company called dnata ("Holdings"). Holdings is a Dubai-incorporated business which acquired all the assets of the Dubai National Air Travel Agency. It is wholly owned and controlled by the Investment Corporation of Dubai. Emirates is also a Dubai-incorporated business which is the holding company in a group including the airline and related companies, and which is also owned by the Investment Corporation of Dubai. One of those related companies is Emirates Flight Catering ("EKFC"). The precise relationship between Holdings and dnata, on the one hand, and Emirates, the airline, EKFC, and related companies, on the other hand, is disputed by the parties, but nothing turns on that precise relationship. Whatever the precise relationship between the different businesses, they all occupied the same headquarters in Dubai and there appears to have been a close relationship between the businesses. So, for example, Robin Padgett, a senior employee of Holdings, was also a director of dnata and had previously been employed by Emirates. Indeed, the closeness of that relationship lies at the heart of what Ms Cooper complains about.

4. By 2012, whilst En Route was successful, Ms Cooper did not have the finances to grow the business further. By this time, the airline was En Route's major customer. So, Ms Cooper asked a contact at Emirates (or, possibly, the airline) whether it was interested in buying En Route. There was real interest in En Route as an acquisition and in retaining Ms Cooper's services. Even at trial, Mr Padgett spoke, in cross-examination, in praise of Ms Cooper's skill in growing En Route's business even after dnata's acquisition of the majority shareholding. He said that she did a "sterling job" and that he was very impressed with her.

5. On 15 May 2012, three agreements were made:

    i) first, a share purchase agreement, by which En Route's existing shareholders sold their shares in the business to dnata, save that Ms Cooper retained a 20% shareholding;

    ii) secondly, a Put and Call Option Agreement, by which, in particular by clause 7 of that agreement, Ms Cooper was granted put options by which she could compel dnata to acquire her remaining 20% shareholding in three tranches between 31 May 2014 and 15 May 2022 on the following terms:

a) as to the first tranche of five shares, at a price equal to 4.2 x En Route's earnings before interest and tax (excluding exceptional items) ("EBIT") by reference to En Route's management accounts for the twelve months ending 31 May 2014 x 2%;

b) as to the second tranche of six shares, at a price equal to 4.7 x EBIT by reference to En Route's management accounts for the twelve months ending 31 May 2016 x 2.5%;

c) as to the third tranche of thirty one shares, at a price equal to 5 x EBIT by reference to En Route's management accounts for the twelve months ending 31 May 2017 x 15.5%;

iii) thirdly, a shareholders agreement:

a) by which Ms Cooper and dnata agreed, by clause 7.2 ("Clause 7.2"), that:

> "The Shareholders shall exercise their powers in the Company to procure that the Company shall not transact any of the business described in schedule 1 (Reserved Matters) without the prior written approval of each of the Shareholders…";

b) which provided, in Schedule 1; paragraph 12, that Reserved Matters included the making of any omission:

> "which is inconsistent with the maintenance of the Company as if it was an independent operation and/or which is artificial or unfair to the interests of [Ms Cooper] and/or which may diminish or adversely affect the profits of the Company."

6. In her Particulars of Claim, Ms Cooper contended that the effect of Schedule 1; paragraph 12 was as follows:

> "dnata…should use its majority shareholding in En Route to protect [Ms Cooper's] minority shareholding from any conduct, or inaction by En Route, which subordinated the interests of En Route to those of the Emirates Group, and deprived [her] minority interest from a full participation in what En Route's profits would be if operated independently, genuinely at arm's length from the Emirates Group, and fairly to [her] interest, unless dnata…had sought and obtained [her] prior written consent to such conduct or inaction."

(At trial, Julian Wilson, who represented Ms Cooper, contended that the appropriateness of any inaction had in fact to be judged against the conduct that would have been expected had En Route operated independently but as a company connected with other companies in the Emirates "group").

7. Ms Cooper exercised her put options as follows:

i) dnata purchased the first tranche of shares in December 2015 for £172,000;

ii) dnata purchased the second tranche of shares in June 2016 for £372,000;

iii) dnata purchased the third tranche of shares in June 2017 for £2,310,000.

8. It is Ms Cooper's case that dnata has been in breach of Clause 7.2 and that, if it had not been, it would have paid £178,752 for the first tranche of shares, £379,878 for the second tranche of shares and £3,360,119 for the third tranche of shares; hence her claim for £1,064,749.

9. Ms Cooper complains that dnata breached Clause 7.2 in two unrelated ways; first in relation to a product, which was referred to at trial as "Little Bites 2", which was the second iteration of an economy class in-flight snack box which was loaded onto all of the routes flown by the airline from 1 April 2014 (except on flights departing Dubai) and, secondly, in relation to a reclaim of paid Dubai import duty on En Route's products imported into Dubai only to be exported almost immediately on the airline's flights, and to a much smaller extent United Airlines flights, departing Dubai.[1]

Little Bites

10. From 2010, En Route supplied Little Bites 1 snack boxes for loading onto flights on the airline's European routes and also, from 2011, on flights departing Dubai. On 17 July 2012, the airline informed En Route that it was planning to "extend" the "Little Bites 1" "contract" from October 2012, when the "contract" was due to expire, to May 2013.

11. By December 2012, consideration began to be given to a replacement product (Little Bites 2 snack boxes). Florian Ott was, at the time, a manager in Emirates' procurement business ("Procurement"). He emailed Ms Cooper on 26 December 2012:

> "With regards to the snack box, please submit a formal proposal based on the attached volumes per region and station. The structure of the commercial proposal should be broken down as follows:
>
> (1) Purchasing cost of each item that goes into the box.
>
> (2) Charge per box including the cost of the box, labour, packing, overheads, profit, etc. This charge should be subject to a discount depending on the annual volume required globally and/or per region. Please propose a volume slab system.
>
> (3) Logistics charge per region."

Attached to the email was a spreadsheet which contained a "forecast", by region and airport, for the annual volume of Little Bites boxes (i.e. Little Bites 2 snack boxes)

[1] The arrangement by which Little Bites 2 snack boxes (or Little Bites boxes as they tended to be referred to at trial) were supplied was also described at trial as Little Bites 2. So, depending on the context, Little Bites 2 may refer to the product (the Little Bites 2 snack boxes) themselves or to the arrangement by which they were supplied.

required. The spreadsheet provided an "estimated" annual volume of approximately 42.3 million boxes, including approximately 25 million boxes for flights departing Dubai.

12. En Route replied with a detailed proposal on 16 January 2013. As to the price per box, En Route explained:

> "Prices per region based on achieving global leverage on components, packaging, assembly and logistic costs across the 42m tender volume.
>
> • Volume rebates fully loaded into headline price.
>
> • Partial award of certain routes would necessitate amending proposed pricing."
>
> ("the Proposal").

In other words, it had calculated its prices on the assumption that 42 million boxes would be supplied each year.

13. Included within the data in the Proposal was the "sell price to caterer".

14. On 16 February 2013, Ms Cooper emailed Mr Ott, referring to a discussion they had had the previous week, and adding:

> "En Route confirmed that pricing in document was dependant on volumes of 42m. The brands (Bel and McVities) had provided competitive pricing based on reaching a potential of 42m pax. If product was only loaded across specific routes some of the component prices may change.
>
> En Route would manage complete supply chain. Manage all deliveries across stations and invoice caterers accordingly. En Route would proactively manage orders from caterers and ensure supply was always available."

15. In August 2013, Mr Ott sent to En Route a revised "Estimated Annual Requirement", for December 2013 to November 2014, of 10.16 million Little Bites boxes. Significantly, the document showed that the boxes were not going to be loaded onto flights departing Dubai.

16. On 23 September 2013, Mr Ott emailed Ms Cooper with what is likely to have been disappointing news; that Little Bite boxes (i.e. En Route's offering) would be loaded onto all the airline's flights, but only for four months, from December 2013 to March 2014, after which, for a period of three years, Emirates intended to load a competitor's product onto its flights, but that that competitor's product was going to be supplied by En Route for all flights except those departing Dubai.

17. Ms Cooper and Mr Ott spoke on 24 September 2013, and the following day, on 25 September 2013, Mr Ott emailed Ms Cooper:

> "I have in the meantime clarified the deployment of the snack box with my colleagues from catering:
>
> From 1 December 2013 until 31 March 2014: Enroute shall supply Enroute's proposed snack box globally, meaning Dubai and outstations according to the list which was shared with you earlier.
>
> From 1 April 2014 until 31 March 2017: Enroute shall supply Enroute's proposed snack box to the outstations only."
>
> ("the 25 September email").

(Robert Dalboth later described this email as the "nearest thing we got as a contract…").

18. It was implicit in Mr Ott's original request and in En Route's response, and the later correspondence, that the airline was seeking consistency in its economy class offering across its routes (in due course except for flights departing Dubai from 1 April 2014).

19. As an aside, by a 15 March 2014 email, Ms Cooper was frankly expressing concern to Gary Chapman about En Route's place in the "Emirates Group" and, in particular, about how EKFC (which was a competitor) was working against En Route, according to her. Mr Chapman was the President of "Emirates Group Services" and of dnata. At trial, Mr Chapman was described as "a big cheese" in Emirates and dnata. As a further aside, EKFC created further problems for En Route in 2015. EKFC had a monopoly in Dubai to load catering onto flights departing Dubai and, in May 2015, it began to refuse to load En Route's products onto United Airline's flights departing Dubai, offering its own products instead.

20. Returning to Little Bites 2, by March 2014, En Route and Emirates had not agreed a price per box for Little Bites boxes for the period from 1 April 2014. Mr Dalboth, En Route's finance director at the relevant times, emailed Emirates on 25 March 2014 with details of the prices fixed for March 2014, and he referred to a forthcoming meeting with Mr Ott in Hamburg. He also said that he had suggested to Mr Ott a "rebate mechanism" for any savings made in the future. (Indeed, an En Route board presentation made on 9 September 2014 recorded that "En Route remains "supplier-neutral", with all costs being fully transparent for scrutiny by Emirates and by their audit programme.")

21. Ms Cooper, Mr Dalboth and Mr Ott met in Hamburg on 7 April 2014, when they agreed that the current price per box would apply until 30 November 2014 and that:

> "On the first anniversary of the agreement Enroute will pass on any savings to Emirates which were achieved through changes made to the packaging, banding, transport and content of the box by means of a credit note.
>
> On each anniversary of the agreement prices shall be mutually reviewed and agreed for the following 12 months."

22. There is no dispute about how Little Bites 2 in fact operated. Save in relation to flights departing Brazil airports, the airline's local caterers notified En Route of the number of Little Bites boxes they required from time to time, at the price which had been agreed between En Route and the airline and which had been notified to the local caterers. En Route supplied those boxes and rendered invoices to those caterers, which paid them. The caterers then re-charged the invoice sums to the airline (together with their own mark-up) and the caterers were paid by the airline. In the case of flights departing Brazil airports, rather than the local caterer placing orders, the airline (or, possibly, Procurement) placed the orders at the agreed prices and were invoiced by, and then paid, En Route. In this latter case, the orders were accompanied by Emirates' "Terms and Conditions of Purchase (General Purchasing of Goods)" ("the Standard Terms and Conditions"), which contained limitation of liability provisions. (Although I have referred here to En Route, it may be that all the relevant dealings were with En Route's Dubai subsidiary, but nothing turns on that).

23. On 9 August 2015, Cecile Beugnot, an En Route business development manager, emailed Ms Cooper:

> "Completely off the record, Tim [Walker (an Emirates procurement manager)] mentioned they are definitely considering taking off the lbb [(i.e. Little Bites boxes)]. This is not final yet but if you get the chance to have a meeting with Joost [Heymeijer (Emirates' senior vice president catering)] next week it will be fab to show him document you put together with new design and try to convince him that they need to get a focus group before making any choices.
>
> Obviously, Tim would like us not to mention that we had any info about this, especially bc it is not confirmed yet."

