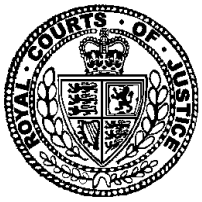

Neutral Citation Number: [2023] EWHC 48 (Comm)

Case No: CL-2020-000357

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

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

Date: 17/01/2023

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

(1) PEREGRINE AVIATION BRAVO LIMITED **(a company incorporated in Ireland)** **(2) AERCAP IRELAND LIMITED** **(a company incorporated in Ireland)** **(3) AERCAP IRELAND CAPITAL DESIGNATED ACTIVITY COMPANY** **(a company incorporated in Ireland)**	**Claimants**
- and -	
(1) LAUDAMOTION GMBH **(a company incorporated in Austria)** **(2) RYANAIR HOLDINGS PLC** **(a company incorporated in Ireland)**	**Defendants**

- -
- -

Bankim Thanki KC, William Edwards, Guy Olliff-Cooper and Ravi Jackson (instructed by **Allen & Overy LLP**) for the **Claimants**
John Taylor KC and Giles Robertson (instructed by **Cleary Gottlieb, Steen & Hamilton LLP**) for the **Defendants**

Hearing dates: 28 April, 3-5 May, 9-12 May, 16-18 May and 25 and 29 July 2022
Draft judgment circulated to parties: 28 December 2022
Further written submissions received: 9 January 2022

- -

Approved Judgment

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

.....

Mr Justice Henshaw:

(A) INTRODUCTION

1. This case is about whether the Austrian airline Laudamotion, a subsidiary of Ryanair, was obliged to accept delivery of four Airbus A320 aircraft leased or managed by members of the AerCap group, the world's largest aircraft leasing company. A dispute arose during the first phase of the Covid pandemic, leading to the AerCap parties terminating or purporting to terminate four leases, and in due course the present claims.

2. In July 2019, the First Claimant ("***Peregrine***") and the Second Claimant ("***AIL***") entered into four 60-month aircraft leases ("***the 2019 leases***", relating to "***the 2019 aircraft***") with the First Defendant ("***Laudamotion***"), a subsidiary of the Second Defendant ("***Ryanair***"). Ryanair guaranteed Laudamotion's obligations under the lease for the first of these aircraft, MSN 3361. The final dates for delivery of the four aircraft were the end of May 2020 for one aircraft and the end of June 2020 for the other three.

3. There were also a number of pre-existing aircraft leases entered into in 2018 ("***the 2018 leases***", relating to "***the 2018 aircraft***") between Laudamotion and either the Third

Claimant ("***AICDAC***") or Wilmington Trust SP Services (Dublin) Ltd ("***Wilmington***"). Wilmington is a trust services provider that acts as lessor/trustee in respect of certain aircraft owned by companies in the group of which AIL and AICDAC form part ("***the AerCap group***" or "***AerCap***"). Ryanair guaranteed Laudamotion's obligations under the 2018 leases.

4. Following the inception of the Covid pandemic, correspondence and discussions took place between the parties which, the Claimants say, led to Laudamotion wrongfully refusing to take delivery of MSN 3361 in early May 2020. That led, on the Claimants' case, to cross-defaults under the other three 2019 leases as well as the 2018 leases.

5. The Claimants' case, in brief, is that:

   i) Correspondence sent by Laudamotion in March and April 2020 gave rise to Events of Default under each of the aircraft leases, entitled Peregrine and AIL to terminate them and recover their losses.

   ii) In addition, Peregrine validly tendered MSN 3361 for delivery on 7 May 2020 but Laudamotion refused to take delivery.

   iii) Laudamotion did not "demonstrate" the existence of any "Material Deviations" under the lease for MSN 3361. Laudamotion was therefore obliged to take delivery of that aircraft.

   iv) Laudamotion's failure to take delivery amounted to a further Event of Default, entitling Peregrine validly to terminate the lease for MSN 3361, which it did on 15 May 2020.

   v) That triggered cross-defaults in respect of the other three leases (in addition to the Events of Default arising from Laudamotion's letters of 18 March 2020 and 20 April 2020), by reference to which Peregrine and AIL validly terminated those leases too on 15 May 2020.

   vi) Peregrine and AIL are entitled to be indemnified in respect of the rental stream they have lost and the other expenses they have incurred. The net lost rental stream is the rent that would have been received from Laudamotion, *less* what was received from Flynas (the previous lessor) after the relevant Final Delivery Dates for the four aircraft, *less* what has been received from SmartLynx (to whom the Claimants leased the aircraft after terminating the Laudamotion leases), *less* what is to be received from SmartLynx over the remainder of what would have been the term of the leases to Laudamotion.

   vii) Ryanair is liable along with Laudamotion because of the guarantees it gave in 2018 and 2019.

6. For the reasons set out below, I have concluded that Laudamotion did not wrongfully fail to take delivery of MSN 3361, that no Events of Default occurred, and that the Claimants were not entitled to terminate the leases of any of the aircraft. As a result, the Claimants' claims must be dismissed.

(B) PRINCIPAL ISSUES

7. The main issues can be summarised as follows:

   i) whether Peregrine and AIL were entitled to terminate the 2019 leases pursuant to Article 24.2(n) of the leases (for threats to suspend payment of debts), and (if so) to bring claims against Laudamotion and Ryanair on that basis;

   ii) whether Laudamotion was obliged to take delivery of MSN 3361 on 7 May 2020 and wrongfully failed to do so (thereby entitling the Claimants to terminate the leases);

   iii) (if relevant) whether the Claimants would, but for the termination, have delivered the other three 2019 aircraft by their respective Final Delivery Dates;

   iv) (if relevant) how much the Claimants are entitled to recover from Laudamotion; and

   v) (if relevant) whether Ryanair is liable as guarantor in respect of the Claimants' claims under all four of the 2019 leases or only the lease relating to MSN 3361.

(C) WITNESSES

8. The Claimants called oral evidence from the six witnesses of fact mentioned below. I mention at the outset that I reject, and deplore, the Defendants' allegation that *"the common characteristic of the evidence given by most of [the Claimants'] factual witnesses and their experts was a dogged intention to stick to the party line unless and until confronted by documents which could not be explained away"*. That kind of hyperbolic comment on the other parties' witnesses has become all too common in commercial litigation. In my judgment, it does not in any way represent a fair assessment of the evidence given by the Claimants' witnesses in the present case.

9. Mr Peter Anderson was Head of EMEA Leasing and subsequently Chief Commercial Officer. His evidence mainly concerned the commercial side of re-marketing the 2019 aircraft and the decisions to waive or stop Flynas rent (with which he was directly involved) and the commercial discussions between the Claimants and the Defendants in March to May 2020 (of which Mr Anderson was contemporaneously made aware). He was a good witness who answered fairly, even on points that might favour the Defendants (for example in saying there was a common understanding by March/April 2020 that the aircraft would be delivered in June at the earliest). As indicated later, I specifically reject the Defendants' contention that he 'invented' evidence of a conversation between other persons at AerCap and Ryanair.

10. Mr Damhan Finegan, Leasing Director and subsequently Vice President Leasing, spoke mainly about the commercial side of remarketing the aircraft. He was a good witness, making appropriate concessions and making clear when he could not assist in relation to particular matters. The Defendants' criticism of him for occasionally wishing to see a document to assist him in answering a question was misplaced.

11. Mr Benjamin Peacock, Vice President Legal Leasing, gave evidence mainly about the commercial discussions between the parties from March to May 2020. He gave

evidence in a straightforward manner. I have, as noted later, specifically rejected the Defendants' allegation that Mr Peacock "made up" the content of a conversation between Mr Merry and Mr Norton on 1 May 2020.

12. Mr Khalid Akhrif, Vice President Technical Services, spoke mainly about the technical delivery of MSNs 3361 and 3396 and the expenses claimed by the Claimants, matters on which he was cross-examined at great length. He was a good witness, answering fairly and honestly. I have rejected, later in this judgment, another inappropriate allegation by the Defendants, this item in relation to Mr Akhrif, that evidence had been "made up".

13. Mr Seamus Mallon, Director Technical, gave evidence mainly about the technical delivery of MSNs 3425 and 3475. He was a good witness who gave evidence calmly and clearly.

14. Mr Sean Murnin, IT Service Desk Analyst, gave evidence about the sending of Mr Peacock's email of 1 May 2020 to Mr Norton. He gave evidence honestly and was frank about the limits of the evidence he was able to give.

15. I deal with the absence of Mr Merry, formerly of AerCap, later in this judgment.

16. The Defendants called only two witness of fact to give oral evidence. (In addition, the witness statement of Mr Pitschmann, a Laudamotion pilot, was admitted in evidence.)

17. Mr Norton, Ryanair's Group Treasurer, gave evidence about commercial discussions between the parties in the period leading up to the termination of the leases, and purported in his witness statement to give evidence about certain technical matters relating to the aircraft. He was a not entirely satisfactory witness. As set out later, when asked about some of Ryanair/Laudamotion's letters he several times failed or showed reluctance to give straight answers about their contents: albeit I consider the answers he did give were truthful, and I have accepted his evidence about Ryanair's underlying commercial objectives. He also lacked sufficient knowledge to make some of the assertions made in his statement about technical matters, particularly concerning the aircraft records review.

18. Mr Alexander Gwihs, Deputy Nominated Postholder for Continuing Airworthiness at Laudamotion, was in general careful and clear in his evidence, but in fact had very little evidence of real relevance to give. I do not share the Claimants' view that he was on some occasions evasive or resorted to inappropriate speculation.

19. The Defendants failed to call any evidence from individuals with any real knowledge of the technical position of the aircraft or their records. Explanations of sorts were proffered for some of the obvious omissions (individuals now working elsewhere, or said to be reluctant to be involved) but there were other individuals (Mr Lampl and Mr Faust of Laudamotion) whose absence was barely explained. The Defendants were accordingly reliant on expert evidence for all these matters. Had it been necessary, I would have given serious consideration to drawing adverse inferences, but in the event it was not necessary.

20. Turning to the experts, the Claimants called Mr Peter Bull and the Defendants Mr Justin Goatcher on matters relating to the technical condition of the aircraft. In relation to

aircraft leasing market issues, the Claimants called Mr George Dimitroff and the Defendants Mr Philip Seymour. All four witnesses possessed the necessary expertise and experience to give expert evidence on the topics in question.

21. Mr Bull gave his evidence fairly, and I do not accept the Defendants' suggestion that he was partisan, though I do consider he is likely to have been over-optimistic about the extent to which Celairion (the Claimants' Continuing Airworthiness Management Organisation) could have stepped in and radically accelerated the process of obtaining and reviewing aircraft documentation from Flynas. Mr Goatcher's evidence was less than satisfactory in some respects. He raised a large number of alleged Material Deviations from the requisite aircraft condition, but during the course of the case dropped a significant number of them; and others cannot credibly be regarded as having been material. He was on occasion reluctant to give a straight answer (e.g. when asked whether Fokker was a highly reputable company, and when asked whether the number of open items Laudamotion/its consultants left on the OIL when they disengaged on 26 March 2020 was in line with usual practice). As discussed later, on one occasion he agreed a point in discussions with Mr Bull, but later backtracked apparently for tactical reasons.

22. I found Mr Dimitroff an extremely impressive witness, who answered questions (even if sometimes at some length) thoughtfully, fairly and analytically. He also very properly revised upwards (in the Defendants' favour) his assumed credit rating for SmartLynx, in the light of new information, in his supplementary report. As to Mr Seymour, the Claimants pointed out that he had been the subject of criticism in previous cases (*Pindell Ltd & Anor v AirAsia Bhd* [2010] EWHC 2516 (Comm) and *ACG Acquisition XX LLC v Olympic Airlines SA* [2012] EWHC 1070 (Comm)), and I agree with the Claimants that Mr Seymour ought to have disclosed that as part of or in conjunction with his report. I nonetheless consider it more relevant to focus on his evidence in the present case, which in general I found to be appropriately given.

(D) KEY TERMS OF THE 2019 LEASES

23. Each of the 2019 leases is for a term of 60 months at a "Base Rent" (or "basic rent") of US$180,000 per month. In fact, the leases make no provision for any further type of rent.

24. The main provisions for present purposes of the lease for MSN 3361, which is broadly typical of all four leases, are as follows.

(1) Article 3: place and date of delivery

25. Article 3 provides for the place and date of delivery. Article 3.1 specifies where the aircraft is to be delivered:

> "LESSOR will deliver the Aircraft to LESSEE at the maintenance facility … where the Aircraft is redelivered by Previous Lessee or such other place as may be agreed in writing between the parties (the 'Delivery Location'). …"

The reference to "Previous Lessee" is a drafting mistake for "Prior Lessee", and refers to Flynas.

26. The delivery location was (i) Fokker in the Netherlands in the case of MSNs 3361 and 3396; and (ii) Vallair in France in the case of MSNs 3425 and 3475. Fokker and Vallair are leading aircraft maintenance and repair organisations ("***MROs***").

27. Art 3.2 provides the definition of Scheduled Delivery Date:

> "As of the date of this Lease, delivery of the Aircraft from Prior Lessee to LESSOR and LESSOR to LESSEE is scheduled to occur during March 2020. LESSOR will notify LESSEE from time to time and in a timely manner of the exact date on which LESSOR expects Delivery to take place (and LESSOR agrees to consult with LESSEE prior to making such a determination as to such date and shall provide LESSEE with reasonable notice in respect of such date), (the 'Scheduled Delivery Date')."