24. This was not the first time the possibility that Little Bites 2 might end before 31 March 2017 was apparent. In July 2015, Ms Cooper had emailed Mr Heymeijer, amongst others, a summary of "the steps required to implement a successful refresh/redesign for the current Little Bites product." Her email set out timeframes "if you would like the current product discontinued by 31 March 2016". In fact, an email, sent on 2 April 2015, to her from Mr Walker may have indicated that Little Bites 2 might end in March 2016.

25. On 7 September 2015, Emirates emailed En Route that "in continuation to previous correspondence on the contract termination of [Little Bites 2], Emirates would like to confirm our position to discontinue this offering from 1 April 2016". Accompanying the email was a letter from Mr Walker, headed "Contract Termination Confirmation" to similar effect.

26. Mr Padgett had been appointed as a dnata-nominated director of En Route on 11 September 2012. Ms Cooper described Mr Padgett as her "boss".

27. Having received Emirates' 7 September 2015 email, Ms Cooper forwarded it to Mr Padgett, who responded:

> "I was going to talk to you about this tomorrow. They don't know what they want to replace it (so a risky strategy serving notice). However, En Route will be a part of the redesign/new product initiative going forward."
>
> ("the Padgett 7 September email").

28. En Route's Board Meeting papers for a board meeting which took place the following day recorded that:

> "Have been informed Little Bites coming off load end Q1 2016 instead of end Q1 2017.
>
> Formal notification provided 7th September 2015.
>
> En Route needs to be involved throughout with regards to product replacement to ensure part of re-tender at the very least. En Route emailed EK Catering with proposed timescales and suggestions."

29. There followed discussions and meetings between En Route and Procurement about the product intended to replace Little Bites 2 (referred to at trial as "Little Bites 3").

30. Ms Beugnot then emailed Ms Cooper on 29 October 2015 saying that she had been informed that the airline was going to continue with Little Bites 2 until 30 September 2016.

31. There continued to be discussions between En Route and Procurement about Little Bites 3. However, on 8 February 2016, Mr Dalboth had a meeting with Procurement, following which he reported that what, if anything, was in fact going to replace Little Bites 2 was unclear. He also reported that he had been told that there were two reasons that Little Bites 2 was ending earlier than originally planned. He reported that Sir Tim Clark, the head of Emirates, had been unhappy with the Little Bites boxes, commenting, apparently, that there was too much packaging and that the boxes were not crew-friendly. In this respect, Mr Dalboth reported that he had been told that: "he threw it around his office…" Mr Dalboth also reported that he had been told that Little Bites 2 was too expensive in the light of existing budget constraints.

32. On 27 April 2016, Ms Cooper reported to Mr Padgett, following a meeting with Procurement, that she thought that the airline intended to use an alternative supplier (other than En Route) for Little Bites 3.

33. A little over three weeks later, on 19 May 2016, Ms Cooper received apparently good news from Mr Walker, that a "firm decision" had been made that Little Bites 2 would continue until 31 March 2017 (as originally planned). The news must have been welcome because, as the papers for En Route's board meeting on 7 June 2016 show, for the 2016/17 year, the airline was forecast to provide En Route with 50% of its turnover. As a source of En Route's income, the airline eclipsed each of En Route's other customers.

34. Within a few weeks, the airline resiled from its "firm decision". On 22 June 2016, Ms Cooper emailed Mr Padgett about "whisperings again today that Little Bites is coming

off" and, on 29 June 2016, Mr Walker reported to Ms Cooper that the suggestion that Little Bites 2 should end in October 2016 was "proposed at senior level". The next day, 30 June 2016, Ms Cooper received formal confirmation that Little Bites 2 would end "effective 1 October 2016".

35. Mr Padgett then sent three emails. To Mr Heymeijer and Terry Daly (Emirates' divisional senior vice president service delivery) he said:

> "I understand that Emirates has decided to remove Lite Bite Boxes effective 1st October. Obviously we are disappointed with this decision but understand that the airline is under considerable financial pressure.
>
> I would very much like to meet with you to review how we can support Emirates during this difficult time. We have a number of proposals which we believe can support your cost efficiency requirements but still protect the integrity of your on-board product.
>
> If you are agreeable I will liaise with your assistants to meet after Eid?"

To Mr Chapman he said:

> "I need to give you a heads up on Emirates' plan to remove product from their economy trays.
>
> Today Emirates arbitrarily terminated En Route's contract for the global supply of economy snack box (Lite Bite box) effective 1 October 2016. This product is placed on all economy lunch and dinner meal trays across Emirates network. The plan is to replace Lite Bite boxes with locally sourced cheese, crackers and other items.
>
> Lite bite boxes are supplied by EKFC out of Dubai and En Route for all outstations.
>
> I don't have access to Emirates' costs but estimate they spend approximately AED 109 million p.a. with En Route, EKFC and for handling charges at their outstation caterers. I understand they plan to save AED 38 million with this initiative to switch to local sourcing.
>
> The impact on En Route will be significant. They will lose AED 57.3 million in annual revenue and AED 15.3 million in contribution. Obviously, this margin will be lost to the Group.
>
> We were aware that Emirates were reviewing Lite Bite boxes and Alison had proactively offered a number of cost saving initiates to Emirates to help support them financially; however, these appear to have been ignored.

> I am also worried that that Emirates will not obtain the costs savings they have planned. By changing product mid-contract their outstation caterers will have an opportunity gouge on prices for the new product.
>
> Gary this initiative seems to be ill considered and will result in a very inconsistent offering across the network. I am in the process of contacting Terry & Joost to see if I can persuade them to change their minds; however, I understand the decision to switch was ultimately taken by PEKA [(Sir Tim Clark)]. I have also advised Saeed at EKFC that the product is being removed."

To Saaed Mohammed (chairman and CEO of EKFC, and a dnata-appointed En Route director) he said:

> "I need to give you a heads up on Emirates' plan to remove product from their economy trays.
>
> Today Emirates terminated En Route's contract for the global supply of economy snack box (Lite Bite Box) effective 1 October 2016. This product is placed on all economy lunch and dinner meal trays across Emirates network. The plan is to replace Lite Bite Boxes with locally sourced cheese, crackers and other items. I am told the only reason for doing this is to save money. If this is the case I am not sure that Emirates will get the costs savings they have planned as changing product mid-contract will allow outstation caterers the opportunity gouge on prices for the new product.
>
> Lite bite boxes are supplied by EKFC out of Dubai. I am not sure if you have been served notice or been advised of Emirates plans in Dubai. The impact of this change on En Route will be significant.
>
> I would be most grateful if you could let me know what EKFC's plans are for Lite Bite Boxes?"

Mr Padgett forwarded all three emails to Ms Cooper.

36. On 17 July 2016, Procurement informed En Route that it had agreed to En Route's request to extend Little Bites 2 to 30 October 2016 and for En Route to continue to supply Little Bites boxes beyond that, into November 2016, in certain regions, to use up existing stock. Procurement also asked En Route to provide details of "leftover costs should we terminate (1) end Oct (2) end Nov".

37. The final position, therefore, was that, as Ms Cooper later commented in an email to Mr Padgett, Little Bites 2 was "removed 4 months early".

38. On 21 July 2016, Ms Cooper set out, in an email to Mr Padgett, her frustration about the handling, by Procurement, of Little Bites 2:

> "My frustration when you meet them.
>
> I was around all that week and no one sits you down and has an adult conversation to simply ask what can we do...?
>
> You then get a letter from procurement telling you exactly the opposite of another letter received 3 weeks before...
>
> You then get invited to a tender for Grissini...
>
> We are part of the same group. I'm not part of GG!!
>
> Can't we just be open, stop pandering around and sit round the table and work on projects to the greater good of the passenger and the airline.
>
> Why do numerous staff keep saying, I've been told we can't tell you but...What's the problem? Why is there this angst around involving En Route in a project? Do they think they are displaying signs of favouritism and that may get them in trouble?
>
> Why when we can quite clearly save them some money they don't grab it with both hands say thank you and ask us to implement? Why 5 months later do I have to ask for another meeting which we discuss the same things again?
>
> What are they scared of? Making the wrong decision?? They can send me upstairs if they are - I have no problem explaining the rationale.
>
> Why are they being so secretive? What has En Route ever done so wrong?
>
> What am I not understanding?"

39. Separately, Ms Cooper was also having to deal with a dispute with British Airways relating to a contract En Route had to supply sandwiches on British Airways' European routes in economy class. The dispute related to British Airways' decision to substantially reduce the volume of sandwiches it would purchase from En Route, even though a "contract" for the provision of the higher volume of sandwiches had been agreed only about seven weeks before and even though En Route's "submitted pricing was based on volumes as per the…table we were asked to fill out." Ms Cooper emailed a British Airways representative in support of her manufacturer's request for an increased payment of £286,000. It appears that she sent the email the same day she had had a conversation with the British Airways representative which he described as "moving towards a position that is not conducive to our relationship". In his email in response, he added:

> "I do appreciate the price given was very good value but there seems to have been no buffer for change. I appreciate business is competitive but this seems to have been too much risk.

> Airlines always change for all sorts of reasons so why was the price given so low?"

Ms Cooper, in response, did not dissent from the suggestion that airlines "always change for all sorts of reasons". She did say, however:

> "As I said on the conference call on Wednesday the manufacturer has provided very keen pricing. We questioned it on numerous occasions but he kept saying – "if you give me those volumes I can give you those prices". Maybe En Route should have provided him with more guidance but quite honestly I thought this is a quick 7 month contract. We simply didn't envisage over 60% of the volumes disappearing 3 weeks after launch. I did think what about if there is a terrorist attack likely volumes would decrease but then thought we can't run a business overshadowed by Brexit or terrorists.
>
> …All I would like is an amicable solution to a negotiation that was based on a volume pricing."

40. The changes in the date when Little Bites 2 was going to be replaced by Little Bites 3 led to disagreements between En Route and its own suppliers; in particular, between En Route and Kaelis Onboard Services SL ("Kaelis"), which manufactured the boxes themselves for Little Bites 2. To assist En Route, particularly with Kaelis (as Mr Dalboth explained in cross-examination), Mr Dalboth and Mr Walker agreed that a letter would be prepared by Emirates (with En Route's input) which En Route could send to all its suppliers, which was intended to deter suppliers from making claims against En Route. Mr Dalboth wanted to use the commercial pressure of the airline's purchasing power to dissuade suppliers from making claims against En Route. The letter, from Mr Walker, dated 7 September 2016, said:

> "To whom it may concern,
>
> EMIRATES AIRLINE SNACK BOX TERMINATION - 2016
>
> Firstly I would like to thank you for the support provided to Emirates in relation to the ongoing changes in the Little Bites program over the course of the last 12 months. Despite our earlier correspondence to En Route for the extension of the program up until end March 2017, we received and provided direction in June 2016 that termination of this program must be exercised as a matter of urgency, with services to cease by October 2016.
>
> Whilst we understand the confirmation of extension and subsequent early termination does put pressure on your supply chain and your supply partners based on commitments in raw material. It is however our expectation that all parties affected will mitigate any and all costs incurred from the early termination in the best interest of maintaining long term partnerships.

> Emirates puts great emphasis on the value of our partnerships and ensuing *(sic)* these are well beyond a simply supply agreement. As such during the evaluation of new business opportunities the history of any relationship will be reviewed to support our partner selection process. At this point I would encourage you to consider this as part of your evaluation when determining impacts of termination and seeking compensation.
>
> Whilst it is disappointing that we have been required to implement early termination following the success of the program, we view this change as an opportunity for both organisations to evaluate new ideas and concepts that can be introduced in the future.
>
> I would like to rake the opportunity to thank you in advance for your supplier, and our thanks to your team for their time, commitment and contribution."

Dubai import duty

41. Emirates had made clear to En Route in February 2013 that it wanted En Route to try to procure exemption from liability to pay Dubai import duty, and En Route then did try, over the following four years, to obtain an exemption. However, because of the way Ms Cooper's case on this issue was put at trial (as to which, see further below), I need only set out the history of En Route's attempts to reclaim paid import duty from about March 2017.

42. By March 2017, Roshan Kundwani had been employed by En Route and had taken on the task of trying to reclaim paid import duty. On 18 March 2017, a meeting took place between En Route, the Dubai Customs authority and EKFC at which a Customs officer said that he would accept stamped delivery notes showing that En Route's products had left Dubai as sufficient evidence to progress the reclaim request. On 21 April 2017, Hamish Cook (an En Route director) emailed Ms Cooper:

> "Import Duty for DXB
>
> We have been progressing this with Roshan who has done some great work and research on getting facts together. Stephen H has also completed some work on analysing the real implications of a couple of models that we can use to implement a duty free status. There is a some more work that Roshan needs to complete next week and we should be in a position to continue discussions with [Emirates]."
>
> ("the Cook 21 April email").

43. It does not appear that, by 31 May 2017, the end of the EBIT period which was used to calculate what was payable to Ms Cooper for the final tranche of shares she disposed of to dnata in the exercise of her put options, En Route had submitted any stamped delivery notes to the Dubai Customs authority or that the authority had given any commitment to repay any paid import duty to En Route.

Representation

44. As I have indicated, Ms Cooper was represented at trial by Mr Wilson. Dnata was represented by Niamh Cleary. I am grateful to them for all their assistance, in particular for their very clear and helpful written and oral submissions and for the collaborative way they worked together during the trial, in their clients' best interests, to ensure that the trial time estimate was met.

45. Ms Cooper's case was not fully particularised before trial, but Mr Wilson helpfully provided those particulars in his oral opening and then, equally helpfully, provided draft Amended Particulars of Claim just before he made his oral closing submissions, which were intended to act as an aide memoire of those particulars. By the conclusion of Mr Wilson's oral closing submissions, Ms Cooper's case had become more focused than her pleaded case had been, and was not precisely the same as that pleaded case. Most favourably to Ms Cooper, in this judgment I consider her case as it finally was, because it causes no injustice to do so. I need to add that, in this judgment, I set out the reasons for reaching my conclusions and the evidence and submissions which are central to that reasoning. Nevertheless, before reaching my conclusions, I considered all the evidence which I heard and to which I was referred (including the material I indicated I pre-read) and all the submissions made on behalf of the parties.

Ms Cooper's case

46. Ms Cooper contends that the 25 September email amounted to an acceptance of En Route's offer to supply (filled) Little Bite 2 snack boxes, and that, thereby, a contract between En Route and the airline came into existence, by which, between April 2014 and March 2017, the airline would purchase and En Route would supply the boxes globally except for loading onto flights departing Dubai.

47. Ms Cooper contends that there was implied into that contract a term by which the airline "would cause to be purchased through its catering agents at the worldwide airports from which it operated at least the 10.16m annual volume [of Little bites boxes] shown in the…forecast" sent by Mr Ott to En Route in August 2013. Ms Cooper contends that such a term was implied into that contract because of the contents of the Proposal I have quoted above and as a matter of commercial sense, and because of the circumstances. She contends that such a term was obvious or necessary to give business efficacy to the contract.

48. Ms Cooper accepts that, by 25 September 2013, the price payable for each Little Bites box had not been agreed, but, she contends, "pricing principles" had been agreed. Those "pricing principles" were that En Route would be open with the airline about its, En Route's, costs and margin, that the charge for each Little Bites box would be subject to a discount based on the annual volume required globally, and (perhaps) that the charge would be calculated taking into account the purchase costs of the box's contents, logistic costs, the cost of the box itself, labour, packing, overheads and profit (i.e. the matters referred to in Mr Ott's 26 December 2012 email). Notably, Ms Cooper does not suggest that the parties had agreed any formula for quantifying any of these variables, so that, for example, she does not suggest that the parties had agreed what percentage profit En Route would make on each box supplied, nor that they had agreed a formula from which that percentage profit could be calculated. On

her case, what might be the actual price for each box supplied was to be agreed later, as it turns out in April 2014 at the meeting in Hamburg and then only until 30 November 2014. (This is a matter to which I return below).

49. Ms Cooper contends that, by terminating early the contract she pleads, the airline was in breach of contract and has been liable to pay En Route compensation.

50. Ms Cooper contends that, had En Route operated independently of Emirates, it would have claimed compensation from the airline, and that dnata has breached Clause 7.2 because Mr Padgett failed to raise with Ms Cooper the possibility of her, as En Route's managing director, causing En Route to make such a claim against the airline. Had Mr Padgett raised this as a possibility, Ms Cooper would, she contends, have caused En Route to make a claim. Had a claim been made, there was, she contends, a real and substantial chance that the airline would have paid compensation, so increasing En Route's EBIT and, in turn, the price paid for her shares disposed of under the put options.

51. For this breach of Clause 7.2, Ms Cooper claims principally £825,375.

52. This is a convenient place to make the following point. Ms Cooper's focus at trial was very much on the question of whether an independently-operated En Route would have made a claim for compensation from the airline. She did not focus on whether the omission, by En Route, to make a claim for compensation was "unfair" to her interests, for example. She was right not to do so. If an independently-operated En Route decided, for sound commercial reasons, not to make a claim for compensation, it will not have "subordinated the interests of En Route to those of the Emirates Group" (which, on her case, is the vice which Schedule 1; paragraph 12 of the shareholders' agreement and Clause 7.2 were intended to guard against).

53. So far as concerns Ms Cooper's claim relating to the reclaim of Dubai import duty, she contends that EKFC sought to obstruct En Route's attempt to reclaim paid import duty, that dnata should have caused Mr Padgett to ask Mr Mohammed to instruct EKFC staff to stamp the delivery notes as the Customs officer had suggested, and that there was a real and substantial chance that EKFC would have done so and, in due course, that En Route would have been repaid paid import duty. Ms Cooper contends that dnata breached Clause 7.2 by failing to get Mr Padgett to make that request of Mr Mohammed.

Dnata's case

54. Dnata disputes that there was any contract at all between En Route and the airline relating to Little Bites 2. Rather, dnata contends, there were only ad hoc contracts which were made each time the airline's local caterers placed an order, and then subject to the Standard Terms and Conditions. Dnata disputes that any contract between En Route and the airline included the implied term Ms Cooper contends for and it denies that the airline breached any contract. In any event, it disputes that an independently-operated En Route would have claimed compensation from the airline, so that, for that reason and in any event, dnata cannot have been, and was not, in breach of Clause 7.2.

55. So far as concerns Ms Cooper's claim relating to the reclaim of Dubai import duty, dnata contends that it did not breach Clause 7.2, that there was not a real and substantial chance that the Dubai Customs authority would have repaid any paid import duty by 31 May 2017 or committed to doing so (so that there would never have been a basis to adjust En Route's EBIT and, in turn, there can be no loss to Ms Cooper) and that, in any event, any repayment would have been credited by En Route to the airline (so that, for this reason too, there would never have been a basis to adjust En Route's EBIT and, in turn, there can be no loss to Ms Cooper).

56. I now turn to the witness evidence.

Ms Cooper

57. Ms Cooper described the Emirates "group" as a dysfunctional organisation, referring, in her witness statement, to "company infighting", "internal politics" and "a culture of fear", a "toxic internal culture" and "backstabbing", and to what she described, in effect, in her witness statement as EKFC's misuse of its monopoly in Dubai, as a caterer for flights departing Dubai, to En Route's disadvantage. This view of companies related to Emirates, which is also evident from Ms Cooper's contemporaneous documents, was one Ms Cooper continued to express in her oral evidence. Ms Cooper attributed much of the "company infighting" to the fact that company directors were trying to protect their individual bonuses. She added that there "were a lot of weak people internally who did not want to risking losing their jobs".

58. Ms Cooper was particularly critical of Mr Mohammed, pointing out that he was conflicted, as an En Route director and an EKFC director, because En Route and EKFC were competitors. She also said that he "would often say he would do things… but then rarely follow through". She thought that Mr Mohammed did not want En Route to obtain duty free status in Dubai because that would have made En Route more competitive.

59. Ms Cooper said that she, Mr Dalboth and Mr Cook made decisions and ran En Route's business, subject to oversight from the dnata-appointed directors, including Mr Padgett. Ms Cooper clearly had a degree of autonomy, as one might expect of the managing director, because she said that her "wings were clipped" in 2016, when Holdings introduced an internal governance manual, although she did add that the dnata-appointed directors of En Route had to approve "bigger financial decisions". Nevertheless, Ms Cooper did feel able to have direct discussions with Mr Chapman, as her 15 March 2014 email shows, and she said, in cross-examination, that she reported her conversations with Mr Chapman to Mr Padgett and the other dnata-appointed directors of En Route after she had had them.

60. Ms Cooper explained that a real benefit to the airline of Little Bites 2 was that there was a consistent offering across the whole of the economy class of the airline's network (except perhaps on flights departing Dubai). She pointed out too that a second benefit to the airline of Little Bites 2 was that (save in the case of flights departing Brazil), the airline's local caterers took the risk of under- or over-ordering Little Bites boxes. Ms Cooper said that, in her experience, more than 10.16 million boxes were ordered annually during Little Bites 2.

61. She was asked, in cross-examination, about the price per box agreed as part of Little Bites 2. She explained that Mr Ott in fact rejected the prices proposed by En Route in its tender, as being too high, and that, she also explained, is why the meeting took place in Hamburg in April 2014 to agree a price per box.

62. She was asked, in cross-examination, why, as a successful businessperson who understood the importance of recording important arrangements in writing, Little Bites 2 was not recorded in writing in detail. She responded that a detailed record of the arrangement was not necessary because En Route was part of the Emirates group. She then said that, in her mind, there was absolutely no risk that one group company might do something to harm another group company.

63. She said that, even though Little Bites 2 was an important arrangement for En Route, it did not represent nearly 50% of En Route's revenue. She then had to accept that, in September 2014, at the time of an En Route board meeting, a board presentation recorded that Little Bites 2 was "nearly 50% of our business".

64. Ms Cooper said, in cross-examination, that the airline never removed routes, unless there was a war or "something political". In other words, she never expected, except exceptionally, volumes of the Little Bites boxes to be supplied to fall because the airline stopped flying a route.

65. Ms Cooper acknowledged that the early termination of Little Bites 2 was "a worrying time", which would probably lead to redundancies, and which she discussed at length with Mr Dalboth. She said that, faced with the airline's continuing change of position about when Little Bites 2 would end, she focused on preserving En Route's reputation with its suppliers, and protecting it and those suppliers.

66. Ms Cooper was asked why she never suggested that a claim should be made against the airline for the early termination of Little Bites 2 (even though, as she explained, in cross-examination, she feels that the airline behaved "abominably" in terminating Little Bites 2 early). She blamed the Padgett 7 September email, as she had done in her witness statement, where she had said that it had made her "less forceful and more subservient in my reply to Emirates than I ordinarily would have been", although she did also say in her witness statement that she also never suggested that a claim should be made because her focus was elsewhere; namely, on her attempts to preserve En Route. She added, in her witness statement, that, in any event, she knew that Mr Padgett "would not be able to exert any power over [the] decision to make costs savings [because] [t]hey didn't seem, to be able to have a sensible commercial conversation at a higher level".