28. Article 3.3 provides that:

> "Without prejudice to LESSEE's right to terminate the Lease under Article 3.6 and to the return of any Base Rent following any such termination, LESSOR and LESSEE expressly acknowledge that Delivery is subject to and conditioned upon redelivery of the Aircraft by Prior Lessee in accordance with the terms of the Prior Lessee Lease Agreement."

29. Article 3.3 must be read in conjunction with Article 3.6, which gives either party an option to terminate in the event of delay beyond the Final Delivery Date, provided that the right is exercised promptly upon delay becoming apparent:

> "Promptly after LESSOR becomes aware that a delay will cause Delivery to be delayed beyond the Final Delivery Date, LESSOR will notify LESSEE. By written notice given to the other party within 10 Business Days after LESSEE's receipt of such LESSOR notice, either party may terminate this Lease and this Lease will terminate on the date of receipt of such notice. In the event of such termination, neither party will have any liability to the other party except that LESSOR will pay to LESSEE an amount equal to the amount of any prepaid Base Rent. If neither party gives notice of termination within such 10 Business Days, both parties lose all right to terminate under this Article 3.6 unless otherwise agreed in writing by the parties. Without prejudice to the foregoing, LESSOR and LESSEE agree to co-operate with each other to ensure that, to the extent reasonably possible, any such delay is minimized."

(2) Articles 6 and 7: delivery and acceptance of aircraft

30. Article 6 obliges the parties respectively to deliver and accept the aircraft, subject in each case to specific conditions. Article 6.2 deals with the aircraft's condition at delivery:

> "If LESSEE is able to demonstrate that at Delivery there are deviations from the condition set forth in Exhibit B which are material or affect the airworthiness of the Aircraft ('Material Deviations'), LESSEE will not be obligated to accept the Aircraft unless LESSOR corrects such Material Deviations at its own cost. In the event that any Material Deviations have not been corrected by the Final Delivery Date, either party may terminate this Lease within 10 Business Days of the Final Delivery Date and in the event of such termination, neither party will have any further liability to the other party except that LESSOR will pay to LESSEE an amount equal to the amount of any prepaid Base Rent. If neither party gives notice of termination within such 10 Business Days, both parties lose all right to terminate under this Article 6.2 unless otherwise agreed in writing by the parties. Without prejudice to the foregoing, LESSOR and LESSEE agree to co-operate with each other to ensure that, to the extent reasonably possible, any such delay is minimized.
>
> If LESSEE is able to demonstrate that at Delivery there are deviations from the condition set forth in Exhibit B and such deviations do not affect the airworthiness of the Aircraft or such deviations are not material, then (a) LESSEE will be obligated to accept the Aircraft in its "AS IS" condition with such deviations, and subject to each and every disclaimer and waiver set forth in Article 8, and (b) LESSOR and LESSEE will at Delivery (by express statement by LESSOR on the Acceptance Certificate and not otherwise) mutually agree an appropriate amount of compensation payable to LESSEE for the cost of rectifying each such deviation or adjust the return conditions of the Aircraft set forth in Article 22 accordingly." (paragraph break interpolated)

31. "Delivery" is defined in § 2.1 as meaning "the delivery of the Aircraft from LESSOR to LESSEE, and the acceptance of the Aircraft by LESSEE from LESSOR….", except where the context otherwise requires.

32. Article 7.4 ("*Conditions Precedent to be Satisfied by LESSOR*") provides that *"[o]n or before the Scheduled Delivery Date, LESSOR shall deliver the following to LESSEE, each in a form and substance reasonably satisfactory to LESSEE and at no cost to LESSEE"*. It then sets out seven categories of document to be provided, followed by an eighth item:

> "7.4.8 Delivery Conditions: the Aircraft conforms to the conditions set forth in Exhibit B or otherwise conforms to such condition whereby LESSEE is obligated, pursuant to Article 6.2, to accept delivery of the Aircraft."

Though this does not on its face require production of a document, it should be noted that the "Aircraft" is defined in § 2.1 as having the following meaning (except where the context otherwise requires):

> ""Aircraft" may also mean the Airframe, any Engine, the APU, any Part, the Aircraft Documentation or any part thereof individually. For example, in the context of return to LESSOR the term "Aircraft" means the Airframe, Engines, APU, Parts and Aircraft Documentation collectively, yet in the context of LESSEE not creating any Security Interests other than Permitted Liens on the Aircraft, the term "Aircraft" means any of the Airframe, any Engine, the APU, any Part or the Aircraft Documentation individually."

"Aircraft Documentation" is defined as meaning (except where the context otherwise requires):

> "all (a) log books, Aircraft records, manuals and other documents provided to LESSEE in connection with the Aircraft either at or prior to Delivery or during the Lease Term, (b) documents listed in the Acceptance Certificate and Exhibit N and (c) any other documents required to be maintained during the Lease Term and until the Termination Date by the Aviation Authority, the Maintenance Program or this Lease."

(3) Exhibit B: aircraft condition at delivery

33. Exhibit B ("*Condition at Delivery*") makes provision for physical condition and the aircraft records – and for the Lessee to satisfy itself about them. Exhibit B § 1 deals with the Technical Evaluation Summary and, potentially, other items the Lessor is required to provide to the Lessee on delivery. Paragraph 2 is headed "*Full Aircraft Documentation Review*" (though it should be noted that Article 27.15 of the Lease makes clear that the Article and clause headings are not relevant to interpretation) and states:

> "For a period commencing at least 10 Business Days prior to the Scheduled Delivery Date and continuing until the date on which the Aircraft is delivered to LESSEE, LESSOR will provide for the review of LESSEE and/or its representative all of the Aircraft records and historical documents described in Exhibit N. The Aircraft records and historical documents may have been maintained in an Electronic Records Format, in which case such Aircraft records and historical documents will be provided to LESSEE in CD or other electronic format at the commencement of such period. Any Aircraft records and historical documents not maintained in an Electronic Records Format will be provided for the review of LESSEE and/or its representative in one central room at the Delivery Location at the commencement of such period."

It appears to be common ground that the process of records review is usually, and was in this case, commenced far earlier than 10 business days before the projected delivery date.

34. Exhibit B § 4 ("*Certificate of Airworthiness Matters*") states:

> "(a) On or before the Delivery Date, LESSOR will provide LESSEE a valid export certificate of airworthiness with respect to the Aircraft.
>
> (b) At LESSEE's request, LESSOR at its cost will demonstrate that the Aircraft meets the requirements for issuance of an EASA Certificate of Airworthiness for transport category aircraft issued by an EASA member country by delivering to LESSEE at LESSOR's option either a Certificate of Airworthiness issued by an EASA member country (if the Aircraft is already or is to be registered in an EASA member country) or a letter or other document signed by an aviation authority of an EASA member country or another Person acceptable to LESSEE stating that such Person has inspected the Aircraft and Aircraft Documentation (including records and manuals) and has found that the Aircraft meets the requirements for issuance of a Certificate of Airworthiness for transport category aircraft issued by an EASA member country in accordance with EASA Part 21 and, in addition, meets the operating requirements of AIR OPS Part-CAT.IDE and Eurocontrol with no restrictions imposed."

"Delivery Date" is defined as "the date on which Delivery takes place" (except where the context otherwise requires).

35. Exhibit B § 5 ("*General Condition of Aircraft at Delivery*") includes the following subparagraphs:

> "(b) Aircraft Documentation (including records and manuals) will have been maintained in English and in an up to date status, and may have been maintained in an Electronic Records Format, in accordance with the rules and regulations of the Civil Aviation Authority of the Cayman Islands and in a form necessary in order to meet the requirements of this Exhibit B. The records and historical documents set forth in Exhibit N will be in English."
>
> (c) All hard time and life limited Parts which are installed on the Aircraft (other than Parts installed by Manufacturer during the manufacture of the Aircraft) will have an FAA Form 8130-3 or EASA Form 1 evidencing the airworthiness of such Part at the time of installation on the Aircraft. In the case of life limited Parts, the documentation will also state the total Flight Hours, Cycles or calendar days, as applicable, since new. In the case of hard time Parts, the documentation will also state the time since last Overhaul or refurbishment, will have a reference to the relevant section of the Component Maintenance Manual under which the Part was overhauled or refurbished, as applicable, and will identify the FAA-approved repair agency or EASA-approved repair agency, as applicable, which performed the last Overhaul or refurbishment.

> (d) All Parts (other than those referred to in the immediately preceding subparagraph) installed on the Aircraft will have EASA-acceptable or FAA- acceptable documentation.
>
> …
>
> (f) The Aircraft will be airworthy, conform to type design and be in a condition for safe operation, with all Aircraft equipment, components and systems operating in accordance with their intended use and within limits approved by Manufacturer, the aviation authority and the EASA.
>
> …
>
> (i) All repairs to the Aircraft will have been accomplished in accordance with Manufacturer's Structural Repair Manual (or EASA-approved data supported by DGAC Repair Design Approval Sheets or its EASA equivalent).
>
> …
>
> (m) All Modifications which must be performed prior to Delivery of the Aircraft or within six months after Delivery in order to meet the EASA requirements applicable to AIR-OPS Part-CAT.IDE and Eurocontrol operations will have been incorporated on the Aircraft at LESSOR's cost.…"

(4) Article 8: disclaimers and waivers

36. Article 8 includes the following provisions limiting any recourse available to the Lessee, at least once it has accepted delivery of the aircraft:

> "8.1 "As Is, Where Is". LESSEE AGREES THAT IT IS LEASING THE AIRCRAFT AND THAT THE AIRCRAFT IS DELIVERED "AS IS, WHERE IS". LESSEE UNCONDITIONALLY ACKNOWLEDGES AND AGREES THAT NEITHER LESSOR NOR ANY OTHER RELEVANT PARTY NOR ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, AFFILIATES, AGENTS OR REPRESENTATIVES HAVE MADE OR WILL BE DEEMED TO HAVE MADE ANY TERM, CONDITION, REPRESENTATION, WARRANTY OR COVENANT EXPRESS OR IMPLIED (WHETHER STATUTORY OR OTHERWISE) AS TO, AND LESSEE HEREBY WAIVES ANY EXPRESS OR IMPLIED WARRANTY OR COVENANT (WHETHER STATUTORY OR OTHERWISE) AS TO (a) THE CAPACITY, AGE, AIRWORTHINESS, VALUE, QUALITY, DURABILITY, CONFORMITY TO THE PROVISIONS OF THIS LEASE AND THE OTHER OPERATIVE DOCUMENTS, DESCRIPTION, CONDITION (WHETHER OF THE AIRCRAFT, ANY ENGINE, ANY

> PART THEREOF OR THE AIRCRAFT DOCUMENTATION), DESIGN, WORKMANSHIP, MATERIALS, MANUFACTURE, CONSTRUCTION, OPERATION, STATE, MERCHANTABILITY, PERFORMANCE, FITNESS FOR ANY PARTICULAR USE OR PURPOSE (INCLUDING THE ABILITY TO OPERATE OR REGISTER THE AIRCRAFT OR USE THE AIRCRAFT DOCUMENTATION IN ANY OR ALL JURISDICTIONS), SUITABILITY OF THE AIRCRAFT OR ANY PART THEREOF OR THE ABSENCE OF LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE, KNOWN OR UNKNOWN, APPARENT OR CONCEALED, EXTERIOR OR INTERIOR, (b) THE ABSENCE OF ANY INFRINGEMENT OF ANY PATENT, TRADEMARK, COPYRIGHT OR OTHER INTELLECTUAL PROPERTY RIGHTS, (c) ANY IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE OR (d) ANY OTHER REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, WITH RESPECT TO THE AIRCRAFT OR ANY PART THEREOF, ALL OF WHICH ARE HEREBY EXPRESSLY, UNCONDITIONALLY AND IRREVOCABLY EXCLUDED AND EXTINGUISHED."
>
> "8.4 Conclusive Proof. DELIVERY BY LESSEE TO LESSOR OF THE ACCEPTANCE CERTIFICATE WILL BE, CONCLUSIVE PROOF AS BETWEEN LESSOR AND EACH OTHER RELEVANT PARTY, ON THE ONE HAND, AND LESSEE, ON THE OTHER HAND, THAT LESSEE'S TECHNICAL EXPERTS HAVE EXAMINED AND INVESTIGATED THE AIRCRAFT AND ENGINES AND (a) EACH IS AIRWORTHY AND IN GOOD WORKING ORDER AND REPAIR AND (b) THE AIRCRAFT AND ENGINES AND THE AIRCRAFT DOCUMENTATION ARE WITHOUT DEFECT (WHETHER OR NOT DISCOVERABLE AT DELIVERY) AND IN EVERY WAY SATISFACTORY TO LESSEE AND IN SUITABLE CONDITION FOR DELIVERY TO AND ACCEPTANCE BY LESSEE. THIS ARTICLE 8.4, AND ARTICLES 8.1, 8.2 AND 8.3 ARE WITHOUT PREJUDICE TO LESSOR'S OBLIGATION TO TAKE SUCH ACTIONS (IF ANY) AS EXPRESSLY SET FORTH IN THE LIST OF OTHER OBLIGATIONS ATTACHED TO THE ACCEPTANCE CERTIFICATE."