67. When Ms Cooper was shown En Route's 8 September 2015 board presentation (i.e. for the board meeting which was held the day after the Padgett 7 September email), she had to, and did, acknowledge that whatever replaced Little Bites 2 would be the subject of a tender process and that En Route might not be the successful tenderer, but she continued to maintain that she did not object to the early termination of Little Bites 2 because of the Padgett 7 September email, even though shortly after, in cross-examination, she accepted that, by April 2016, she believed that En Route would not be part of Little Bites 3. (A little later in her cross-examination she suggested that she believed that En Route might be part of Little Bites 3 as late as the end of June 2016).

68. Ms Cooper suggested in cross-examination that she was not sure that Mr Padgett could not exert power over the decision to terminate Little Bites 2 early, until she was reminded of her contrary assertion in her witness statement.

69. Ms Cooper was also cross-examined about Little Bites 1; in particular, an email from Procurement making clear that the airline would not pay for all surplus stock after the end of the arrangement. Ms Cooper said that En Route would not have accepted such a proposal, because there is always surplus stock in airline catering arrangements, which has to be "burnt off" (i.e. used after the formal end of a catering arrangement). Ms Cooper was then shown a later email from Mr Dalboth to Procurement expressing concern that En Route might be left with excess stock, and she accepted that that might have been the case.

70. Ms Cooper was cross-examined about the changes to the arrangement En Route had with British Airways. She acknowledged that the airline catering industry is highly volatile and that the requirements of airlines change all the time, although, she said at first, not when a supplier has a contract with an airline. She then had to accept that the arrangements En Route had with British Airways changed even though there was a contract between them.

71. She was asked in cross-examination finally about the reclaim of paid import duty. She acknowledged that she could not say how long it would take the Dubai Customs authority to process the reclaim for paid import duty once it was supplied with stamped delivery notes.

72. I have concluded that I must approach Ms Cooper's evidence cautiously. Perhaps because she is the claimant, and perhaps because of her clear antipathy towards Emirates, related companies and senior employees (as can be seen by her reference to "weak people" and by her generalisation that they were concerned to protect their bonuses), and as she demonstrated in her evidence, she was not a dispassionate historian.

73. Perhaps the clearest example of what I mean is her response to the Padgett 7 September email. However dysfunctional the Emirates group might have been, it is highly improbable that En Route was guaranteed an involvement in Little Bites 3 and, as a successful businessperson, Ms Cooper must have appreciated that. Despite Ms Cooper's insistence that it was because of that email that she never suggested that En Route should make a claim for compensation against the airline for the early termination of Little Bites 2, that is simply not credible. As I have just said, that En Route was guaranteed an involvement in Little Bites 3 is highly improbable and would, if for no other reason, have been understood to be improbable following the En Route board meeting on 8 September 2015 (the day after the email was sent), because the board presentation made clear that there would have to be a tender process for Little Bites 3 which Ms Cooper accepted En Route might not win. Nor can the Padgett 7 September email justify why Ms Cooper did not suggest that En Route claim compensation from the airline after February 2016, when Mr Dalboth said that what, if anything, was going to replace Little Bites 2 was unclear, after April 2016 when, on her own account, she thought that En Route would not have a role to play in Little Bites 3, or after July 2016, when she was complaining to Mr Padgett about Procurement's handling of Little Bites 2.

74. There are other examples, in Ms Cooper's evidence, which support the conclusion that she was not a dispassionate historian:

    i) she did not accept that Little Bites 2 represented almost 50% of En Route's revenue, until she was shown En Route's 2014 board presentation to that effect;

    ii) she suggested, in cross-examination, that Mr Padgett was able to influence the decision to terminate Little Bites 2 early, at least until she was reminded of the contrary evidence in her witness statement;

    iii) she maintained a position about excess Little Bites 1 stock (that En Route would not accept the risk of having excess stock) which was apparently inconsistent with Mr Dalboth's contemporaneous email;

    iv) she suggested that the airline catering industry was not volatile where there are contracts between supplier and airline, at least until she was reminded that, at a time when British Airways cut its sandwich order drastically shortly after it was placed, En Route had a contract with British Airways.

Mr Dalboth

75. Mr Dalboth suggested, in his witness statement, that dnata-appointed directors, including Mr Padgett, really allowed the En Route management team (Ms Cooper, Mr Dalboth and Mr Cook) to manage En Route's business and took a back seat in En Route's affairs. He said that quarterly board meetings were really "business review meetings" at which few "actions or resolutions" were agreed. He added:

> "Alison directly reported into Robin Padgett. As a result, it was a casual relationship between Alison and Robin and they spoke very frequently, maybe once or twice per week. Robin thought the world of Alison at the time. He thought she was one of the greatest entrepreneurs he had seen and he had a lot of respect for her and the work she was doing. He was her boss, but it was very informal. Had En Route's results started going badly I think the relationship would have changed."

76. Mr Dalboth said that "the world of airline catering is largely a world without…written contracts. The lack of written contracts is highly usual: it was done on trust and emails."

77. Mr Dalboth said that, at the time Little Bites 2 was terminated early, "Emirates were En Route's largest customer…, and given the group connection, En Route did not particularly want to enter into a dispute with Emirates then, as it would sour the relationship". He said that "the mood in the room" was that, if En Route sued the airline, it would have "scuppered" En Route's chance of being involved in Little Bites 3. He said that there "were valid commercial reasons" why En Route did not sue the airline for the early termination of Little Bites 2; namely, (i) that both businesses were part of the same group, (ii) En Route hoped to have a role in Little Bites 3 and (iii) the airline was En Route's biggest customer. He also suggested that suing the airline

would have "damage[d] En Route permanently". He added that not suing the airline was "the right view for the longevity" of En Route.

78. Mr Dalboth expanded on this in his oral evidence. He said that En Route's management team (principally Ms Cooper, himself and Mr Cook) decided that it was commercially unwise to proceed with a claim for compensation against the airline whilst En Route was tendering for Little Bites 3. He said that he could not recall any discussions about making a claim after En Route learned that it would have no involvement in Little Bites 3, even though the discussions were then "intense" (because so much of En Route's business had been lost). He said that, at that later time, if any member of the management team had thought that a claim should be pursued, they could have raised that as a possibility and, if the rest of the management team agreed, the proposal would have been taken to En Route's board.

79. Mr Dalboth was asked, in cross-examination, about the possibility of crediting paid import duty which En Route successfully reclaimed to the airline. He was cross-examined on this subject by reference to an email headed "Brazil pricing", which appeared to relate to the Little Bites 2 arrangement which applied just to Brazil (i.e. by why which the airline or Procurement ordered Little Bites boxes directly from En Route). He accepted that, if En Route was repaid Brazil import duty it had paid, this would be repaid to the airline.

80. Mr Dalboth was asked, in cross-examination, about the preparation of En Route's management accounts. He could not recall much difference between its statutory and management accounts.

Mr Padgett

81. Mr Padgett's evidence about the role played by dnata-appointed directors in En Route was consistent with Mr Dalboth's evidence. Mr Padgett explained that the dnata-appointed directors were non-executive directors who were keen not to micro-manage En Route's management team for fear of stifling "the entrepreneurial spirit of the organisation". Mr Padgett added that when he began working for Holdings, he "made it very clear to [Ms Cooper] that [he] wasn't there to direct her; [he] provided constructive criticism and gave support and guidance, while she was in charge of directing strategy and setting policy". He accepted that the budget-setting process was an exception to that. He continued:

> "Alison and her team at En Route team controlled the overall day-to-day management, had autonomy over who their customers were, and what product lines they were running. I would describe my management style in relation to En Route as hands off. This was in line with dnata's aim to preserve an independent, entrepreneurial, and agile organisation in En Route. For example, in my email of 10 August 2016, Robert [Dalboth] and Alison were making decisions about an En Route restructuring in order to safeguard the business. In response, I provided (along with Tajana in the HR team), some headline thoughts and observations on their summary of the restructuring. This exemplifies the relationship I had with the En Route directors, in which they would occasionally come to

> me to sense check proposals, asking me to provide advice or assistance where needed."

82. When discussing Little Bites 2 in his witness statement, Mr Padgett explained:

> "It is worth noting that it isn't usual business practice in the aviation sector to have any kind of minimum order requirements. Even when I worked in jet fuel purchasing at Emirates, which was a vast undertaking, we would never have given a minimum order requirement. The risk is always with the supplier and the level of contingent stock they are prepared to hold. There were generally no commitments to purchase a certain number of items based on the forecast passenger numbers."

83. Mr Padgett concurred with Mr Dalboth's contemporaneous view that Sir Tim Clark (and his immediate management team (that is, the Emirates senior management team)) had decided that Little Bites 2 should end early. Mr Padgett explained, however, that the junior management team recognised that a substitute for Little Bites 2 could not be introduced as quickly as Sir Tim Clark and the senior management team wanted.

84. Mr Padgett was cross-examined at length about how the airline might have responded to a claim for compensation for the early termination of Little Bites 2. As explained by him, the airline's response would have depended on how tactfully and moderately En Route raised the matter. Mr Padgett acknowledged that, in July 2016, the airline had agreed, at En Route's request (which did not damage relations), to the continued supply of Little Bites boxes in October and November 2016 to use up some excess stock. Mr Padgett suggested that En Route's request to continue to supply boxes in October and November 2016 was "modest", which the airline agreed to because its staff were "reasonable". He explained that in most of its arrangements with its caterers, the airline allows only up to seven days' burn-off (continued supply) of excess stock after the end of an arrangement, to encourage caterers to manage stock well. He thought that, other than making sure that excess stock was used up, the airline would have done little more by way of amends for the early termination of Little Bites 2. He said that En Route's relationship with Emirates (and the airline in particular) was not one of "mutual reliance". He said that, whilst En Route had ongoing projects other than Little Bites 2 with companies in the Emirates group, on those other projects there were other suppliers to which, after a lapse of time of some months, En Route's business could have been re-directed. He said that a solicitor's pre-claim letter or a formal claim for compensation by En Route would have been "catastrophic" and "severely soured" its relationship with companies in the Emirates group and would have caused long term harm to En Route. He said that it would have been possible for En Route to have had a carefully-handled discussion with the airline about compensation which would not have damaged En Route's relationship with Emirates group companies, but anything more would have been very damaging for En Route because of the "personalities". He thought that, whilst a carefully-handled discussion with the airline about compensation would not have damaged any relationships, such a discussion had "little chance" of successfully causing the airline to pay compensation. He assessed the chance of the airline paying compensation to En Route as "slim".

85. Mr Padgett was an impressive witness. His evidence was consistent with Mr Dalboth's evidence, as I have explained. He also gave his evidence moderately. For example, despite the personal criticism made of him by Ms Cooper, he continued to volunteer praise for Ms Cooper in cross-examination for her work at En Route. He also gave evidence in a balanced way (see, for example, his cross-examination about how the airline might have responded to a request for compensation, which I have summarised above).

Gordon Steele

86. Because of the conclusions I have reached in any event, I can summarise the evidence of the parties' forensic accounting experts very briefly. (As it happens, the differences between the experts, which Mr Wilson correctly summarised in paragraph 66 of his written opening, were in fact very narrow).

87. Mr Steele was Ms Cooper's expert. He prepared an amended principal report and a supplemental report, and he contributed to a joint statement. As I understand his supplemental report, in his opinion, had the airline not terminated Little Bites 2 early, Ms Cooper would have received at least £815,300 more on the transfer of the final tranche of her shares than she in fact did. He is also of the opinion that, had the Dubai Customs authority repaid to En Route the paid import duty before 31 May 2017 (the end of the final EBIT period used to calculated the consideration for the transfer of Ms Cooper's shares) and that sum been retained by En Route, Ms Cooper would have received £68,700 more for all three tranches of her shares than she did.