(5) Article 24: default by Lessee

37. Article 24 is headed "*Default of Lessee*", and Article 24.2 sets out Events of Default. It includes these provisions:

"24.2 Events of Default. The occurrence of any of the following will constitute an Event of Default and material repudiatory breach of this Lease by LESSEE:

(a) Delivery. LESSEE fails to take delivery of the Aircraft when obligated to do so under the terms of this Lease and such failure continues for 5 Business Days; (b) Non-Payment. (i) LESSEE fails to make a payment of Basic Rent or Agreed Value within five Business Days after the same has become due or (ii) LESSEE fails to make a payment of any other amount due under this Lease or any of the other Operative Documents (including amounts expressed to be payable on demand) after the same has become due and such failure continues for seven Business Days;

…

(f) Breach. LESSEE fails to perform or observe any other covenant or obligation to be performed or observed by LESSEE under this Lease or any other Operative Document, which failure is not cured within 21 days after written notice thereof to LESSEE, provided that, if such failure cannot by its nature be cured within 21 days, LESSEE will have the reasonable number of days necessary to cure such failure (not to exceed a period of 30 days) so long as LESSEE uses diligent and all reasonable efforts to do so;

…

(k) Material Adverse Change. Subsequent to the date of execution of this Lease and measured in relation thereto, any event or series of events occurs (other than a Total Loss) or circumstances arise which has, or may reasonably be expected to have, a prejudicial effect on any Relevant Party's title and interest in and to the Aircraft or any of the rights of a Relevant Party under the Operative Documents or a material adverse effect on the business, assets or financial condition of (A) LESSEE or on the ability of LESSEE to perform all of its obligations under, or otherwise to comply with the terms of, this Lease or any other Operative Document or (B) Guarantor on its the ability to perform all of its obligations under, or otherwise to comply with the terms of the Guarantee;

…

(n) Insolvency. LESSEE or Guarantor (i) is or becomes, or is deemed for the purposes of any Law to be, insolvent or unable to pay its debts or other obligations as they fall due, or admits its inability to pay its debts or other obligations as they fall due, (ii) suspends or threatens in writing to suspend payment with respect to all or any of its debts or other payment obligations or a moratorium is declared in respect of all or any of LESSEE's or

Guarantor's debts or other payment obligations or (iii) proposes, enters into or is a party to any proceeding regarding (or takes any corporate action to authorize or facilitate) any arrangement or composition with, or any assignment for the benefit of, its creditors; (o) Voluntary Bankruptcy. LESSEE or Guarantor commences a voluntary case or other proceeding seeking liquidation, reorganization, protection from creditors or other relief with respect to LESSEE or Guarantor or such party's debts under any bankruptcy, insolvency or similar Laws, or seeking the appointment of a trustee, examiner, liquidator, administrator, receiver, custodian or similar official of LESSEE or Guarantor or any material part of the business or assets of LESSEE or Guarantor, or seeking the sequestration of a material part of the business or assets of LESSEE or Guarantor, or consents to any such relief or to the appointment of or taking possession by any such official, or takes any corporate action to authorize or facilitate any of the foregoing;

(p) Involuntary Bankruptcy. An involuntary case or other proceeding is commenced against LESSEE or Guarantor seeking liquidation, reorganization, protection from creditors or other relief with respect to LESSEE or Guarantor's or such party's debts under any bankruptcy, insolvency or similar Laws, or seeking the appointment of a trustee, examiner, liquidator, administrator, receiver, custodian or similar official of LESSEE or Guarantor's or any material part of the business or assets of LESSEE or Guarantor's, or seeking the sequestration of a material part of the business or assets of LESSEE or Guarantor's, and (i) such involuntary case or other proceeding is not withdrawn or dismissed within 45 days thereafter, (ii) a decree, judgment or order for relief is entered by any court of competent jurisdiction in connection with any such involuntary case or other proceeding and such decree, judgment or order for relief is not withdrawn or dismissed within 45 days thereafter, or (iii) LESSEE or Guarantor consents to any such relief or to the appointment of or taking possession by any such official;

(q) Cross-Default.

(i) any Financial Indebtedness of LESSEE in an aggregate amount of US$2,000,000 or more (or its equivalent in other currencies) is not paid when due (subject to any applicable cure periods) or becomes due and payable prior to its stated maturity;

(ii) any final un-appealable judgment, award or order is made against LESSEE for an amount in excess of US$2,000,000 or more (or its equivalent in other currencies) that is not stayed or complied with or for which an adequate bond has not been provided as soon as practicable and in any event by the earlier of (A) the time required under such judgment, award or order

> and (B) 30 days from the day of such judgment, award or order;
>
> (iii) An event of default is existing and continuing under any Other Agreement and the same is not cured within the specified cure period;
>
> …"

38. "Financial Indebtedness" is defined so as to include "*obligations under capitalized or operating leases … in respect of aircraft or aircraft equipment*" but excluding "*any indebtedness under any Other Agreements*". "Other Agreements" are defined as aircraft/engine leases between the Lessee and the Lessor, its Affiliates, and trustees of the Lessor and its Affiliates.

39. The Claimants allege:

i) an Event of Default in respect of all four aircraft under Article 24.2(n);

ii) an Event of Default in respect of MSN 3361 under Article 24.2(a); and

iii) an Event of Default under Article 24.2(q) in respect of each of the last three aircraft, as a result of Laudamotion's failure to accept MSN 3361. Peregrine relies on Article 24.2(q)(iii) in relation to MSN 3396. AIL relies on Article 24.2(q)(i), rather than 24.2(q)(iii), because it says it is not an Affiliate (etc.) of Peregrine, so that the lease of MSN 3361 is not an "Other Agreement" for the purposes of the two leases in respect of which AIL was the Lessor.

40. Article 24.3 deals with the Lessor's rights where an Event of Default occurs, providing *inter alia* as follows:

> "24.3 LESSOR's General Rights. Upon the occurrence of any Event of Default and so long as the same shall be continuing, LESSOR may do all or any of the following at its option (in addition to such other rights and remedies which LESSOR may have by statute or otherwise):
>
> (a) if such Event of Default occurs prior to Delivery, and by written notice to LESSEE, terminate LESSEE's right to lease the Aircraft and terminate LESSOR's obligations hereunder (but without prejudice to the indemnity obligations and any continuing obligations of LESSEE under this Lease and any other Operative Document, including the obligations set forth in Articles 15 and 16);
>
> (b) by written notice to LESSEE, terminate the leasing of the Aircraft whereupon (as LESSEE hereby acknowledges and agrees) all rights of LESSEE to possess and operate the Aircraft will immediately cease and terminate and in which case LESSEE's obligations under this Lease will continue in full force and effect (including the obligations set forth in Articles 10.5,

> 15, 16 and 17); provided, however, that upon the occurrence of an Event of Default under any of Articles 24.2(n), 24.2(o) or 24.2(p), such termination will occur automatically and with immediate effect without any notice or further action from LESSOR;
>
> …"

41. Article 24.3 also confers various other rights, including in subclauses (e), (i) and (j):

> "(e) enter upon the premises where the Airframe, the APU or any or all Engines or any or all Parts or Aircraft Documents are (or are believed to be) located without liability and take immediate possession of and remove them or cause the Aircraft to be returned to LESSOR at the location specified in Article 22.4 (or such other location as LESSOR may require) or, by serving notice require LESSEE to return the Aircraft to LESSOR at the location specified in Article 22.4 (or such other location as LESSOR may require) and LESSEE hereby irrevocably by way of security for LESSEE's obligations under this Lease appoints LESSOR as LESSEE's attorney and agent in causing the return or in directing the pilots of LESSEE or other pilots to fly the Aircraft to an airport designated by LESSOR and LESSOR will have all the powers and authorizations necessary for taking that action, with the foregoing power of attorney being granted by LESSEE as a deed;"
>
> …
>
> "(i) with or without taking possession of the Aircraft, sell all or any part of the Aircraft at public or private sale, with or without advertisement, or otherwise dispose of, hold, use, operate, lease to another Person or keep idle all or any part of the Aircraft as LESSOR in its sole discretion may determine appropriate, all free and clear of any rights of LESSEE and without any duty to account to LESSEE with respect to such action or inaction or for any proceeds thereof, all in such manner and on such terms as LESSOR considers appropriate in its absolute discretion, as if LESSOR and LESSEE had never entered into this Lease;"
>
> …
>
> "(j) for LESSEE's account, do anything that may be necessary or advisable to cure any default and recover from LESSEE all costs and expenses (including legal fees and expenses incurred) in doing so".

42. Article 24.4 ("*Deregistration and Export of Aircraft*") further provides that:

> "If an Event of Default has occurred and is continuing and as a result thereof, the leasing of the Aircraft has been terminated,

> LESSOR may take all steps necessary to deregister the Aircraft in and export the Aircraft from the State of Registration, the Habitual Base and/or any other applicable jurisdiction. LESSOR shall not invoke the Deregistration Power of Attorney unless an Event of Default shall have occurred and be continuing."

43. Articles 24.6 to 24.9 deal with the Lessee's liability for damages where an Event of Default has occurred, and waiver, including these provisions:

> "24.6 LESSEE Liability for Damages. If an Event of Default occurs, in addition to all other remedies available under applicable Law, LESSOR and each other Indemnitee has the right to recover from LESSEE, and LESSEE will indemnify LESSOR and each other Indemnitee on LESSOR's first written demand against, any Expenses which LESSOR or any other Indemnitee may sustain or incur directly as a result, including:
>
> (a) any losses suffered by LESSOR as a result of a delay in Delivery of the Aircraft to LESSEE, including Aircraft parking, maintenance costs and insurance costs during the period of delay;
>
> (b) all amounts which are then due and unpaid hereunder or under any other Operative Document or which become due prior to LESSOR's recovery of possession of the Aircraft;
>
> (c) any losses suffered by LESSOR or Owner because of an inability by LESSOR or Owner to place the Aircraft on lease with another lessee or to otherwise utilize the Aircraft on financial terms as favorable to LESSOR as the terms of this Lease and the other Operative Documents (and LESSOR will be entitled to accelerate any and all Rent which would have been due from the date of LESSOR's recovery of possession of the Aircraft through the Expiration Date);
>
> …
>
> (i) any additional amount(s) as may be necessary to place LESSOR in the same economic position, on an after tax basis, as LESSOR would have been in if LESSEE had properly and fully performed each of its obligations under this Lease and the other Operative Documents.
>
> 24.7 Mitigation of Damages. LESSOR will take such reasonable commercial actions insofar as and to the extent that such a corresponding defense exists under English Law to mitigate any damages or losses it may incur as a result of the occurrence of an Event of Default, provided that (a) LESSOR will not be obliged to consult with LESSEE concerning any proposed course of action or to notify LESSEE of the taking of any particular action, (b) LESSOR will not be obligated to take any step that, in its

> reasonable discretion, could prejudice LESSOR, and (c) this provision is without prejudice to LESSOR's rights under Article 24.6.
>
> 24.8 Waiver of Default. By written notice to LESSEE, LESSOR may at its election waive any Default or Event of Default and its consequences (with or without conditions, at LESSOR's sole discretion). The respective rights of the parties will then be as they would have been had no Default or Event of Default occurred. LESSOR's waiver of any Default or Event of Default will not constitute a waiver of any subsequent Default or Event of Default.
>
> 24.9 Present Value of Payments. In calculating LESSOR's damages hereunder, on the Termination Date all Rent and other amounts which would have been due hereunder during the Lease Term if an Event of Default had not occurred will be calculated on a present value basis using a discounting rate of the prime rate announced by LESSOR's Bank discounted to the date on which LESSOR recovers possession of the Aircraft."

(6) Maintenance and redelivery: Article 12

44. The 2019 leases require Laudamotion to maintain the aircraft (Article 12), but do not require it to pay maintenance rent or maintenance reserves. Some of the provisions of Articles 12 and 22 are relevant to quantum, because of the potentially very significant effect engine condition has on the payment in either direction ("upsy-downsy" in the jargon) due at lease end pursuant to Article 22.12 ("End of lease maintenance payments"), depending on whether the aircraft is re-delivered at lease-end in a better or worse maintenance condition than it was at delivery to Laudamotion.

45. Article 12.2.4 provides:

> "12.2.4 With respect to any shop visit of an Engine during the Lease Term, LESSEE will submit to LESSOR (a) at least 30 days in advance of the scheduled induction date, the intended workscope of such shop visit and (b) prior to the actual induction date, and if such shop visit is to be performed by a third party vendor, a disclaimer of Security Interests from such vendor in a form reasonably acceptable to LESSOR. LESSEE will ensure that the tasks comprising each such workscope are in accordance with the recommendations of Engine Manufacturer and are sufficient to restore the subject Engine to a full operating interval (which will be determined in accordance with the recommendations of Engine Manufacturer). Within 10 days of receipt by LESSOR of such intended workscope, LESSOR in its reasonable discretion may elect to provide a replacement engine to LESSEE in place of the Engine and in lieu of performance of such intended shop visit on the Engine. Upon such replacement, the replacement engine will become an "Engine" under this Lease and the Engine which requires a shop visit will cease to be

> an "Engine" and will be returned to LESSOR (and this Lease will be amended as may be appropriate to reflect such exchange). If LESSOR requests, LESSEE will perform additional work at such shop visit at LESSOR's cost."

(7) Article 22: return of aircraft

46. Article 22 contains provisions relating to the return of the aircraft. Article 22.12 contains the so-called "upsy-downsy" clause mentioned above. Broadly speaking, this provides that if the aircraft is redelivered in a better condition than it was delivered in, then the Lessor is to make an end of lease (or "***EOL***") payment to Laudamotion at specified rates. Conversely, if the aircraft is redelivered in a worse condition than it was delivered in, then Laudamotion is to make an EOL payment to the Lessor.

47. Article 22.12.8 makes provision for the payment rates to be adjusted if one party can demonstrate that these are different from the "actual demonstrated and invoiced costs" of the workscopes. This evidently aims to ensure that neither party can seek to arbitrage their actual costs against the rates set out in the lease.

(8) Article 25: notices

48. Article 25.1 ("*Manner of Sending Notices*") states:

> "Any notice, request or information required or permissible under this Lease will be in writing and in English. Notices will be delivered in person or sent by fax, e-mail, letter (mailed airmail, certified and return receipt requested), or by express courier addressed to the parties as set forth in Article 25.2. In the case of a fax, notice will be deemed received on the date set forth on the confirmation of receipt produced by the sender's fax machine immediately after the fax is sent. In the case of an e-mail, notice will be deemed received at the time the sender sends such e-mail, unless the sender receives an automated e-mail error message. In the case of a mailed letter, notice will be deemed received upon actual receipt. In the case of a notice sent by expedited delivery, notice will be deemed received on the date of delivery set forth in the records of the Person which accomplished the delivery. If any notice is sent by more than one of the above listed methods, notice will be deemed received on the earliest possible date in accordance with the above provisions."

49. Article 25.2 provides that notices to the Lessee will be sent to Mr Norton, setting out his telephone number, email address and street address, or to such other places and numbers as the Lessee directs in writing to the Lessor.

(E) MAIN FACTS

(1) Parties

50. The AerCap group, of which AIL and AICDAC are part, both owns aircraft and manages aircraft owned by third parties. AICDAC and Wilmington were Lessors of the 2018 aircraft. AIL was Lessor of two of the 2019 aircraft, MSN 3425 and MSN 3475. Peregrine is a third party. The aircraft owned by it, MSNs 3361 and 3396, are managed by AIL under a Servicing Agreement dated 18 December 2017.

51. Wilmington is an "Affiliate" of the AerCap companies (AIL and AICDAC) for the purposes of the leases, because it is lessor/trustee in respect of aircraft owned by companies in the AerCap group. However, at least on the Claimants' case, Peregrine is not an "Affiliate" of any of those companies.

(2) Events from late 2018 to mid 2019

52. On 26 October 2018, AICDAC and Wilmington entered into the five 2018 leases with Laudamotion for Airbus A320 aircraft.

53. On 6 December 2018, Ryanair guaranteed to AICDAC Laudamotion's obligations under the lease for MSN 3131. (I assume its guarantees in relation to the other 2018 leases were entered into at about the same time, but it does not matter.)

54. On 19 July 2019, Laudamotion entered into the 2019 leases with Peregrine and AIL.

(3) Late 2019 and early 2020

55. The documents suggest that a "kick-off" meeting was held between the parties on 6 November 2019 to discuss the delivery of the 2019 aircraft. Weekly calls were instituted from mid-December 2019 between the parties' respective technical teams.

56. On 13 December 2019, 17 December 2019, and 18 December 2019 respectively, MSNs 3361, 3396 and 3425 were flown to Fokker or Vallair (as applicable). Pre-delivery maintenance checks commenced soon after that.

57. Around this time, the Claimants suggested to the Defendants that the records review for the 2019 aircraft be performed on site. However, the emails indicate that the Defendants did not agree to that, and that thereafter the records review for each aircraft was performed wholly or mainly remotely.

58. Between 27 December 2019 and 2 January 2020, the technical records relating to MSNs 3361, 3396 and 3425 were made available to the Defendants and their consultants.

59. Between 5 and 20 January 2020, initial versions of open items lists ("***OILs***") for MSNs 3361, 3396, and 3425 were made available by Laudamotion to the Claimants and their consultants, and the aircraft were made available for physical inspection by the Defendants and their consultants.

60. Between 7 and 10 February 2020, the technical records relating to MSN 3475 were made available to the Defendants and their consultants, and an initial version of the OIL

for that aircraft was made available by Laudamotion to the Claimants and their consultants.

61. Between 11 February and 4 March 2020, MSNs 3361, 3396 and 3425 were painted in Laudamotion livery.

62. On 24 February 2020, MSN 3475, which had been undergoing work including 6-year and 12-year checks at Joramco (an MRO in Jordan), was flown to Vallair. By 2 March 2020, pre-delivery maintenance checks had commenced, and the aircraft had been made available for physical inspection by the Defendants and their consultants.

(4) Early and mid March 2020

63. Each of the 2019 aircraft was physically in the possession of the two MROs, Fokker and Vallair.

64. At this stage, the Defendants indicated a wish for the 2019 aircraft to be delivered to Laudamotion in late March or April, in good time for the summer 2020 season where, as a short haul operator, it was anticipated that Laudamotion would make most of its annual revenue.

65. It was always intended that MSN 3361 would be delivered first. In relation to that aircraft:

i) On 24 February 2020, AustroControl (the air navigation services provider which controls Austrian airspace) and Celairion (the Continuing Airworthiness Management Organisation ("***CAMO***") retained by the Claimants) had completed their inspection of MSN 3361. The findings from the inspection were addressed to the satisfaction of Celairion, to which AustroControl had delegated authority, prior to the demo flight referred to below. Laudamotion had also given its approval for a consultant from Eirtech Aviation Services ("***Eirtech***") to go on site in a bid to try and close out the remaining records items for the aircraft.

ii) As at 2 March 2020, documents internal to the Claimants suggested an expectation that the records review for MSN 3361 could be finalised by Laudamotion within a week.

iii) As at 4 March 2020, the parties appear to have been targeting around 20 March 2020 for the delivery of MSN 3361 to Laudamotion.

iv) Between 4 and 9 March 2020, the Claimants and the Defendants exchanged outstanding condition precedent documents in anticipation of the delivery of MSN 3361, including a parent company guarantee from Ryanair to Peregrine which was entered into on 5 March 2020.

v) On 9 March 2020, Fokker issued a Certificate of Release to Service for MSN 3361 and the demo (demonstration) flight was completed. (The evidence of the Defendants' technical expert, Mr Goatcher, was that a demo flight would usually be carried out approximately two weeks prior to delivery.) The demo flight was observed by a pilot from Laudamotion, Mr Pitschmann, who noted

that no re-flight was necessary. Mr Pitschmann said in his witness statement that this was because "*all of the problems that I had identified could be fixed and checked on the ground and a further flight was not necessary in order to check the repair*."

vi) On 10 March 2020, Mr Faust of Laudamotion (Deputy Nominated Postholder for Continuing Airworthiness) raised a query with Mr Spencer of Ryanair (Deputy Director of Technical Services) as to whether Laudamotion should increase the number of personnel assigned to the records review for MSN 3361. Mr Spencer responded that there was "no need".

vii) On 10-11 March 2020, the engine borescope checks for MSN 3361 were completed with no major defects recorded.

66. It appears to have been envisaged by the parties around this time that MSNs 3396, 3425 and 3475 would be delivered around 23 March, 27 March, and April 2020 respectively. As regards MSN 3396, it appears to have been envisaged that the Certificate of Release to Service would be issued, and the demo flight would take place, on 18 March 2020.

(5) Mid to late March 2020

67. From around mid-March 2020, the impact of Covid-19 began to be felt. Some people working abroad flew home before travel restrictions were put in place. Three of the Claimants' four technical consultants at Vallair went home, including Mr Mallon (responsible for the delivery of the aircraft at Vallair), whose hotel closed on 15 March 2020. Flynas' technical consultants also appear to have left Vallair. One of the Claimants' technical consultants, Mr Peev, was excluded from Vallair's premises from late March and regained access to the hangar on 13 May 2020, when he was allowed in between 12 pm and 1 pm while Vallair's staff were on their lunch break. The Claimants' Mr Akhrif (Vice President Technical Services, who was responsible for the delivery of the aircraft at Fokker) left site in early March to return home to Abu Dhabi. The Cayman Civil Aviation Authority (CAA) (under whose jurisdiction the four aircraft fell at the time) advised on 16 March 2020 that, due to Covid-19, all foreign travel had been cancelled, and its offices were shut from 24 March, though as noted below that did not mean it ceased to function.

68. On 14 March 2020, Mr Merry (the Claimants' Managing Director Leasing Europe) relayed internally a conversation with Ryanair's Group Treasurer, Mr Norton:

> "• Spoke with John Norton Group Treasurer. FR [Ryanair] has 4bn in cash to see them through.
>
> • O'Leary is looking at scenarios that includes grounding 50% of the Group fleet and more.
>
> • For the 2020 deliveries to Lauda (~12 aircraft) incl our 4, John wanted not to take delivery until a future date when there is business for them. I said no.
>
> • Long story short FR will work with us to take delivery (3 due in March, 1 in April), then they would be parked either in the

> current MROs (Fokker/Vallair) or in Vienna. Rent would start when they start flying which is likely end of the summer but possibly before depending on how long this situation lasts. Monthly run rate for these four aircraft is $720k.
>
> • Our five delivered aircraft will continue to be paid in full even they are subsequently grounded. Monthly run rate is $990k.
>
> • I believe having them delivered is a priority and we don't want AOGs. They are still in check and I also want FlyNas out of the loop so we are not stuck in the middle. If they are parked for 4-6 months on Ryanair's ticket it's a better outcome for us than having a fight now where they are not delivered and we bear all the risk. Moreover, FR will want first mover advantage in Vienna when this passes and so having them delivered means they can take advantage of that.
>
> • This has not been agreed with John yet but let me know if you disagree with my approach."

69. This conversation appears to have contemplated that the 2019 aircraft would be delivered in March/April 2020 as previously envisaged, but that the rent for the aircraft would be postponed by further agreement until there was demand for the aircraft.

70. On 16 March 2020, the Claimants noted internally that they could deliver MSN 3361 "this week" but that that was subject to agreement with the Defendants on rent, given the grounding of much of the Ryanair group's fleet. The Claimants' consultants requested that Fokker close the remaining items on MSN 3361, noting that it was "not a big job".

71. At this stage, both Fokker and Vallair implemented restrictions at their facilities in order to minimise the risk of the transmission of Covid-19. However, neither facility closed and work continued to be carried out on the 2019 aircraft. Thus on 16 March 2020, the Claimants emailed Flynas saying:

> "The MRO [Vallair] has not yet closed and they continue to work the aircraft. There are restrictions in place for customers to the MRO, but work is continuing… I would ask your team to continue the return work on the aircraft."

On 17 March 2020, Fokker emailed various parties involved in the delivery of the 2019 aircraft (including the Claimants and Flynas) saying:

> "At present there is no lockdown @ Fokker Techniek - our teams continue to work…We have decided to minimize movements in the hangars in our attempt to protect everyone's health which is our top priority. That is why we arrange meetings with our project managers in your offices. We are convinced you will understand and appreciate our actions and we remain at your disposal for any additional support or info you require…"

72. Similarly, on 16 March 2020, the inspector from the Cayman CAA, who was dealing with the deregistration of the 2019 aircraft, told the Claimants that:

> "Due to continued Corona Virus situation, the Cayman Islands CAA has cancelled all overseas travel. Therefore my trip to Brussels will not take place and I will carry out the Export C of A's as a desk top exercise. I have advised Flynas of this decision."

73. On 18 March 2020, the Claimants again noted internally that MSN 3361 was "ready" and could be delivered "this week", subject to agreement with the Defendants, whose technical team were said to have been "non-comit[t]al" in the weekly call with the Claimants' team.

74. On the afternoon of 18 March 2020, Ryanair's CFO, Mr Sorahan, telephoned the Claimants' Chief Executive, Mr Aengus Kelly, asking to push back delivery of the four aircraft until June 2020. In addition, Mr Norton spoke to Mr Merry, who reported internally that the Defendants' "*Entire fleet of 460 a/c to be grounded by the weekend. Likely to let 50% of staff go*".

75. The same afternoon, 18 March, Mr Sorahan, wrote to Mr Kelly:

> "I refer you to the extraordinary and unprecedented events of recent days due to the rapid spread of the Covid-19 Virus, which has led to all EU states imposing flight and/or travel bans at short or no notice causing catastrophic cancellations to all airline programs and mass aircraft groundings. We now expect the entire Ryanair Group fleet to be grounded by EU Government flight restrictions over the corning weekend.
>
> In these unprecedented circumstances, the Ryanair Group must immediately take all actions to preserve liquidity in order to survive the next 3 or 4 months of uncertainty. In this regard, we write to advise that Laudamotion is deferring the lease of MSN: 3361, 3396, 3425 & 3475 until we see a return to normal flight services, which we hope will be in a 2 or 3 month time frame. As such we are postponing this lease until at least the end of June. We will update you again at that time.
>
> We thank you for your understanding and support during these difficult times as we trade through this Force Majeure grounding of the EU airline industry caused directly by EU Governments emergency response to the Covid-19 Virus pandemic across Europe."

76. Mr Norton gave this evidence in cross-examination about the letter:

> "Q. Just standing back, looking at this letter, Ryanair was first of all asserting that Lauda would postpone delivery of the 2019 aircraft until at least the end of June, correct?

> A. Yes.
>
> Q. By definition, that meant Lauda would not take delivery of the 2019 aircraft prior to each of their final delivery dates?
>
> A. I think what it was intended to do was to get into a negotiation with AerCap around how we can restructure the lease.
>
> Q. But on its face, the letter was saying Lauda would not take delivery of the 2019 aircraft prior to their final delivery dates?
>
> A. We were looking to engage with AerCap around how we can meaningfully take delivery of the aircraft.
>
> Q. Yes but in terms, the letter was saying Lauda would not perform its contractual obligations, correct?
>
> A. As I say, the letter was intended in terms of that we were trying to engage with AerCap in terms of getting to a point of negotiation with them.
>
> Q. It doesn't say that, does it?
>
> A. That is my recollection at the time in terms of how we were dealing with them in terms of trying to get solidarity and support from them."

77. Each of those answers, apart from the first, showed a reluctance or failure to give a direct answer to the question. Mr Norton's evidence was in that respect unsatisfactory. I nonetheless accept Mr Norton's broader point, that the Defendants saw this letter as part of a negotiating strategy. That view of it is also broadly consistent with the reactions on the AerCap side, both to this letter and the 20 April letter referred to below. It is evident from those reactions that AerCap viewed Ryanair as a company prone to taking an aggressive stance as part of its negotiating strategies, and did not necessarily regard forceful statements of this kind (on their face arguably suggestive of a renunciation of the contracts) as bringing discussions to an end.