88. Mr Steele was cross-examined about when a contingent asset might be provided for in a company's accounts.

89. Contingent assets are defined by International Accounting Standard 37 – Provisions, Contingent Liabilities and Contingent Assets as possible assets that arise from past events and whose existence will be confirmed by the occurrence or non-occurrence of uncertain future events that are not wholly within the control of the entity. Any unpaid compensation for the early termination of Little Bites 2 or any yet to be repaid import duty could only be contingent assets, unless they were virtually certain to be received. En Route prepared its statutory accounts in accordance with International Financial Reporting Standards as adopted by the EU and Financial Reporting Standard 101 – Reduced Framework Disclosure, which provide that contingent assets should not be recognised in a company's accounts. In other words, unless the receipt of compensation for early termination of the Little Bites 2 was virtually certain or the repayment of paid import duty was virtually certain, until any money was received by En Route, the possibility of payment was not to be provided for in En Route's statutory accounts.

90. Mr Steele pointed out that there was no evidence that, in En Route's preparation of its management accounts (the accounts by reference to which the consideration for the transfer of all three tranches of Ms Cooper's shares was calculated), there were taken into account the same accounting standards which En Route applied to the preparation of its statutory accounts. He accepted, however, that En Route's finance director would have been likely to take a prudent approach to the preparation of its management accounts and that there would be a risk if they showed, on En Route's balance sheet, a large sum (such as a compensation payment) which was never in fact

paid. He added that, as a matter of commercial prudence, contingent assets would not be recognised in management accounts unless their receipt was virtually certain and that it was highly unlikely that any compensation claim for the early termination of Little Bites 2 or any repayment of paid import duty would have been recognised in En Route's management accounts at any time before their receipt was virtually certain.

91. Mr Steele also confirmed that, had any repaid import duty been paid over by En Route to the airline, the repayment by the Dubai Customs authority of any sum to En Route would have been neutral for the purposes of En Route's EBIT (and so in the calculation of the consideration for the transfer of Ms Cooper's shares).

Debbie Revill

92. Ms Revill was dnata's expert. She too prepared a principal report and a supplemental report, and she contributed to a joint statement.

93. Ms Revill's opinion was that, if Little Bites 2 had not been terminated early, En Route's EBIT would have been higher by £546,443 assuming a gross profit margin on the arrangement of 23%, or £680,723 assuming a gross profit margin of 28%, which would have resulted, in turn, in Ms Cooper receiving as much as £527,560 more on the transfer of the final tranche of her shares. The difference between Mr Steele's calculation and Ms Revill's calculation came about because they disagreed about:

    i) whether it should be assumed that the airline would have loaded a minimum number of 10.16 million Little Bites boxes onto its flights in the final year of Little Bites 2, or a greater number consistent with the greater number the airline actually loaded during the arrangement as Ms Cooper contended;

    ii) whether En Route's gross profit margin on the arrangement should be 23% or 28% (derived from contemporaneous documents), as Ms Revill contended, or 32% as Mr Steele contended, the 32% margin being applied because Ms Cooper had informed Mr Steele, during a conversation between them, that that was the appropriate margin to adopt;

    iii) whether it should be assumed that the airline would have continued to permit excess stock to be burnt off (used by En Route) after 31 March 2017, when Little Bites 2 had originally been due to end, as Mr Steele contended, or whether that assumption should not be made, as Ms Revill contended.

94. On the assumption that, but for any breach of Clause 7.2 by dnata, the Dubai Customs authority would have repaid paid import duty to En Route before 31 May 2017, and, on the assumption that En Route would have retained that repayment, Ms Revill appeared more or less to agree with Mr Steele's opinion that Ms Cooper would have received £68,700 more for all three tranches of her shares than she did.

Contractual uncertainty

95. It is notable that, on Ms Cooper's case, by the time the contract on which she relies, between En Route and the airline for the supply and purchase of Little Bites boxes, was said to have been made on 25 September 2013, no price was agreed for the supply and purchase for each box and there had been no agreement about how the

different variables of the formula by which the price was going to be agreed later (as it turns out, in Hamburg in April 2014), or what was described as "the pricing principles", were to be quantified. In short, on Ms Cooper's case, by the time the contract on which she relies in support of her claim in relation to Little Bites 2 was said to have been made, all that En Route and the airline had done was to agree that they would agree the price for each Little Bites box at a later date, and, as it happens, when they did agree that price they only did so for the first period of the contract on which Ms Cooper relies.

96. I have come to the conclusion that such an agreement is too uncertain to be a contract, because a fundamental element of that agreement, namely the price to be paid by the airline for each Little Bites box, had yet to be agreed and because that price could not be established by 25 September 2013 by the application of any formula. I have also come to the conclusion that such an agreement cannot be saved as a contract by the implication of a term that the price to be paid for each box was to be a reasonable sum. As is explained in Cartwright: Formation and Variation of Contracts (3rd ed) at paragraphs 3-14-3-17 (including footnote 72):

> "…It is not…necessary that the parties agree expressly on the detail of every term which the law regards as essential to the type of contract which the parties intend to form, as long as there is a sufficiently certain mechanism by which detail can be completed: for example, agreement on the price is an essential term in a contract of sale of goods, but if the parties' agreement is silent as to the ascertainment of the price, as long as there is agreement on the goods the property in which is to be transferred, and on any other terms the parties have decided should form part of their contract of sale, the buyer must pay a "reasonable price" [(Sale of Goods Act 1979 s.8(1); what is a reasonable price is a question of fact dependent on the circumstances of each particular case: s.8(3). This provision applies only if the parties have been silent as to the price: if they are in disagreement over the price, or if they have agreed a formula for the price which is not sufficiently certain…, there is no implied term: *May and Butcher Ltd. v. R* [1934] 2 KB 17 HL. For the similar "reasonable charge" in a contract for the supply of a service where the contract is silent about the consideration for the service, see Supply of Goods and Services Act 1982 s.15(1).]
>
> …If the agreement contains elements which are not objectively certain, nor capable of being defined without further negotiation between the parties, the agreement cannot form a contract, although the courts will look carefully at the words used, in their context, to determine whether the term can be given a sufficiently certain meaning. In the context of a commercial contract, where the parties clearly believe that they have concluded a contract, and have even acted on it, a court will be reluctant to decide that their agreement is not sufficiently certain…

> …An agreement for the sale of goods at a price which "shall be agreed upon from time to time" is therefore uncertain and does not create a contract.
>
> Where, however, the parties have agreed on a term which contains (expressly or impliedly) an objective standard for its determination, the courts will generally be able to give effect to that standard so as to complete the contract…"

97. I prefer, though, not to finally determine the case on the basis that the contract on which Ms Cooper relies is uncertain, because her case on the pricing mechanism only became apparent at trial and I did not hear detailed submissions on whether that gave rise to such uncertainty as to prevent a contract coming into existence.

The agreement between En Route and the airline

98. As it happens, and as I shall now explain, I have concluded that the arrangement between En Route and the airline in relation to Little Bites 2 was neither the arrangement contended for by Ms Cooper nor the arrangement contended for by dnata. Rather, I have concluded that En Route and the airline agreed that, (subject to a slightly different arrangement in relation to flights departing Brazil) in return for En Route committing to supply Little Bites boxes for a three year period, at a price fixed by agreement between En Route and the airline, to the airline's caterers when those caterers placed orders for them, the airline agreed to direct its caterers that any Little Bites boxes the airline instructed them to load onto flights during that three year period were to be purchased by those caterers at the agreed price (subject to the caterers' mark-up) from En Route. In effect, En Route and the airline reached a framework agreement under which the airline agreed to nominate to its caterers En Route as its sub-contractor for the supply of Little Bites boxes.

99. In reaching this conclusion, I have taken into account what was said to be the arrangement as it was always contemplated to be and as it operated. There was no dispute between counsel that, in determining what the arrangement between En Route and the airline was, I can look at how that arrangement actually operated. As Longmore LJ explained in *Great North Eastern Railway Ltd. v. Avon Insurance plc* [2001] EWCA Civ 780 at [29]:

> "…If the question is whether a term was incorporated into a contract, the subsequent conduct of the parties may be very relevant to the inquiry whether such a term was or was not agreed. Mr Flaux's submissions to the contrary were, with respect, a misapplication of the principle that the subsequent conduct of the parties cannot be relied on as an aid to the construction of the contract, see *Miller v. Whitworth Estates* [1970] AC 583, 603D-E per Lord Reid, 615A per Lord Wilberforce. No such principle exists in relation to the question whether an alleged term of a contract was, in fact, agreed."

What I can take into account is explained more fully in Lewison: The Interpretation of Contracts (7th ed) at paragraphs 3.188-3.189:

> "…In *HMRC v. Secret Hotels 2 Ltd.* Lord Neuberger said:
>
> > "The subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons… Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship."
>
> …Evidence of post-contractual conduct is admissible in deciding what terms the parties agreed (as opposed to interpreting the meaning of the terms that they did agree), at all events where the contract is not contained wholly in writing. Thus in *Wilson v. Maynard Shipbuilding Consultants AG Ltd.*, the Court of Appeal held that where one cannot ascertain from the terms of the contract itself what was agreed about a relevant term (in that case the place where under his contract an employee normally works), one may look at what has happened and what the parties have done under the contract during the whole contemplated period of the contract for the limited purpose of ascertaining what that term is. In *Maggs v. Marsh*, Smith LJ, approving the equivalent passage in the previous edition of this book, said:
>
> > "In my judgment it is clear that the principle set out in *Miller's* case, does not apply to an oral contract. Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose recollection is right. It is not surprising to me that the editor of Lewison should observe that there is nothing in the authorities to prevent the court from looking at post-contract actions of the parties. As a matter of principle, I can see every reason why such evidence should be received."

(There is then a reference to Longmore LJ's judgment in *Great North Eastern*).

100. From the outset, the expectation was that En Route would render invoices to the caterers, at the prices agreed between En Route and the airline, that the caterers would pay those invoices and that the airline's only liability was to pay the caterers' invoices to the airline (see, for example, En Route's reference, in the Proposal, to the "sell price to caterer" and Ms Cooper's reference, in her 16 February 2013 email to Mr Ott to invoicing caterers and to proactively managing the caterers' orders). That is what happened (save in relation to flights departing Brazil). There is no evidence that any supplier other than En Route (the nominated supplier) supplied boxes as part of Little Bites 2 for loading onto flights. In the 25 September email, Mr Ott only mentioned

that En Route would "supply" Little Bites boxes. He said nothing about by whom those boxes would be purchased. I have also borne in mind that the airline/Procurement spoke of Little Bites 2 as a single contract when they corresponded about the early termination of the arrangement.

101. In reaching this conclusion I have rejected dnata's version of the arrangement. Dnata's case is that there were only ad hoc contracts each time an order was placed for Little Bites boxes. That case is not obviously consistent (save in the case of Little Bites boxes loaded onto flights departing Brazil) with the invoicing arrangement, at a fixed price, between En Route and the airline's caterers and then between those caterers and the airline. Nor is that case consistent with Emirate's/Procurement's description of the early termination of Little Bites 2 as a contract termination.

102. I heard no argument at all from the parties about whether the framework agreement that I have concluded was made between En Route and the airline was sufficiently certain to be a contract. That agreement was not obviously uncertain, and I will proceed, most favourably to Ms Cooper, on the basis that it was a valid contract.