78. An email of 19 March 2020 from Ms Moloney (head of AerCap's air servicing department) referred to the 18 March letter as "Ryanair's request" to defer the start of the leases. The letter led to discussions between the parties about that possibility. Another email from Ms Moloney, dated 20 March 2020, reported that "as advised yesterday discussions continue with Lauda Motion /Ryanair on delivery deferral requests".

79. In the meantime, the contemporary documents suggest that work relating to documentation and receipt of parts continued to be performed at Vallair, even though by about 23 March 2020, Vallair appears to have entered into some form of lockdown.

80. On 23 March 2020, the Claimants' Mr Merry emailed Mr Norton regarding the 18 March letter from Ryanair, saying:

> "Just following up on [Ryanair's letter dated 18 March 2020]. This will need to be documented. Suggest I send you over a draft amendment for the first one which we can clone for the others. We should have the tech guys on the call to plan the logistics on the four aircraft."

81. On 25 March 2020, Fokker issued a revised Certificate of Release to Service correcting an error in the previous version that had been issued on 9 March 2020. At this stage, manpower was somewhat reduced at Fokker but an internal AerCap email of 25 March suggests that work continued to be performed. Another such email noted that "we most likely now won't be delivering MSN 3361 until June"; and Mr Anderson accepted in cross-examination that a June delivery date (at the earliest) was the common understanding of the parties in March and into April.

82. On 25 March 2020, Mr Akhrif emailed Mr Spencer requesting a call to discuss the best way to progress the delivery of the 2019 aircraft. Mr Spencer responded on 26 March:

> "Apologies we did not attend the call yesterday. We have been asked to pause all activity on these aircraft for the moment due to the Covid-19 situation. All our focus is on the grounded operational fleets, therefore the records and physical review are paused. Once I have instruction to continue, we will be back in contact."

83. Mr Akhrif replied "*No worries and understood. I'm sure Colin Merry and John Norton will be discussing the way forward/new arrangements for these transitions so we will react/plan when we hear back from them*". Mr Spencer's email was forwarded to Mr Merry, who then sent an email to Mr Norton stating:

> "not good news but being dictated by the situation. We need to do a simple amendment to the lease on the back of Neil's letter to Gus that amends the delivery date per Ryanair's request and the rent start date. Gus will look for that comfort. Can I send you something over?"

84. Mr Gwihs of Laudamotion, whose role had included coordinating the process of taking on the aircraft, was that after the 26 March 2020 email his focus "completely shifted" to dealing with operational matters relating to the Ryanair group's grounded fleet. He did not check the "Box" (the electronic portal enabling shared access to documents) between the end of March 2020 and mid-May 2020. Mr Norton described the context of the 26 March email as being the "triage situation" Ryanair was placed in, in which it was "imperative" for it to "manage…resources".

85. On the same day, 26 March 2020, Laudamotion instructed its consultants to cease work. Mr Murphy (the project lead at Eirtech) emailed the Eirtech consultants that he supervised saying:

> "Alex Faust from Laudamotion has just advised me that all deliveries are being suspended with immediate effect.

> This means that you are required to stop working these aircraft today or tomorrow at latest. Before finishing can you please ensure the following:
>
> Open item lists are all up to date
>
> All available documents are uploaded to the LDM cloud.
>
> Manpower Log has been updated with your days.
>
> I would appreciate if all of you would confirm with me when all of the above is complete.
>
> Thanks to each of you for [sic] your hard work and making this project as successful as it has been. Hopefully this project will re-commence in the not too distant future."

86. Mr Norton was asked in cross-examination about the reasons for this instruction, leading to these exchanges:

> "Q. But there was no need, was there, to ask the external consultants to down tools, particularly those conducting a remote document review?
>
> A. As I said, in terms of all of the workstreams that were going on, there was people moving around and they were going home. In terms of correspondence, here we were focusing on what we were seeing as priority which was the existing fleet.
>
> Q. But why did you need to stand down the consultants working on the delivery of the 2019 aircraft?
>
> A. I wasn't involved in that correspondence.
>
> Q. Doesn't it reflect a decision within Ryanair that you were not going to be taking these aircraft?
>
> A. In terms of the delivery of the aircraft, there is no one more than myself who worked around trying to get an agreement with AerCap around delivering the aircraft.
>
> Q. We'll come on to that. But what I really want you to focus on is why, if at all, there was any need to stand down the external consultants working on the documents?
>
> A. Alex's priority was in terms of looking at the existing Lauda fleet in terms of management consultants. It was not his priority.
>
> Q. I don't see how the consultants one way or the other had any effect on managing the general fleet. They were specifically working in relation to the delivery of these aircraft?

> A. I could probably say the same about AerCap's consultants on the other side and delivery of what they needed to attend to around delivering the aircraft and we were not reciprocated in terms of what was outstanding that needed to be delivered.
>
> Q. We see nothing in the documents from any of the Eirtech records consultants suggesting that there were any practical obstacles to them continuing to perform their review. Can you comment on that?
>
> A. I can't comment on that.
>
> Q. Indeed, as at 26 March, the consultants are being asked to make sure the open items lists are all up to date and "available documents are uploaded to the Lauda cloud", all exercises that should have been done remotely, aren't they?
>
> A. In terms of how they were operating, that is obviously the way they were working.
>
> Q. The only reason that these consultants stop work is because Lauda instructed them to suspend work; correct?
>
> A. As I said, all our attention was going to our existing fleet and our people and our resources were completely focused on that.
>
> Q. If Lauda had not instructed the Eirtech consultants to cease work, the records review could and would have continued, wouldn't it?
>
> A. I mean, if we were getting to a process of delivering and that, AerCap could make -- deliver everything that we knew that was outstanding at the time, I mean, we would have -- and as well as that, if they had tendered the aircraft for delivery, you know, we would obviously work to a process of meeting what was required under the lease for us to take the aircraft."

Here again Mr Norton was reluctant to give a direct answer to the question about why the records review needed to be stopped. The evidence as a whole points to the conclusion that the Defendants made a decision to do so, not because the review could not continue for practical reasons, but because they chose to focus their attention on their grounded fleet, and possibly also as part of the strategy of seeking to renegotiate the terms of the leases in view of the economic problems created by the pandemic.

87. Between 26 and 31 March 2020, each of the Eirtech consultants working on the records review for the 2019 aircraft complied with Mr Murphy's instructions and ceased work. None of the consultants suggested that there was any practical obstacle to them continuing to perform their review remotely, as they had been doing. Numerous items had been raised by Eirtech via the OIL for MSN 3475 in the days leading up to Mr Spencer's email of 26 March 2020. The Eirtech consultant responsible for reviewing

on-site the physical maintenance work at Fokker did not to return to site, saying "I have been told not to come".

88. Mr Norton in his witness statement said that from around St Patrick's Day (17 March), most of the work on the aircraft stopped, and that (in addition to obvious difficulties at the MRO around the continuing physical work on the aircraft) there were difficulties on the records side because Eirtech' s consultants' ability to continue working on the aircraft records was limited by the Covid-related restrictions that came into place since no on-site review could take place. It was suggested to him in cross-examination that that evidence was wrong because, apart from one specifically authorised visit, the Eirtech consultant working on the records review did so entirely remotely. The following exchanges occurred:

> "Q. You see, from what we can discern from the documents, apart from one specifically authorised visit on the part of Mr Aras, an Eirtech consultant, the Eirtech consultant working on the records review did so entirely remotely. You don't know?
>
> A. In terms of -- that is what I was told? In terms of what I have said is based on the knowledge that I have from working with our technical guys.
>
> Q. I suggest to you that Covid-19 had no impact on the ability of the Eirtech consultants to perform the records review because it was being performed remotely?
>
> A. Well, it would have impacted because we were struggling to get the records because we were reliant on AerCap who were -- Mr Akhrif was obviously working from the Middle East and we were working with him around getting what we needed to get from Flynas to effectively continue the review of the aircraft and that was just continuing to be laborious and hence my communication with Colin around this.
>
> Q. You say you were dependent on AerCap loading documents onto the Box for review; yes?
>
> A. Yes.
>
> Q. That review was done remotely, wasn't it, the documents on the Box?
>
> A. The Box is a convenient way of just putting records up. Whether that is done physically, on site or remotely, it is irrelevant.
>
> Q. Yes.
>
> A. It is an ability of being -- ease of use around getting access to records –
>
> Q. I think you would agree with me –

A. -- between both [sides], it is a two-way process.

Q. -- Mr Norton that as far as documents were available online there was nothing post the onset of the Covid pandemic which prevented the remote review of documents continuing, was there?

A. Remotely being able to review documents, assuming they are delivered to us.

Q. Thank you. And it was quite a rare event when an Eirtech consultant actually did the review of the documents physically on site. Are you aware of that?

A. As I said, I mean in terms of what their actual movements were, I wasn't tracking what they are doing, whether --

Q. Thank you. If you go to {D/64/1}, you see an email of 25 February from Mr Murphy to Mr Aras copied to -- well, an email to Mr Aras and Mr Faust. Do you see that?

A. Yes.

Q. And Mr Murphy, can you remind me who Mr Murphy is?

A. Presumably he is someone in Eirtech, I have had no dealings with him.

Q. As I understand it, he is the project lead at Eirtech. Does that make sense?

A. I assume so, yes.

Q. "Hi Alex, Ilhan.

"Khalid from AerCap has called me and is requesting that llhan go onsite to the Netherlands next week (Monday 2nd March) in a bid to try and close out open items."

And he asks whether it is possible for Mr Aras to go to the Netherlands and he asks whether Mr Faust whether he approves for this to happen. Do you see that?

A. Yes.

Q. And then over the page, Mr Faust approves that. {D/64/1} Now, this is the only occasion -- I think the visit lasted about four or five days, the only indication we've seen in the documents where someone went on site to perform any part of the document review. Does that accord with your recollection?

> A. As I said, I don't track their activities in terms of whether they are on site or off site. It is in terms of --"

In my view, Mr Norton overreached himself by suggesting that the Covid restrictions impeded the records review, a proposition which the contemporary document did not bear out. Mr Norton had no sound basis on which to make that assertion in his witness statement. It evidently was not based on any first-hand personal knowledge, and he did not identify any source for the information.

89. From this point onwards, as Mr Gwihs accepted in cross-examination, Laudamotion's technical team and the Eirtech consultants ceased to engage in the delivery process:

> "Q. …So it is right that from the end of March, Lauda ceased to attend the weekly calls?
>
> A. Yes.
>
> Q. It is right that Eirtech ceased to be any work on the four aircraft; yes?
>
> A. They stopped work end of March, yes.
>
> Q. And the work that Eirtech ceased doing included updating the OIL and closing out items?
>
> A. Including closing items, yes.
>
> […]
>
> Q. As far as you were aware, did Mr Spencer ever get back in touch and say "we are resuming the process"?
>
> A. I am not aware of any, no."

90. Mr Gwihs also accepted that, in light of the Defendants' stance, it would have been futile for the Claimants to have continued to provide updates to the Defendants:

> "Q. I suggest to you in those circumstances that you have just described to the court, you couldn't reasonably expect AerCap to keep providing updates on the aircraft.
>
> A. No, I have not -- no.
>
> Q. There would be no point, would there, because you weren't engaged in the process?
>
> A. Yes.
>
> Q. You agree with me."

91. On 27 March 2020, Mr Merry emailed Mr Norton about Mr Spencer's email of 26 March. He proposed an amendment to the leases whereby the delivery dates and rent start dates would be postponed and said "Can I send you over something?"

92. On 31 March 2020, notwithstanding the Defendants' disengagement five days earlier, the Defendants were considering internally whether they should proceed to finish off their work in respect of the delivery of MSN 3361 (though ultimately they did not). Ryanair's Director of Technical Services, Mr Clear, emailed Eirtech describing MSN 3361 (among other aircraft) as "close to completion of the records review" and requesting that Eirtech "provide a 'quote' for finishing these off".

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93. On 1 April 2020, Eirtech told Mr Clear:

> "Main parts of records are reviewed and appear satisfactory.
>
> 186 open items are remaining.
>
> Updated statuses are awaited.
>
> LDND will need to be revisited regarding calendar time items.
>
> Estimate 10 days to complete this aircraft."

The Claimants point out that a large number of the 186 open items appear to have been added to the OIL on or shortly before 26 March.

94. During the same period, there were some discussions about likely deferred lease start dates:

i) In its March 2020 report to Peregrine, AIL stated:

> "due to the impact of COVID 19 Lauda Motion has requested that delivery of each aircraft be deferred until the end of June. Discussions remain in progress with an expectation that related lease amendment agreements will be executed to include a condition that existing walkaway rights will not apply due to the delayed deliveries. Discussions are also in progress with Flynas to retain both [MSN 3361 and MSN 3396] on the existing register (Cayman) and on their operating certificate. This will avoid additional re-registration costs. It will require the leases to remain in place following technical acceptance of each aircraft (at which point rent will no longer be payable). Both aircraft will be stored at their current location (Fokker facility in the Netherlands)."

ii) On 1 April 2020, Mr Akhrif asked Celairion to provide a quote to be shadow CAMO for MSN 3361 and MSN 3396, since "the delivery of the four A320s to Lauda is delayed till June, exact date yet to be agreed".

iii) By 1 April 2020, AustroControl had been told by the Claimants' consultants that the delivery of MSN 3361 would be delayed until June.

95. Reflecting this anticipated delay, the Claimants sought to proceed with a technical redelivery of the 2019 aircraft from Flynas to the Claimants but to keep the aircraft on lease to Flynas until such time as the Claimants were ready to proceed with delivery to Laudamotion. The background to this approach was as follows:

i) Flynas had ceased to operate the aircraft prior to the aircraft being flown to the MROs in late 2019/early 2020.

ii) Flynas had, however, failed to redeliver each of the 2019 aircraft in redelivery condition by their respective contractual redelivery dates. As a result, the Claimants had the right to terminate the Flynas leases at will if they wished to do so.

iii) If Laudamotion had re-engaged, the Claimants could have terminated the Flynas leases in order to effect delivery to Laudamotion. Mr Anderson and Mr Peacock said in evidence:

> (Anderson) "A. You couldn't have two leases running at exactly the same time, but we would have terminated the Lauda lease -- terminated the Flynas lease and delivered to Lauda.
>
> […]
>
> A. …It is the ordinary course of business. We terminate leases and start new ones every single day."
>
> (Peacock) "Q. Well, if there was any intention to terminate the Flynas lease, which I think is what you are saying, is it, would have happened?
>
> A. Immediately before or shortly before tender to or acceptance by Laudamotion, yes, that is what would happen."

Mr Anderson's evidence is consistent with an email of 2 March 2020 from Mr Akhrif confirming internally that the aircraft would be redelivered from Flynas and delivered to Laudamotion on the same day. I accept his and Mr Peacock's evidence on this point.

iv) Unless and until Laudamotion re-engaged, it was in the Claimants' interests to keep the aircraft on lease to Flynas so that Flynas, and not the Claimants, would bear costs such as maintenance, parking and/or storage, and insurance.

96. By 3 April 2020, it appears that an internal decision had been taken at Ryanair, based on a quotation provided by Eirtech a few days earlier, to finish off the records review for MSN 3361 (although ultimately this did not happen). Mr Clear wrote to Mr Spencer:

> "…For the 4 aircraft in the table below [including MSN 3361], Eirtech will complete the records review…To limit the man-days

> Eirtech suggested the lessors first close out the OIL, and then the reps can come back in. Can you contact…AerCap…
>
> […]
>
> …I discussed this with Karsten, and according to him the decision from MOL [Michael O'Leary] was not to send any staff to rep the checks…KM was very specific that the records review for the aircraft near completion should continue using the current inspectors."

"Karsten" and "KM" referred to Mr Muhlenfeld, Ryanair's Director of Maintenance & Engineering.

97. On 6 April 2020, internal AerCap emails envisaged sending the Defendants a draft amendment to the leases. However, on the Defendants' side, Mr Sorahan sent an internal memorandum to Mr O'Leary that day in which he listed details relating to a number of lessors who had transacted with the Defendants, including the Claimants. The total amount of the rent payable under leases with the Claimants was listed as $1.2 million. Mr Sorahan said in the notes section of the memorandum:

> "…AerCap…will be the most impacted A320 lessor with 6 A30s [sic] delivered & 4 on the way…It may make more sense to continue cancelling undelivered A320s with AerCap…before we get into lease holidays with them."

98. In an internal AerCap email on 8 April 2020, Mr Kelly said "*we need to make sure Ryanair don't try and get out of the lease due to the walk away date*", to which Mr Merry replied "*I have already discussed with them. Legal is drafting a lease amendment to push out the walk away dates and revise the delivery dates*."

99. Around this time, the Claimants were continuing to push ahead with the technical delivery of the 2019 aircraft. Fokker remained operational and the documents suggest that progress was being made at Vallair again notwithstanding the pandemic.

100. On 15 April 2020, following on from his email on 27 March 2020, Mr Merry emailed Mr Norton attaching a draft Global Amendment Agreement. Mr Merry said:

> "Further to Neil's letter to Gus and as discussed between us, AerCap is willing to support Ryanair and Lauda during this time.
>
> We continue to spend money on these aircraft in order to prepare them for delivery to Lauda.
>
> The deferred deliveries need to be documented, something also required by Gus and I have attached a draft amendment agreement. Some of the calendar items will obviously have a few months burned as a result of this delay but we can accept the same at return."

101. The draft Global Amendment Agreement provided for amendments to the 2019 leases such that (a) the Scheduled Delivery Date for each of the 2019 aircraft would become

June 2020, and (b) the Final Delivery Date for each aircraft would become either 31 August 2020 (MSNs 3425 and 3475) or 30 September 2020 (MSNs 3361 and 3396).

102. On 17 April 2020, Fokker issued a final report and unconditional Certificate of Release to Service in respect of MSN 3361.

103. A significant event then occurred. On 20 April 2020, Mr Fritthum, Laudamotion's CFO, sent a letter to Mr Merry in the following terms, which it is necessary to quote in full:

> "As you are aware, the Covid-19 crisis has led to an unprecedented EU Government mandated grounding of the aircraft fleets of most EU airlines to stem the spread of the virus on public health grounds. Airlines across Europe are implementing unprecedented measures including bankruptcies, administration, and/or mass layoffs for the foreseeable future. No one knows when Europe's airlines will be allowed to return to service, or how much capacity will be allowed to return, or under what Government restrictions.
>
> As a result of the above, aircraft values and lease rentals have collapsed. Many airlines are defaulting on their lease obligations, and many lessors have seen a sharp decline in lease payments since this crisis erupted in March 2020.
>
> Laudamotion must respond to these market conditions by preserving cash and cutting our payment obligations to reflect the fact that we have no flights, no passengers, and no revenues for the foreseeable future. We hereby advise you that with effect from 1 April we will be reducing the monthly rental of MSN 2502,3105,3270,3131,3153 from its present rate to $150,000 per month. This reduced rental will be reflected in the next (May) rent payment, which will incorporate the April catch up.
>
> This market rate reduction is a sensible and realistic solution to the current unprecedented Covid-19 crisis and we expect, as our lessor, that you will work with us to agree this reduced rental, which will apply for the remainder of these aircraft leases. If this rent reduction is not acceptable, then we are prepared to redeliver your aircraft by agreement with immediate effect without the payment of any further monthly rentals.
>
> We also refer to the A320 aircraft that Lauda had hoped to take delivery of later this year. Since Lauda has been completely grounded since 17 March last, and will be forced to substantially downsize its operation (and future growth plans) as a direct response to the Covid-19 crisis, it is clear that Lauda cannot accept delivery of these aircraft, and accordingly, you are now free to re-market these aircraft elsewhere.

> We sincerely regret these unprecedented, emergency actions, which are a direct result of the Covid-19 crisis, which has grounded Europe's airlines from mid-March for the foreseeable future. We will continue to work with you to try to find some work for these leased aircraft at this reduced monthly rental, which will enable Lauda – unlike many other airline customers – to continue to generate monthly lease revenue for you despite the fact that these aircraft are grounded and earning no revenue for Lauda for the foreseeable future.
>
> Please confirm your agreement by return."

104. Various witnesses were asked about this letter and their reactions to it. Mr Anderson agreed that it was a "*common practice*" during Covid-19 for lessees to ask the Claimants to give up contractual rights, including requests from lessees to cancel undelivered leases, as well as to defer rent (and, he said, during the pandemic the Claimants agreed to defer rent of US$500 million from other lessees). However, Mr Anderson nonetheless said that he did not regard this particular letter as being part of a negotiation, and that it changed the temperature of the conversations. Mr Philip Scruggs (AerCap's President and Chief Commercial Officer) commented internally that *"this is the Ryanair I know and love"*. Mr Peacock described it as a "*like a bombshell*".

105. Mr Norton said the 20 April 2020 letter was *"a commercial letter that went to not just AerCap but to all of our lessors around all of the aircraft that we had, each one of them, around looking for rent reductions and then we were looking to get to a point where we could negotiate the existing leases and the delivered leases"*. He went on to give this evidence about the letter:

> "Q. At this point in time, Lauda is telling AerCap that it will not comply with its contractual obligations to accept delivery of the 2019 aircraft and pay rent under the leases when it became due, correct?
>
> A. I would clarify that it was part of a commercial letter that went to each of our lessors, not just AerCap, around trying to find a way of getting an amendment of our existing leases and also our own delivered aircraft. Because we were well aware that there was movement in the market around other airlines getting rent reductions and deferrals and non-delivery of aircraft and we were no different to anybody else, that we were looking for that solidarity from each of the lessors around it.
>
> Q. Leaving aside, I hear what you say, that this letter is written in the context of commercial negotiations but in terms of what the letter says on its face, it is telling AerCap that it will not comply with its contractual obligations to accept [the] 2019 aircraft and pay rent under the leases when it became due, correct?
>
> A. I think it is the difference between saying one thing and actually doing another and I think what it led to was we got

> engagement across the board from all of our lessors around what we needed to do around having a partnership with each of the lessors around trying to find a solution to the issues that we were dealing with.
>
> Q. I understand the distinction you point to, between telling and doing. Yes. But in terms of telling, that is what the letter is saying, isn't it?
>
> A. Yes, but in terms of what actually transpired …is that we got on a path around finding solutions with each of our lessors, except for our relationship with AerCap, on the basis that we continued to pay the rents as they fell due, granted under protest. But none of those leases went into default.
>
> Q. I understand what you are saying about what transpired and I am asking you to keep focusing on what this letter says?
>
> A. I can only talk about the facts of what actually happened. Whereas when that letter went out as a commercial letter at a point in time, the events that moved were very different."

Mr Norton thus eventually accepted (in the third answer quoted above) that the letter amounted to telling AerCap that Laudamotion would not comply with its contractual obligations to accept the 2019 aircraft and pay rent under the leases when it fell due. His answer in substance was that, whilst the Defendants were saying that, what they were seeking to achieve in practice (and did achieve with other lessors) was a consensual amendment to the lease terms. As he put it slightly later in cross-examination, he regarded it as "*part of trying to get commercial agreement and a negotiation with AerCap*".

106. Notwithstanding the 20 April letter, the Claimants continued to proceed with the delivery process for the 2019 aircraft. The documents suggest that around this time, Vallair began to open up again and further work could be performed.

107. On 22 April 2020, the Claimants replied to the 20 April letter as follows:

> "…This letter is in response to your letter to Colin Merry of AerCap dated 20 April 2020 ("20 April Letter"). While AerCap is sympathetic to the harm caused by COVID-19, we cannot accept the requests or statements made in the 20 April Letter which violate both the terms of the Lease Agreements as well as the spirit of the relationship between our companies to date.
>
> Specifically, to the extent that the 20 April Letter purports to unilaterally vary the amount of Base Rent payable under the 2018 Lease Agreements or unilaterally terminate the 2019 Lease Agreements, we remind Lessee that it has no right to do so. Lessee remains fully obligated to comply with its obligations under the Lease Agreements, including paying all amounts when due, and taking delivery of the 2019 Aircraft in accordance with,

> the Lease Agreements. Any failure by Lessee to do so will constitute an Event of Default under each Lease Agreement.
>
> Moreover, we note that there have been recent discussions and correspondence between AerCap, Guarantor and Lessee regarding a potential deferred delivery of the 2019 Aircraft in order to accommodate Lessee. These discussions culminated in a good faith proposal from AerCap in such respect. The 20 April Letter appears to reject this proposal. For the avoidance of doubt, the 2019 Aircraft will be tendered for Delivery in accordance with the 2019 Lease Agreements."

108. An internal Laudamotion document dated 22 April 2020 (i.e. the same day) said:

> "Letter received from Aercap, will not agree to unilateral rent reduction or non delivery of the 4 aircraft. Aircraft will be tendered for delivery and under the terms of the lease they will force delivery of the aircraft in accordance with the lease."

Thus it appears that the Defendants appreciated from at least 22 April 2020 that the Claimants intended to tender the 2019 aircraft for delivery, and Mr Norton accepted in cross-examination that the Defendants were aware that MSN 3361 would be tendered first, though there is no indication that the Defendants knew the date on which this would occur.

109. Mr Kelly spoke with the Defendants on the evening of 23 April, and on 24 April 2020, Mr Merry spoke with Mr Norton. Mr Kelly reported back Mr Norton's view that "*there will be a negotiation to work out a solution…. he expects that to be between Neil [Sorahan] and Gus [Kelly] rather than with me and him*".

110. On 24 April 2020, Mr Burke (AerCap's Deputy Chief Technical Officer) emailed Mr Akhrif saying:

> "We discussed with Gus [Aengus Kelly] who spoke with Ryanair last night. We are going to tender 3361 ASAP. I told Gus we can do this in 7-10 days subject to Cayman CAA …. 3361 will be shot across the bow. Plan is to tender all aircraft. This must be front and centre of all decisions we make. Keep this in mind in all comms. Talk at 2pm but get the ball rolling".

Mr Akhrif agreed in cross-examination that the reference to "*7-10 days subject to Cayman CAA*" was to the need to obtain an export certificate of airworthiness ("***ECoA***"), one of the documents required by Exhibit B § 4 of the lease.

111. On 27 April 2020, Mr Norton spoke again to Mr Merry, and suggested a rent reduction on all delivered and undelivered aircraft. Mr Anderson accepted in cross-examination that this would have meant the conversation envisaged Laudamotion accepting all four aircraft, and that internally he asked Mr Merry to draw up a spreadsheet showing the financial position if the rent were reduced.