Implication of a contractual term

103. As I have said, Ms Cooper contends that, in the contract between En Route and the airline, a term was implied that the airline "would cause to be purchased through its catering agents at the worldwide airports from which it operated at least the 10.16m annual volume [of Little bites boxes] shown in the…forecast" sent by Mr Ott to En Route in August 2013. Ms Cooper does not contend that such a term ("the minimum order level term") was an express contractual term.

104. By the end of the trial, it appeared not to be disputed that, if the minimum order level term was not implied into the contractual arrangement between En Route and the airline, En Route can have suffered no loss from the early termination of Little Bites 2, because, if the airline was not bound by such an implied term, it could have performed the contract without actually buying any (or, perhaps, any other than a nominal number of) Little Bites boxes from En Route.

105. As I have also said, Ms Cooper contends that the minimum order level term was implied into that contract because of the contents of the Proposal I have quoted above and as a matter of commercial sense, and because of the circumstances. She contends that such a term was obvious or necessary to give business efficacy to the contract.

106. On reflection, it occurs to me that the parties' focus on an implied minimum order level term may have been something of a distraction. Rather, it is more appropriate (and most favourable to Ms Cooper) for me to consider whether there was implied into the arrangement (whether the contract contended for by Ms Cooper or the contract which I have concluded actually existed) a promise, by the airline, to cause to be loaded, into economy class, Little Bites boxes onto its flights (except those departing Dubai) for the whole of the three year period from April 2014 to March 2017 ("the implied term"). I say this for the following reasons:

    i) Ms Cooper's complaint at trial was, in reality, not about the airline's volume of orders, but that it terminated Little Bites 2 early;

ii) the factual basis for Ms Cooper's case that a minimum order level term was implied into the contract between En Route and the airline is what was contained in the Proposal. It is difficult to see how what was contained in the Proposal can be the factual basis for the implication of a minimum order level term when the Proposal was based on the assumption that 42 million boxes would be supplied each year (or, according to Ms Cooper's 16 February 2013 email to Mr Ott, perhaps only on the assumption that 42 million boxes was the "potential" annual supply), when that assumption was undermined eight months later when Mr Ott sent En Route a revised estimated annual requirement for one year of 10.16 million boxes, and when, in fact, the Proposal was rejected by Mr Ott as being too expensive;

iii) if the implied term ought not to be implied into the contract between En Route and the airline, even less so ought the minimum order level term to be implied into that contract. In short, because the implied term is not obviously affected by the fact that the Proposal was rejected, whilst the minimum order level term is, it ought to be easier for the implied term to be implied into the contract than for the minimum order level term to be implied into that contract;

iv) it may be argued that the minimum order level term, properly construed, is not breached if Little Bites 2 was terminated mid-year, as in fact happened. No such argument can be made in relation to the implied term;

v) because any damages for any breach of the implied term are likely to have been quantified on the assumption that, but for that breach, the airline would have loaded Little Bites boxes onto all its flights worldwide (except those departing Dubai) for all its economy class passengers, the implied term accommodates the expectation that the airline was likely to increase the routes, and so increase the number of boxes loaded onto flights, beyond any 2013 estimate;

vi) the minimum order level term was contended for, it seems to me, to address a concern arising from what has been described as "the minimum obligation rule"; that is the principle that, if the defendant could have performed the contract in issue in different ways, the court is to assume that the defendant would have performed that contract in the way which benefited it the most, which is generally assumed to be the cheapest way. I am doubtful that the minimum obligation rule would apply in the circumstances of this case assuming the implied term was part of the arrangement between En Route and the airline, because the airline was not entitled to perform its obligations in different ways, but, if the minimum obligation rule might otherwise have applied, I do not think that it should apply in this case (on the assumption that the implied term was part of the arrangement), because the airline wanted consistency across its whole service (perhaps except for flights departing Dubai) and, if it was obliged to cause Little Bites boxes to be loaded onto its flights at all for the three years in issue, I am satisfied that it would have loaded them onto all its flights (except those departing Dubai) for all its economy class passengers. (To this extent, on reflection I agree with Mr Wilson and with Mr Steele about the correct approach to the quantification of loss). Kramer: The Law of Contract Damages (3rd ed) explains at 13-63, 13-71:

> "The Court Will Not Make Unrealistic Assumptions as to the Defendant's Business Decisions
>
> > "[O]ne must not assume that [the defendant] will cut off his nose to spite his face and so control these events as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects."
>
> By this principle, although a defendant might have only been obliged to pay claimant for as long the defendant continued in business, it cannot be assumed that the defendant would have ceased its business. Indeed this would not be the least burdensome mode of performance for the defendant. If a defendant might only have been obliged to pay the claimant a pension for so long as the employee pension scheme continued, it cannot be assumed that the defendant would have stopped the pension scheme (although it might be proven that the scheme would in fact have been discontinued, for example by evidence that it had been discontinued by the date of trial).
>
> …Where the contract provides a minimum level of obligatory performance or different alternatives, the defendant is by this approach entitled to the assumption that it would have done the least burdensome thing, but where there is no such express or implied specification of the minimum or of alternatives, the court must take a more realistic view rather than seeking itself to work out what would have been the minimum the defendant could have done. Viewed in this way, the *Lavarack* principle is relatively confined."

107. Whether it is the implied term or the minimum order level term which it is contended ought to be implied into the contract between En Route and the airline, ultimately the key question is the same: did En Route bear the risk that the airline might choose, for the future, not to load Little Bites boxes onto flights at some point between April 2014 and March 2017 (so that En Route was dependent on the airline's good will or the airline's self-interest for continued orders) or should there be implied into the contract an obligation which caused the risk to pass to the airline, so that the airline was obliged to continue to load boxes onto its flights even if its plans for economy class passenger food changed, whether because of financial constraints, a desire to re-brand, or for any other reason?

108. As to the implication of contract terms, Ms Cleary referred me to what Carr LJ said in *Yoo Design Services Ltd. v. Iliv Realty Pte Ltd.* [2021] EWCA Civ 560 at [51]:

> "i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;

> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

109. I have also found it helpful to keep in mind what is said in Chitty on Contracts (34th ed) at paragraphs 16-008, 16-012, 16-013 and 16-016:

> [On the question of whether a suggested implied term satisfies the obviousness test,] [a] term will not, however, thus be implied unless the court is satisfied that both parties would, as reasonable people, have agreed to it had it been suggested to them…

…The Supreme Court in *Marks & Spencer* affirmed that it is not enough to show that the term is a reasonable one for it to be implied into the contract. Reasonableness may be a necessary requirement before a term will be implied but it is not sufficient of itself to lead to the implication of a term into the contract. Thus a term will not be implied into a detailed commercial contract merely because it appears fair or because the parties might have agreed to it had it been suggested to them. Nor will a term be implied simply because it would improve the contract or make the carrying out of it more convenient. As it has been observed, "[t]he touchstone is always necessity and not merely reasonableness". The test therefore remains one of necessity, albeit not "absolute necessity" but whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term "in order to make the contract work". In short, in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. Given the strict nature of the test established by the Supreme Court it is now no easy task to persuade a court to imply a term into a contract, particularly a written contract of some length which has been negotiated with the benefit of legal advice, and a number of cases can now be found in which the courts have applied the approach of the Supreme Court in *Marks & Spencer* and, on that basis, have declined to imply a term into the contract between the parties. If the contract does not expressly provide for what is to happen when a particular event occurs or in a particular situation, the most usual inference to be drawn is that nothing is to happen and no term is to be implied.

A helpful summary of the principles now applied by the courts when considering whether or not to imply a term into a contract as a matter of fact was given by Lord Hughes, giving the judgment of the Privy Council in *Ali v. Petroleum Company of Trinidad and Tobago*, in the following terms:

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same.

> The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."…
>
> …A further situation where a term may be implied is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms: "[i]n this sense the court is searching for what must be implied". There is no need for the court first to identify the existence of a contract before considering whether to imply a term into that contract: a term can be implied into what would otherwise be an incomplete agreement if it is necessary to do so in order to make the contract work as intended by the parties…"

110. With hindsight, now that the risk of the early termination of Little Bites 2 has proved to be a certainty, it may seem unfair, or it may have been unfortunate, that the airline terminated Little Bites 2 early, leaving En Route with difficulties dealing with suppliers, managing stock and facing a significant drop in income, when it had developed complex supply chains and worked hard to make the arrangement a success. But that is not enough to justify the implication of the implied term into En Route's contract with the airline.

111. I have concluded that neither the implied term nor the minimum order level term were necessary to give business efficacy to the contract, nor do they satisfy the obviousness test, so that they were not implied into the contract.

112. The contract was perfectly workable in circumstances where En Route bore the risks arising from an early termination of Little Bites 2. En Route was still able to supply Little Bites boxes until any early termination, and could have set up its own supply chains accordingly. In fact, it appears to be not uncommon for suppliers in the highly volatile airline industry to bear the risk of sudden cuts to supply arrangements mid-term. This is what happened in the case of En Route's arrangement for the supply of sandwiches to British Airways and, as Mr Padgett explained, the practice in this context was that suppliers bear the risk that a supply arrangement may be terminated early. Further, at the time the Little Bites 2 arrangement was made, the risk of early termination would have appeared slight, as it did to Ms Cooper, because En Route was connected to the airline, because, as Ms Cooper explained, the risk of the airline removing routes was small and because, as Mr Dalboth indicated, business was done on trust.

113. Neither the implied term nor the minimum order level term would have been obvious to the airline. As seems to not be disputed, and as the history of En Route's contract with British Airways and the discussions relating to that contract establish, the airline industry is highly volatile, with airlines changing their requirements, without detriment to them, all the time, even where they have entered into contracts. Further,

as I have said, the practice appears to be that suppliers bear the risk that arrangements will be terminated mid-term. This is likely to be because of airlines' strong buying power, which it is not obvious they would wish to give up by committing to making no changes to an arrangement for a long time. The airline clearly did have strong buyer power, or, at least, Mr Dalboth perceived the airline to have strong buying power, because it was for that reason that he obtained a "to whom it may concern" letter from Mr Walker to deter claims against En Route. As Ms Cleary pointed out, there are other instances (albeit on very different facts) where companies with strong buying power use that power to ensure that their suppliers continue to bear the risk of the early termination of arrangements (see, for example, *Baird Textiles Holdings Ltd v. Mark and Spencer plc* [2002] 1 All ER (Comm) 737, a case where the defendant had developed a "spirit of co-operation" with its suppliers, and where it worked on "trust" with those suppliers, but where the defendant did not, on the grounds of business efficacy (see per Sir Andrew Morritt VC at [30]), have the obligation to continue in a "long-term [relationship with those suppliers, which] would be terminable only upon the giving of reasonable notice"). So, it would not have been obvious to the airline that a term ought to be implied into its contract with En Route that it should bear the risks from an early termination of Little Bites 2. Put simply, if the airline had been asked, in September 2013, whether it would effectively commit not to re-brand for three years or not to adjust its economy class food offering for three years, I believe that the airline's resounding answer would have been: no.

114. Indeed, there is evidence that the airline did take steps to ensure that its suppliers bore the risk that the airline might not accept supplies. The airline required its caterers to bear the risk of buying more stock than the airline required. It is true, as Mr Wilson pointed out, that the caterers were given a window of a few days following the end of an arrangement to use excess stock, but that window was only a few days. It is true, too, as Mr Wilson also pointed out, that the Standard Terms and Conditions did contain exculpatory provisions intended to protect the airline, but, whilst those provisions are consistent with the airline otherwise accepting the risk of having to take supplies when those supplies were not actually required, they are also consistent with the airline's lawyers doing no more than adopting a belt and braces approach if a claim was made against the airline.