112. On 28 April 2020, Laudamotion replied to the Claimants' letter of 22 April 2020 as follows:

> "…We welcome your acknowledgement of the difficulties that the current crisis is having on Laudamotion Gmbh ("Lauda") and your willingness to discuss ways to assist. We continue to believe, however, that the solution set out in our letter of 20 April 2020 is a sensible and realistic one given the current circumstances.
>
> On the understanding that you will engage constructively with us to deliver a mutually agreeable position by 15 May 2020, we will pay the lease rentals due on 6,7, 8th and 21st May 2020 without deduction.
>
> These payments will be made under protest and without prejudice to the position set out in my letter of 20 April 2020 and all of Lauda's legal rights and entitlements, including in relation to the leases, all of which are reserved."

113. Mr Norton's answers in cross-examination about whether Laudamotion was actually entitled to make payment under the 2018 leases optional, in the way this letter implied, sought to avoid that point in favour of arguing Ryanair's commercial case:

> "Q. The agreement to pay continuing rent on the 2018 leases is stated to be expressly conditional upon some mutually agreeable position being reached on 15 May, wasn't it?
>
> A. Yes.
>
> Q. That wasn't really an option, was it?
>
> A. As I said in terms of where we got to and where the existing leases are continuing to be in full force and effect and we continue to pay on the basis that as they fall due, we meet the payment of them.
>
> Q. So I think you would agree with me that it was not really open to make those payments conditional on anything?
>
> A. As I said, we were looking to try and find a way that we can get agreement also on the delivered aircraft where we were paying leases on.
>
> Q. I will ask you the question again. It was not open to you to make those payments conditional upon anything else, was it?
>
> A. As I said, we continued to pay those leases. We were trying to constructively work with AerCap to try and find an overall solution around the existing leases and the undelivered aircraft."

The short answer, which Mr Norton ought to have conceded, was that payment of rent under the 2018 leases was not optional. However, I accept the point that the Defendants were continuing to seek a renegotiation and (backtracking in this respect on their 20 April letter) continued to pay the 2018 lease payments in full in furtherance of that strategy.

114. Laudamotion in fact paid the rent in full under the five 2018 leases during this period, making payments on 21 April of US$200,000 (MSN 3131), 21 April of US$200,000 (MSN 3153), 6 May of US$190,000 (MSN 2502), 7 May of US$200,000 (MSN 3105) and 8 May of US$200,000 (MSN 3270).

115. On 29 April 2020, there was an internal email exchange between Mr Spencer and Mr Faust regarding the status of the 2019 aircraft (the context being that Mr Norton was looking to provide a status update to Mr O'Leary). Mr Spencer said in that exchange:

> "John Norton looking for a status of the A320s for MOL. I have expanded out the summary I did at the end of March per below
>
> I have advised him we have not been in touch with Lessors since approx.. mid-March so some aircraft may have progressed since we were last engaged in the project"

116. Mr Spencer then set out a table which described the status of the aircraft. As regards MSN 3361, it stated: "*Physical: Demo flight and BSI complete. Some minor items in cabin to be closed. Records: Review in final stages, 70% completed*."

117. Also on 29 April 2020, the Claimants replied to Laudamotion's letter of 28 April 2020:

> "…This letter is in response to your letter to Colin Merry of AerCap dated 28 April 2020 ("28 April Letter"). AerCap will continue discussions with Lessee and Guarantor regarding potential modifications to the Lease Agreements to accommodate Lessee on the following basis: (i) any such discussions will be held on a without prejudice basis; (ii) Lessors reserve all rights and remedies under the Lease Agreements, including their right to deliver each 2019 Aircraft to Lessee in accordance with the terms of the 2019 Lease Agreements; (iii) such discussions must be concluded as soon as practicable given that the 2019 Aircraft are or will shortly be ready to be delivered to Lessee; and (iv) any agreement to modify any of the Lease Agreements is conditional upon the execution of a binding agreement which documents the commercial agreement reached.
>
> With respect to the statement made in the 28 April Letter that the payment of lease rentals in May 2020 is conditional on AerCap engaging constructively with you on potential modifications to the Lease Agreements, Lessors do not agree to any such conditions being placed upon Lessee's obligations to pay Rent under the Lease Agreements…"

118. Mr Akhrif commented in an email of 30 April 2020 that "*the situation is not rosy at all similar to most of the airlines, we're still discussing the delivery of the four aircraft and trying to find a solution …*".

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119. On the morning of 1 May 2020, there was a call between Mr Norton and Mr Merry. There is no note of the conversation. Mr Merry gave his account in a witness statement, but was not called to give evidence. His evidence was the subject of a ruling I gave on 5 May 2022, during the course of trial. Briefly, the Claimants served a late hearsay notice, the week before trial, saying they would rely on his evidence as hearsay because he was overseas. They did not explain why the hearsay notice was served so late, nor whether (and, if not, why not) they had explored the possibility of his giving evidence by videolink. Counsel for the Claimants told me that Mr Merry was in Ireland (consistent with the address given in his statement), and no longer employed by or available to the Claimants.

120. I noted that as a result of the late service of the hearsay notice, the Defendants lost any real opportunity to seek Mr Merry's cooperation, or to obtain evidence from him by the formal process for taking evidence abroad (albeit in practice there may have been insufficient time for the latter anyway between the date of service of witness statements and the trial date). I concluded that Mr Merry's evidence should be admitted, and that the court could address any risk of prejudice to the Defendants by bearing very much in mind when assessing its weight the unsatisfactory manner in which it had been put forward, and the absence of explanation for either the lateness of the hearsay notice or for the lack of any arrangements to take Mr Merry's evidence by videolink. I noted that under section 4 of the Civil Evidence Act 1995, the factors relevant to the weight placed on any hearsay evidence admitted include whether it would have been reasonable and practicable for the party to call the witness, and whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

121. The account given in Mr Merry's witness statement of the 1 May 2020 conversation was that, following the parties' letters of 20 and 22 April, *"there were further telephone discussions between Mr Norton and me including a call on the morning of 1 May 2020, during which it was clear that no agreement on an amendment of the 2019 Leases was going to be reached in the short term."*

122. Mr Norton did not mention this conversation in his witness statement. In cross-examination, he said he remembered the call, and gave this evidence:

> "Q. I suggest to you that the call on 1 May was a final attempt by AerCap to reach a sensible compromise; yes?
>
> A. I think that phone call that happened was that Colin expressly asked me how we were getting on with the other lessors and he seemed to have a particular focus of GECAS in terms of have we anything agreed with them and I said to him that, well, things have moved forward significantly since we last talked on the basis that we had one lessor in particular that asked us for a short deferral on the basis that they were going to come back with a

fully comprehensive solution that they believed was going to work quite well for us. And it seemed to change the whole conversation.

Q. If we go to {B/5/4}, this is Mr Merry's statement. And at paragraph 18, we see he refers to various letters that we have been looking at. And then says:

> "Following these letters, there were further telephone conversations between Mr Norton and me including a call on the morning of 1 May 2020 during which it was clear that no agreement on an amendment on the 2019 leases was going to be reached in the short-term."

That is an accurate description of what happened on the call, isn't it?

A. It is accurate on the basis that we had, as I said, made significant progress with the other lessors around rent deferrals and rent reductions and that way was the progress that we were moving towards around our negotiations with AerCap. And obviously trying to find a solution on the 2019 leases.

Q. But Mr Merry was right to conclude, wasn't he, that there was unlikely to be an agreement on amending the 2019 leases in the short-term?

A. I would say that we had stated to him in terms of where we were with everybody else and what we had asked him to do is to consider that based on we were seeing solidarity from our other relationships and that we were hoping that he was going to take it away internally and see if we could get to a common position with everybody.

Q. So you wanted AerCap to go down the same route as other lessors?

A. That is where the path forward was seemingly tracking with everybody.

Q. You wanted AerCap to reach the same point?

A. It would be helpful for us around meeting the business in terms of what we were experiencing if we could get everybody working together to find the right solution.

Q. But it is right to say that AerCap had proposed deferrals of the scheduled delivery dates and the final delivery dates in relation to all four aircraft?

A. Yes and I think as I said, we had proposed to AerCap around the reductions of the rent around the existing leases and then also

> a rent reduction on the undelivered aircraft as a way forward of getting a solution because that is what the way was tracking with our other leasing arrangements.
>
> Q. And that is what you were asking for on 1 May?
>
> A. Yes."

I find that a broadly plausible explanation of the conversation, in the context of the dealings between the parties shown by the contemporary documents, and also not necessarily inconsistent with the statement in Mr Merry's witness statement that he concluded no deal would be reached in the short term (depending on what Mr Merry meant by the 'short term'). In simple terms, the Claimants were willing to discuss lease deferrals, but the Defendants were also hoping to achieve rent reductions as, they said, they were achieving with other lessors.

123. Later that day, 1 May 2020, Mr Peacock emailed Mr Norton a notice designating 7 May 2020 as the Scheduled Delivery Date for MSN 3361. Mr Peacock's evidence, which was not challenged in cross-examination, was that he sent the email and did not receive an error message. Mr Norton said he did not recall receiving the email, though he believed he would have remembered it, and could not find it when he later checked his email inbox. That evidence was also unchallenged. The Claimants also called Mr Murnin, one of their IT Service Desk Analysts, who caused a check to be made, by AerCap's service provider, of AerCap's exchange server log, in order to find out whether the email had left AerCap's server. Mr Murnin in his statement said the result was that the email had left the server (and no non-delivery receipt had been received). However, in his oral evidence Mr Murnin accepted that he did not have personal experience of interpreting server logs of this kind, and that on closer examination it appeared that the logs produced did not show that the email had actually left AerCap's server.

124. I have some doubt as to whether a notice clause such as Article 25, quoted earlier, referring to "*the time the sender sends such e-mail*", is intended to require the sender of the notice to adduce technical evidence at this level of detail in order to prove the sending of the email – as opposed to the simple statement of the sender supported by production of the relevant part of his/her list of sent emails – save perhaps where there is some specific technical reason to believe that a malfunction occurred. However, given the state of the evidence as it emerged in the present case, I do not consider the Claimants to have established that the email was in fact delivered to Ryanair at about 5.51pm on 1 May 2020. For the reasons set out later, though, it makes no difference in my view whether the notice was received on the late afternoon of Friday 1 May (as Claimants allege) or on Tuesday 5 May (when a hard copy was delivered by courier), particularly bearing in mind that Friday 1 May was a holiday in Austria and Monday 4 May a holiday in Ireland.

125. It is not clear why, following the Claimants' internal decision on 24 April 2020 to tender 3361 "ASAP", the notice was not sent until 1 May (by when the ECoA and other Exhibit B § 4 documents remained outstanding), and the Claimants' witnesses were unable to shed any light on that point.

126. At 9.18am on Thursday 7 May 2020, Peregrine tendered MSN 3361 for delivery at Fokker's premises, stating:

> "upon tender of the Aircraft by LESSOR to LESSEE in accordance with the Lease Agreement, LESSEE is obligated to accept the Aircraft and the date of tender by LESSOR to LESSEE will be deemed to be the Delivery Date for all purposes under the Lease Agreement, including the commencement of LESSEE's obligation to pay Rent thereunder".

127. Laudamotion responded by way of a letter sent later that day. They said:

> "Clause 3.2 of the Lease Agreement requires the Lessor to do three things:
>
> (a) notify the Lessee from time to time and in a timely manner of the exact date on which the Lessor expects Delivery to take place;
>
> (b) consult with Lessee prior to making a determination as to such date; and
>
> (c) provide reasonable notice of such date.
>
> The Lessor has failed to do all three things.
>
> In reality, there has been no engagement from AerCap, the Lessor and their respective teams in relation to the delivery process for this Aircraft for a number of weeks with no recent contact whatsoever with the Lauda/ team in relation to the technical acceptance and Delivery process.
>
> The Lessor has therefore breached all of its obligations under Clause 3.2 of the Lease Agreement and we reserve all of our rights at law and under the Lease Agreement in relation to such breach.
>
> We also consider AerCap's lack of engagement and communication and attention in respect of its material obligations to be unreasonable and we reserve all rights in relation to such unreasonable behaviour.
>
> Further, and without prejudice to all of our rights at law and under the documents, Clause 7.4.8 of the Lease Agreement requires the Aircraft to conform to the condition set forth in Exhibit B thereto. Exhibit B sets out various requirements that must be complied with before Delivery can occur. These conditions have not been satisfied by the Lessor. In particular, without limitation, we refer to Article 1 (Technical Report), Article 2 (Full Aircraft Documentation Review), Article 3 (Aircraft Inspection) and Article 4 (Certificate of Airworthiness

> Matters) of such Exhibit B, none of which have been complied with by the Lessor as required by the Lease Agreement.
>
> Arising from the foregoing, Lauda does not consider that it has been validly notified of the Scheduled Delivery Date, as required pursuant to the Lease Agreement, and will not be taking delivery of the Aircraft on 7 May 2020 as requested, and accordingly, we dispute that any Event of Default or obligation to pay Base Rent pursuant to the terms of Clause 6.5 (Delay or Failure in Acceptance) of the Lease Agreement arises or could arise.
>
> Furthermore, we maintain the position outlined in our most recent letter to you - namely that the current crisis, which has led to the grounding of airlines, including Lauda, with no certainty in relation to when, if ever, normal service will resume, is clearly unprecedented. In this regard, we would note Norwegian Air's rescue plan whereby aircraft lessors (actively led by AerCap) have agreed to a debt-for-equity swap alongside bondholders, which bears clear testimony to this. The current crisis has radically changed the commercial and legal position since the time the Lease Agreement and those lease agreements in respect of three additional Airbus A320-200 aircraft (namely MSNs 3425, 3475 & 3396) (together with the Lease Agreement, the "AerCap Lease Agreements") were entered into, in ways that were not and could not have been contemplated by the parties. Accordingly, and without prejudice to all of the above and to all of our rights at law, we take the view that the Covid-19 crisis is an unforeseeable change in circumstances, not contemplated by the parties or within their control and has made performance of the AerCap Lease Agreements impossible or radically different from that contemplated by the parties when they entered them, all of which would render the AerCap Lease Agreements void."