115. Before reaching the conclusion that the implication of the implied term would not have been obvious to the airline, I have considered particularly Mr Dalboth's evidence that the relationship between En Route and the airline was one of trust and the fact that En Route had a connection to the airline. I accept that these could be factors which favour the implication of the implied term on the ground of obviousness but they could equally be factors making it less likely that the implied term was implied into the contract in this case on the ground of obviousness and, ultimately, do not justify the implication of the term when weighed against competing factors such as the apparent practice in the airline industry and the airline's strong buying power.

<u>Would an independently-operated En Route have made a claim for compensation against the airline for the early termination of Little Bites 2?</u>

116. It seems to me that this question needs to be answered by reference to two different periods of time; the period up to about 1 July 2016 and the period thereafter. Until about 1 July 2016 ("the first period"), save for a few weeks in April/May 2016 (when it is unlikely any decisions about making compensation claims would have been

made), the En Route management team either believed that En Route would be involved in Little Bites 3 or believed that Little Bites 2 would not be terminated early. After 1 July 2016 ("the second period"), the management team appreciated that En Route would not be involved in Little Bites 3 and knew that Little Bites 2 was being terminated early. I am aware that both Ms Cooper (and, as it happens, Mr Padgett) suggested, at trial, that the second period began later, but that is not consistent with the contemporaneous documents and is less favourable to Ms Cooper in any event.

117. I have come to the conclusion that an independently-operated En Route would not have had a carefully-handled discussion with the airline about compensation during either period. It is even less likely that it would have sent a pre-claim letter or begun litigation. In this section of the judgment, I therefore explain why I have concluded that an independently-operated En Route would not have had a carefully-handled discussion about compensation.

118. During the first period, an independently-operated En Route's decision whether or not to have a discussion with the airline about compensation would have been determined by the following factors, which would have caused it to conclude that there was too much risk to its other business to make a claim for compensation for the early termination of Little Bites 2:

i) whatever in fact was the relationship between En Route and the airline (i.e. whether or not there was in fact a contract between them and, if so, whatever the contract's terms), En Route would have appreciated that there was hardly any contractual documentation (as Mr Dalboth acknowledged at the time), so any claim against the airline would have been difficult to make out;

ii) the airline was En Route's major customer both in terms of the airline's contribution to En Route's revenue and when compared to En Route's other customers;

iii) En Route would have appreciated that the decision to terminate Little Bites 2 early had been made by Sir Tim Clark, the head of Emirates (as Mr Dalboth reported) or senior management. To intimate a claim, however tentatively, would have been potentially to challenge the most senior Emirates management;

iv) one of the reasons Little Bites 2 was terminated early was to save costs. If the airline had to pay a large amount of compensation to En Route, that cost-saving imperative might have been defeated;

v) according to Ms Cooper, the Emirates group is dysfunctional. There was every possibility that, faced with a claim for compensation, however informal, Emirates managers would not have reacted commercially and dispassionately, but might have taken such a claim personally and used it to disadvantage En Route in the long term;

vi) much of the management team's attention was taken up with dealing with the practical consequences of the early termination of Little Bites 2, including attempts to find alternative business. Making a claim, however tentatively, may well have been a distraction;

vii) it was possible that En Route might participate in Little Bites 3 and making a claim, however tentatively, could have put that participation at risk.

119. As I shall now explain, the best evidence of what an independently-operated En Route would have done in the first period is what its management team (in particular, Ms Cooper) actually did during that period; that is, nothing by way of making a claim for compensation from the airline.

120. I accept Mr Padgett's evidence that En Route effectively operated independently of other Emirates-connected companies.

121. In any event, Ms Cooper's sole focus was En Route and, I have no doubt, had she thought that it was in En Route's interests to make a claim for compensation from the airline, she would, at the very least, have discussed that possibility with Mr Padgett, but she did not. Ms Cooper was a successful businessperson at the time who was apparently able to express her views trenchantly, as the British Airways representative confirmed when he recorded his view of a conversation between them. As Mr Dalboth confirmed, and as the contemporaneous documents show, Ms Cooper had an open relationship with Mr Padgett and felt able to express her discontent with him (as she felt able to express her discontent about EKFC to Mr Chapman).

122. Further, instead of making a claim for compensation, or even raising it as a possibility with Mr Padgett, the En Route management team, Ms Cooper included, made a conscious decision, according to Mr Dalboth for sound commercial reasons, not to make a claim for compensation during the first period.

123. Ms Cooper cannot explain away her decision not to make a claim for compensation by relying on the Padgett 7 September email, as she largely sought to do. As a successful businessperson she would have appreciated, as En Route's board presentation for its board meeting the following day acknowledged, that there was no guarantee that En Route would participate in Little Bites 3.

124. Mr Wilson pointed out, in his closing submissions, that the airline may well have been willing to agree to pay some compensation to En Route (as Mr Padgett acknowledged in evidence), if only because En Route had other ongoing projects with Emirates-connected companies, because it was appreciated that En Route was an innovative company the success of which was of real benefit to Emirates and Holdings and because the airline agreed to extend, to November 2016, the period of time when Little Bites boxes could be supplied. No weight can be attached to this last point. The airline may have had its own, self-interested, reasons for allowing a short extension of Little Bites 2. As to the other points, whilst it is possible that the airline might have paid some compensation, En Route had to weigh that possibility against the matters I have already identified. I do not think that what I accept is the slim chance that the airline may have paid compensation would have resulted in an independently-operated En Route making a claim for compensation against the airline, when the matters I have already identified are taken into account.

125. Mr Wilson also suggested that because, at the time Ms Cooper indicated she was leaving En Route, Mr Chapman and Mr Padgett indicated that they might be willing to increase the amount payable to her for her final tranche of shares because of the early termination of Little Bites 2, I should infer that Mr Chapman and Mr Padgett

thought that the prospect of a successful claim against the airline for compensation were stronger than Mr Padgett suggested. I do not accept Mr Wilson's suggestion. It is clear, from the contemporaneous documents and from Mr Padgett's evidence, which I accept, that Mr Chapman and Mr Padgett were merely willing to allow Ms Cooper to pray in aid the early termination of Little Bites 2 as part of a commercial negotiation the aim of which was to encourage Ms Cooper to continue working in En Route.

126. Most of what I have said about the first period applies with equal force to the second period.

127. During the second period, it was clear that Little Bites 2 was going to be terminated early and that there was no prospect of En Route participating in Little Bites 3, and so the possibility of that participation was no deterrent to an independently-operated En Route making a claim against the airline for compensation. However, I do not think the removal of that deterrent tilts the balance to such a degree as to make the possibility of an independently-operated En Route making a claim against the airline for compensation much more likely.

128. It is true that, during the second period, En Route's management team does not appear to have made a positive decision not to make a claim for compensation. Nevertheless, I think that the fact that they, and, in particular, Ms Cooper, did not raise with Mr Padgett the possibility of such a claim is a good indicator that an independently-operated En Route would not have made a claim. The possibility of making a claim was likely to have been in Ms Cooper's mind at some point in the second period, because that possibility was positively discussed during the first period. If Ms Cooper had thought that there was any benefit to En Route in making a claim for compensation during this period, she is likely to have raised that as a possibility with Mr Padgett, with whom she had an open relationship, because she is likely to have recalled there were specific discussions about the possibility of making a claim during the first period and that one of the reasons why that was rejected as a possibility was because En Route might, during the first period, still have participated in Little Bites 3. (If I am wrong about this, and none of the management team thought about the possibility of making a claim for compensation during the second period, that tends to indicate that the management team of an independently-operated En Route would not have thought about that possibility either).

129. It follows, from my conclusion that an independently-operated En Route would not have made a claim against the airline for compensation for the early termination of Little Bites 2, that, in connection with that arrangement, dnata cannot have been in breach of Clause 7.2, and, to that extent, Ms Cooper's claim fails.

<u>Further matters in relation to Little Bites 2</u>

130. I can deal with some further points in relation to Ms Cooper's claim relating to Little Bites 2 briefly.

131. Mr Wilson never explained how formally, as an En Route shareholder, dnata might have exercised its power to procure that En Route should cause Mr Padgett to speak to Ms Cooper to suggest that she might cause En Route to make a claim for compensation against the airline for the early termination of Little Bites 2. It is

dnata's alleged failure in this way which is said, by Ms Cooper, to be a breach of Clause 7.2.

132. Whatever the mechanism by which dnata could have brought that conversation about, I am not satisfied that Ms Cooper would have accepted Mr Padgett's suggestion that En Route should make a claim for compensation (and so Ms Cooper has suffered no loss by the alleged breach by dnata of Clause 7.2). En Route's management team, of which she was a key part, positively rejected the possibility of a claim during the first period and Ms Cooper may in fact have rejected that possibility during the second period as I have already suggested.

133. I consider below in a little more detail issues of loss of chance. In the present context, I must record that I accept Mr Padgett's evidence that there was only a slim chance that the airline would have paid any, or any significant, compensation to En Route for the early termination of Little Bites 2. I accept Mr Padgett's evidence that the most that the airline is likely to have done is to allow all excess stock to be used (burnt off) in October and November 2016, as, in fact, the airline did allow excess stock to be used, which is consistent with Procurement's 17 July 2016 email asking about "leftover costs" for those two months. I think that, had a claim against the airline been intimated, the airline is likely to have taken legal advice and been advised that a successful claim against it was unlikely (because it was unlikely that the implied term (or the minimum order level term) was implied into any contract). I think that the airline is likely to have taken that into account in deciding how to proceed, as it would have taken into account that it was in a strong bargaining position in the absence of a detailed contract and because it was En Route's major customer.

134. In the light of what I have already concluded, I do not need to consider quantum generally, or the expert evidence in particular, in relation to that part of Ms Cooper's claim relating to Little Bites 2.

Dubai import duty

135. I can deal with this part of Ms Cooper's claim briefly.

136. I will proceed, most favourably to Ms Cooper, on the basis that:

i) En Route was entitled to repayment of paid Dubai import duty for the whole of the period in issue;

ii) so long as that entitlement was established to the satisfaction of the Dubai Customs authority, En Route would have been repaid the full amount it had previously paid;

iii) the obstacle to En Route obtaining that repayment was the failure by EKFC to stamp delivery notes as the Customs officer had suggested.

137. There was an assumption at trial, largely on Ms Cooper's side, that En Route was entitled to repayment of paid import duty for the whole of the period in issue and that the Dubai Customs authority would have repaid the full amount of duty paid in due course, once it was satisfied of En Route's entitlement to repayment. There was, in

fact, no material to support either of these assumptions and, as it happens, there was no evidence that, even now, En Route has been repaid any paid import duty.

138. The suggestion that the obstacle to En Route obtaining repayment was EKFC's failure to stamp delivery notes was based on brief evidence from Ms Cooper (whose evidence I have indicated already I approach cautiously), and the suggestion that stamped delivery notes were part of the solution to any block to repayment seems to have been the advice of an unidentified Customs officer about whose authority and status nothing is known.

139. As I have explained, Ms Cooper's case is that, in breach of Clause 7.2, dnata failed to cause Mr Padgett to ask Mr Mohammed to instruct EKFC staff to stamp the delivery notes as the Customs officer had suggested. It was not explained at trial how dnata, in exercise of its powers as an En Route shareholder, might procure En Route to cause Mr Padgett to ask Mr Mohammed to instruct EKFC staff to stamp delivery notes. Ms Cooper would have to establish that there was a failure by dnata to exercise some shareholder power for dnata to be in breach of Clause 7.2. I will assume, again most favourably to Ms Cooper, that dnata, as a shareholder, could in some way have brought about a circumstance in which Mr Padgett did make a request of Mr Mohammed for help.

140. To succeed on her claim in this context, Ms Cooper would have to establish that, after 18 March 2017 and by 31 May 2017:

    i) Mr Kundwani (who was in control of the paid duty reclaim) would have provided delivery notes to EKFC for stamping;

    ii) there is a sufficient chance that, had Mr Padgett asked Mr Mohammed for help, Mr Mohammed would have provided that help;

    iii) there is a sufficient chance that, on being requested by Mr Mohammed to do so, EKFC staff would have returned stamped delivery notes to Mr Kundwani;

    iv) Mr Kundwani would have submitted the stamped delivery notes and other material needed for a reclaim of paid import duty to the Dubai Customs authority;

    v) there is a sufficient chance that the Dubai Customs authority would have repaid paid import duty or would have given a commitment to make a repayment so that it was virtually certain that a repayment would be made.

141. I need to explain why I have formulated the requirements for a successful claim in this way. The evidence establishes that the proposal that stamped delivery notes were required was not put forward before 18 March 2017. For the purposes of any adjustment to the consideration for the sale and purchase of any of the tranches of Ms Cooper's shares, the repaid import duty must have been received by 31 May 2017 (the end of the last EBIT period used to calculate the consideration) or there must have been a commitment by the Dubai Customs authority to make a repayment which was sufficiently strong that a repayment was virtually certain. In the light of Mr Steele's evidence, I am satisfied that, unless it was at least virtually certain by 31 May 2017 that a repayment of paid import duty would be made, there would be no recognition of

that repayment in En Route's management accounts for any of the years in issue. Ms Cooper's claim is largely a loss of chance claim, because it is largely dependent on what EKFC and the Dubai Customs authority might have done. To the extent that it is dependent on what En Route (and, in particular, Mr Kundwani) might have done, I have concluded (as the parties agree, as it happens) that Ms Cooper must prove her case on the balance of probabilities, because of the degree of connection between her and En Route (and because of her degree of day to day control over, and so knowledge of the business of, En Route). On how a loss of chance claim should be considered and on the circumstances in which a claim is a loss of chance claim or claim which must be established on the balance of probabilities, I have found useful the following authority counsel drew to my attention.

142. Kramer explains, at paragraph 13-08:

> "There is Court of Appeal authority that the actions of those third parties closely linked to the claimant are…to be proven on the balance of probabilities and not on a loss of chance basis ordinarily applicable to third parties. In *Veitch v. Avery* the question of whether the claimant's father would have lent the claimant money was said to be governed by the balance of probabilities "since the son and father were for practical purposes a unity" and so the question was essentially one of "what would the plaintiff have done". This approach has been applied…to a company that was agent of the claimant… Whether there is sufficient unity or close connection to disapply the loss of chance approach is said to be a question of fact although it is also likely to be relatively rarely satisfied. This whole approach is problematic because once one goes beyond the claimant itself (the party with full access to evidence as to what it would have done and the full interest in advancing its case) it is hard to draw the line between third parties with differing degrees of friendliness or identity of interest with the claimant…"

He continues, at paragraphs 13-099, 13-101:

> "The claimant has the burden of proving (on the balance of probabilities) that it lost a substantial chance, but does not have the burden of proving the precise amount of that chance, which is at large for the court's reasonable assessment and "making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account"….
>
> …There is no minimum percentage for "real and substantial", and the Court of Appeal has resisted laying down a minimum, but courts will not usually be convinced to make awards for, say, a 2 or 3 per cent chance, and there are High Court authorities that less than a 10 per cent chance is not a real and substantial chance."

143. I have also found helpful the following from McGregor on Damages (21st ed) at paragraphs 10-052, 10-60, 10-063 and 10-064:

> "…[A] loss of chance claim requires a real chance. A chance of bringing a claim which has no underlying substance, such as a "nuisance claim" or a dishonest claim is not a real chance. Further, a chance which is negligible will not permit recovery. The difficult question then is, what is a negligible chance? In *Harding Homes (East Street) Ltd. & ors v. Bircham Dyson Bell (a firm)*, the defendant solicitors were negligent by including an all moneys clause in a guarantee given by the claimant builders to a bank in relation to a property development. The guarantee should have been limited to interest shortfall and cost overruns. The claimants alleged that they lost the opportunity for a more profitable result arising from negotiations about the development with the bank. The trial judge, Proudman J, considered whether the loss of opportunity was of something of value, that is something that had a real and substantial rather than a merely negligible prospect of success. In concluding that prospects of success were negligible, the trial judge, followed *Thomas v. Albutt*, where Morgan J said that if "the prospects were 10 per cent or less, then I should regard them as negligible". It is difficult to justify such mathematical precision in relation to a broadly expressed approach to "negligible" prospects of success. But even if this point were to be expressed in mathematical terms, the better approach is that a "negligible" prospect should be assessed in light of the circumstances. For instance, a 10 per cent prospect of succeeding in relation to a transaction worth billions of pounds might not be negligible for the same company compared with one which is worth thousands…
>
> ….In…cases in which the defendant's negligence consists of an omission where causation depends not upon a question of historical fact but upon the answer to the hypothetical question what would the claimant have done if there had been no negligence[,] [h]ow the claimant would have reacted is again subject to proof on the balance of probabilities …
>
> [In *Perry v. Raleys Solicitors*] [t]he central distinction which the Supreme Court adopted, drawn by Stuart Smith LJ in *Allied Maples*, was between a claimant needing only to show that they had a substantial chance of a third party acting in such a way as to benefit them and having to prove on the balance of probabilities what they would or would not have done…
>
> The principle that hypothetical actions of third parties are assessed on the basis of a need to prove a "substantial chance" but that a claimant's hypothetical actions must be proved on the balance of probabilities was confirmed in *Wellesley Partners LLP v. Withers LLP*. In that case, Floyd LJ, in the leading

> judgment on this issue, set out his basic understanding of the position before undertaking a comprehensive examination of the authorities to confirm that it was correct. His Lordship said that the claimant head-hunters (WP) needed to prove their actions on the balance of probabilities but only a real and substantial chance of benefit from the actions of the third party (Nomura). His Lordship said:
>
> > "I would have thought that, applying those principles to the present case, it would be plain that, whilst WP would need to show on the balance of probabilities that, but for the negligence complained of, they would have opened a US office (a question of causation dependent on what the claimant would have done in the absence of a breach of duty), the actual loss which they claimed to have been caused by the defendant was dependent on the hypothetical actions of a third party, namely Nomura. Accordingly, in line with well-established principle, the chances of Nomura deciding to award the mandates to WP would have to be reflected in the award of damages.""

144. I am not satisfied that Mr Kundwani would have sent delivery notes to EKFC for stamping before 31 May 2017. There is no evidence that he did do that. If he did do that, there should have been such evidence. If he did not do that, I do not see how Ms Cooper can establish that he would have done that.

145. I am not satisfied that, had he been asked for help, there is a real chance that Mr Mohammed would have provided help, at all or efficiently by 31 May 2017. Ms Cooper's own evidence was that Mr Mohammed was dilatory, at least, in the help he provided En Route. The provision of stamped delivery notes to the Dubai Customs authority was urgent for no-one, and only has become something that had to be done, with hindsight, urgently, because Ms Cooper's claim cannot succeed unless the documents were provided urgently. That there is no real chance that Mr Mohammed would have helped in time is reinforced by Ms Cooper's criticism of EKFC as a business which positively sought to obstruct En Route, a criticism which she had expressed as long ago as 2014. For the same reasons, I am not satisfied that there is a real chance that EKFC staff would have returned the stamped delivery notes to Mr Kundwani by 31 May 2017.

146. I am not satisfied that Mr Kundwani would have provided the stamped delivery notes to the Dubai Customs authority by 31 May 2017. Towards the end of April 2017 there was some more work which Mr Kundwani needed to complete before he had further discussions with Emirates, as the Cook 21 April email confirms. Whatever that further work was, the evidence does not suggest that, in April 2017, Mr Kundwani was in a position to provide the stamped delivery notes to the Dubai Customs authority in any event or that he was rushing to do so.

147. There is no real chance that the Dubai Customs authority would have repaid the paid import duty or given a sufficient commitment to do so by 31 May 2017. Ms Cooper acknowledged, in cross-examination, that she could not say when the Dubai Customs authority might make a repayment. There is no evidence that it was treating the

reclaim of paid import duty urgently and there is no evidence that it has ever made a sufficiently strong commitment to pay any sum before payment is made.

148. Ms Cooper's claim fails on each of the five contingencies I have identified. Even if I am wrong about that, for her claim to succeed, she would have to establish all five of those contingencies to a sufficient degree. As Kramer explains, at paragraphs 13-110-13-111:

> "Often there will be more than one third party decision or action, all of which would have had to occur for the claimant to have received the benefit/avoided the loss. In such cases, and providing the events are independent, it is (at least in principle) necessary to multiply the chance of each event to find the chance of the result that depended upon them.
>
> In one case it was necessary to multiply the 50 per cent chance of a third party not going to counsel for advice (and thus not discovering its true entitlement) by the 70 per cent chance of the third party, if it had not gone to counsel, reaching agreement with the claimant, giving a 35 per cent chance of the deal being done. Similarly where there would have been a 70 per cent chance of getting judgment against the insolvent defendants in the lost litigation, and a 40 per cent chance of recovering from the defendant's insurers if judgment were obtained (no more than 40 per cent because the insurers had been late notified by their insured, the defendant), the claimant lost a 28 per cent chance of recovery."

I agree with Mr Wilson that two contingencies are not independent of each other; those being the chance that Mr Mohammed would help and that EKFC staff would return stamped delivery notes, both by 31 May 2017. In the case of those two contingencies, because they are not independent, the multiplication principle does not appear to apply. Nevertheless, when those two contingencies are taken together, there is less chance of them occurring than of each one of them occurring, when considered in isolation. Whether or not this is right, and whether or not it is appropriate to consider any of the contingencies as independent, I have come to the clear conclusion that the chance of all five contingencies occurring is a fraction of the chance of each one of them individually occurring. In the light of what I have said, there is no real chance of Ms Cooper establishing all five contingencies.

149. It follows, therefore, that Ms Cooper's claim relating to the reclaim of paid import duty must fail.

150. As it happens, and as I shall now explain, I think that it is likely that En Route would have paid over to the airline any paid import duty it was repaid by the Dubai Customs authority, so that, according to Mr Steele, the repayment would have been neutral for the purposes of En Route's EBIT and so neutral too for the purpose of quantifying the consideration payable for Ms Cooper's shares. In other words, even if dnata breached Clause 7.2 as Ms Cooper alleges in this context, Ms Cooper would not have suffered a loss in relation to the repayment of duty relating to the airline (and, as to any repayment relating to United Airlines, Mr Wilson accepted, correctly in my view, that

such repayment would have had a nominal effect on the consideration payable for Ms Cooper's shares).

151. It was Emirates which initially made clear to En Route in 2013 that En Route should try to procure an exemption from a liability to pay Dubai import duty, no doubt because Emirates believed that, for En Route to procure an exemption, would benefit Emirates. Mr Dalboth offered a "rebate mechanism" to the airline in relation to Little Bites 2 in March 2014. En Route's 9 September 2014 board presentation recorded that it was "supplier neutral" and operated an open book policy so far as Emirates was concerned. En Route offered to pass on savings to Emirates on the first anniversary of Little Bites 2. Mr Dalboth accepted that, if En Route was repaid Brazil import duty, it would have credited that sum to the airline. For all these reasons, I think it is likely that, had the Dubai Customs authority repaid En Route paid import duty, En Route would have paid over (or somehow otherwise credited) the sum it received to the airline.

Disposal

152. For the reasons I have set out, I am compelled to dismiss the claim.

153. I will hear further from counsel about the correct form of order to give effect to this decision and on all costs and consequential matters.