128. Peregrine sent a response on 8 May 2020 stating that it had addressed all issues raised by Laudamotion, that the aircraft had been available for inspection since late March, and that "*all Certificate of Airworthiness matters have been addressed save where such matters are entirely in your hands*". It is unclear what that final phrase meant, given that the Exhibit B § 4 documents had not been provided and did not require Laudamotion's involvement (as shown by the fact that the Claimants were subsequently able to obtain them without such involvement).

129. The ECoA was issued on 12 May 2020, and the CAT IDE statement and EASA compliance letters (which were the other Exhibit B § 4 documents) were available on 13 May 2020. However, the Claimants did not present any of these documents to the Defendants (by way of correction of a demonstrated Material Deviation pursuant to Article 6.2, or otherwise).

130. On 15 May 2020, the Claimants wrote a series of letters terminating the lease in respect of MSN 3361, terminating the leases in respect of the other three aircraft under the cross-default provisions, making demand under the indemnification provisions in the

leases, and making demand of Ryanair as guarantor. Letters before action were subsequently sent to the Defendants on 25 May 2020.

131. Laudamotion by a letter of 21 May 2020 treated the Claimants' letters of 15 May as repudiatory and accepted them as bringing the leases to an end. As a fallback, Laudamotion wrote letters on 19 June and 2 July 2020 terminating the leases (if still extant) for having passed their respective Final Delivery Dates without delivery of the aircraft.

(8) Technical status of the 2019 aircraft following termination

132. The Claimants' evidence is that, following the termination of the 2019 leases on 15 May 2020, their strategy shifted. It made no sense for the Claimants to continue to press ahead at full speed with the technical redelivery of the aircraft from Flynas, because there was no new lessee to which they could be delivered. Prior to the termination, the Claimants say, they had gone to great lengths to progress the deliveries, including by escalating issues to Flynas senior executives, taking carriage of tasks such as borescope inspections if Flynas were delaying unduly, making payments on Flynas' behalf to the MROs, and ordering and paying for parts. By contrast, following the termination of the Laudamotion leases, the Claimants say they allowed Flynas to dictate the pace. The Defendants challenge that evidence, and I address this matter in section (H)(2) below.

133. In any event, following the 15 May 2020 termination notice, the actual dates of key stages in relation to the second, third and fourth aircraft were these:

i) As regards MSN 3396 (Final Delivery Date 30 June 2020):

a) On 10 June 2020, Fokker issued a Certificate of Release to Service and the demo flight was completed.

b) On 15-16 June 2020, the engine and APU (auxiliary power unit) borescopes were completed.

c) On 27 July 2020, the Export Certificate of Airworthiness was issued.

ii) As regards MSN 3425 (Final Delivery Date 31 May 2020):

a) On 28 May 2020, Vallair issued a Certificate of Release to Service.

b) On 29 May 2020, the demo flight was completed.

c) On 2-3 June 2020, the engine and APU borescopes were completed.

d) On 21 July 2020, the Export Certificate of Airworthiness was issued.

iii) As regards MSN 3475 (Final Delivery Date 30 June 2020):

a) Around 27 October 2020, the demo flight was completed.

b) Around 6 November 2020, the engine borescopes were completed.

c) On 10 November 2020, the Export Certificate of Airworthiness was issued.

(9) SmartLynx leases

134. The Claimants sought to remarket the four aircraft from mid-2020, ultimately resulting in leases to SmartLynx, an ACMI (aircraft, crew, maintenance, insurance) operator, dated 8 March 2021.

135. The term of those leases ends in February 2026, later than the last possible end date of the Laudamotion leases. The leases are on "power-by-the hour" or "PBH" terms, under which the lessee pays base rent and maintenance rent based on utilisation. Whilst the lessee is required to maintain the aircraft (Article 12), the lessor is required to make what are called "contributions" to the cost of certain maintenance events (Article 13). I consider these leases further in section (I)(2) below.

(F) WERE CLAIMANTS ENTITLED TO TERMINATE UNDER ART. 24.2(N)?

(1) Meaning of Article 24.2(n)

136. The Claimants submit that the Defendants' letters of 18 March 2020 and 20 April 2020 threatened to suspend payment of some of Laudamotion's debts or other payment obligations, entitling the Claimants to terminate each of the leases on the ground of an Event of Default under § 24.2(n) of the lease:

> "24.2 **Events of Default.** The occurrence of any of the following will constitute an Event of Default and material repudiatory breach of this Lease by LESSEE:
>
> …
>
> (n) Insolvency. LESSEE or Guarantor
>
> (i) is or becomes, or is deemed for the purposes of any Law to be, insolvent or unable to pay its debts or other obligations as they fall due, or admits its inability to pay its debts or other obligations as they fall due,
>
> (ii) suspends or threatens in writing to suspend payment with respect to all or any of its debts or other payment obligations or a moratorium is declared in respect of all or any of LESSEE's or Guarantor's debts or other payment obligations or
>
> (iii) proposes, enters into or is a party to any proceeding regarding (or takes any corporate action to authorize or facilitate) any arrangement or composition with, or any assignment for the benefit of, its creditors"
>
> (paragraph breaks interpolated)

137. If such an event occurs before delivery of the aircraft, it gives the Lessor the termination right provided for in § 24.3(a):

> "24.3 … Upon the occurrence of any Event of Default and so long as the same shall be continuing, LESSOR may do all or any of the following at its option …:
>
> (a) … by written notice to LESSEE, terminate LESSEE's right to lease the Aircraft and terminate LESSOR's obligations hereunder (but without prejudice to the indemnity obligations and any continuing obligations of LESSEE under this Lease and any other Operative Document, including the obligations set forth in Articles 15 and 16)"

138. Articles 15 and 16 contain detailed provisions requiring the Lessee to pay and indemnify the Lessor against taxes relating to the aircraft and its use. Both articles contain "survival of obligations" clauses providing that the obligations they set out will continue in full force and effect notwithstanding (*inter alia*) the termination of the leasing of the aircraft under the lease or the cancellation or repudiation by the Lessor or Lessee of the lease.

139. If an Event of Default occurs after delivery of the aircraft, then the Lessor's corresponding right is usually, by written notice pursuant to Article 24.3(b), to terminate the leasing of the aircraft, with the result that the Lessee's right to possess and operate it immediately ceases. However, the proviso to Article 24.3(b) means that where the Event of Default occurs under Article 24.2(n) ("*Insolvency*"), 24.2(o) ("*Voluntary Bankruptcy*") or 24.(p) ("*Involuntary Bankruptcy*"), then termination occurs "*automatically and with immediate effect without any notice or further action from LESSOR*".

140. As to the scope of § 24.2(n), the Claimants submit that it is not confined to insolvency or similar situations:

i) The heading "*Insolvency*" at the start of the clause is not an aid to construction of the substantive part, because Article 27.15 provides that "*All article and paragraph headings and captions are purely for convenience and will not affect the interpretation of this Lease*."

ii) Article 24.2(n) as a whole is not confined to insolvency situations. One of the triggers in (iii) is an "*arrangement*". That covers both schemes of arrangement under Part 26 of the Companies Act 2006 and a CVA under Part I of the Insolvency Act 1986 (and analogous proceedings abroad). Neither of these requires the company to be insolvent: a scheme of arrangement may be sanctioned in respect of a solvent company (see Palmer, "*Company Law*", § 12.017) and a CVA can involve a solvent company (see Sealy & Millman, "Annotated Guide to the Insolvency Legislation" (24th ed), notes to IA 1986, Part I: *"It is not a prerequisite for the application of this Part of the Act that the company should be "insolvent" or "unable to pay its debts" within the statutory definitions of those terms."*)

iii) Proper weight must be given to the structure of the clause, which involves three distinct species of Event of Default:

a) Limb (i) deals with insolvency in the technical sense.

b) Limb (ii) deals with two things: (1) suspension, or threat of suspension, of payment; and (2) a "*moratorium*". The reference to a "*moratorium*" cannot be to the procedure now in Part A1 of the Insolvency Act 1986, because that was inserted by the Corporate Insolvency and Governance Act 2020. It is presumably intended to cover procedures such as the US Chapter 11 bankruptcy procedure.

c) Limb (iii) deals with "*any arrangement or composition with, or any assignment for the benefit of, its creditors*". As noted above, whilst this class of events may involve insolvency in the technical sense, it does not necessarily do so.

There is, in view of this structure, no reason to read down the words in Article 24.2(n) limb (ii) so that they only apply in a situation of insolvency.

iv) Article 24.2(n) is followed by two provisions ((o) and (p)) addressing "*Voluntary Bankruptcy*" and "*Involuntary Bankruptcy*", so it is not the only Event of Default potentially applicable in an insolvency situation.

v) The words "*suspends or threatens in writing to suspend…*" should be given their natural meaning. They serve an obvious commercial purpose and there is no reason to read them down. The Claimants refer to the statement of the Supreme Court in *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33 (in the context of a planning case) that:

> "In summary, whatever the legal character of the document in question, the starting point, and usually the end point, is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense." (§ 19)

vi) The Claimants accept that § 24.2(n) is directed at more general suspensions/threats of suspension of payments than particular payments under a particular contract; they say it is aimed at indicators of financial difficulties, which may or may not be a prelude to more formal insolvency-type events. However, the words "all or any" indicate that it is unnecessary for the suspension or threat to relate to the Lessee's debts as a whole: it is sufficient that it relates to a category of them, such as aircraft lease payments.

vii) The opening words of Article 24.3, referring to what the Lessor "may" do "at its option", mean that the Lessor is entitled to elect not to rely on the lease having automatically terminated, or to affirm the lease. (For example, the Claimants did not rely on automatic termination of the 2018 leases.) There is no need to restrict the meaning of § 24.2(n) by reason of the fact that, post delivery of an aircraft, it can operate automatically.

141. In construing Article 24.2(n), it is appropriate to apply the ordinary principles of contractual interpretation, of which the brief statement quoted above from the *Lambert* case may be regarded as a reflection. In short form the principles may be summarised (so far as relevant to the present case) as follows:

i) The task is to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean. The court does this by focussing on the meaning of the relevant words in their documentary, factual and commercial context. The meaning has to be assessed in the light of (a) the natural and ordinary meaning of the clause, (b) any other relevant provisions of the contract, (c) the overall purpose of the clause and the contract, (d) the facts and circumstances known or assumed by the parties at the time that the contract was made, and (e) commercial common sense, but disregarding subjective evidence of any party's intentions. (*Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, § 15).

ii) The court has to ascertain the objective meaning of the language used, within the context of the contract as a whole and, depending on the nature, formality, and quality of the contract, give more or less weight to the wider context in reaching a view on objective meaning (*Wood v Capita Insurance Services* [2017] UKSC 24 § 10).

iii) The unitary exercise of construction is an iterative process by which rival constructions are checked against the provision of the contract, business common sense, and their commercial consequences. It does not matter whether the court's analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each. However, the extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement. Sophisticated and complex agreements or those negotiated and prepared with the assistance of skilled professionals should be interpreted principally by textual analysis (*Wood v Capita* §§ 11-13).

iv) Subsequent conduct and contracts are generally inadmissible as an aid to construction: see Lewison, *"The Interpretation of Contracts"* §§ 3.183-3.187, and *Hyundai Merchant Marine Co Ltd v Daelim Corp* [2012] 1 Lloyd's Rep 211: *"reliance on a subsequent contract to construe a written contract is, to say the least, a heretical approach to construction… The inadmissibility of a subsequent contract as an aid to construction of a written contract is merely one aspect of the general principle of English contract law that… the subsequent conduct of the parties cannot be looked at to interpret a written contract… It seems to me that the principle that the subsequent contract is inadmissible is equally applicable whether it is made the following day or long after."* (§ 13)

142. Turning to the contract in the present case, in addition to the provision regarding clause headings referred to above, Article 27.17 addresses how the lease is to be construed:

> "This Lease and the other Operative Documents are the result of negotiations between LESSEE and LESSOR and are the product of both parties. Accordingly this Lease and the other Operative Documents or any uncertainty or ambiguity in any such agreements will be interpreted to fairly accomplish the purposes and intentions of LESSEE and LESSOR and will not be

> construed or resolved against LESSOR merely because of LESSOR's involvement in the preparation of this Lease and the other Operative Documents, regardless of any rule of construction."

143. It is logical, first, to consider the contents of § 24.2(n) as a whole. As the Claimants point out, only limb (i) necessarily relates to situations of actual insolvency. However, other parts of the clause are also directed at events which typically, even if not always, arise in situations where a company's creditors in general are at risk of being left unpaid, or at least at risk of an alteration in their rights.

144. Thus, in limb (ii) (which includes the suspension of payment provision on which the Claimants rely), the Claimants note that "*moratorium*" seems to be directed at procedures such as Chapter 11 of the US Bankruptcy Code, which provides for the reorganisation of an insolvent company's affairs, debts and assets. Suspension of payment is itself, as the Defendants point out, a familiar concept in insolvency law. Under section 1(h) of the Bankruptcy Act 1914, *"[a] debtor commits an act of bankruptcy… if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend payment of his debts*". The Defendants cite the further example of the Dutch law insolvency regime of suspension of payment ("*surseance van betaling*").

145. In limb (iii), the words "*any proceeding regarding… any arrangement or composition with… its creditors*" are most naturally read as covering "arrangements with" creditors such as a Creditor Voluntary Arrangement under Part I of the Insolvency Act 1986 (and analogous proceedings abroad), though it is possible that they would also cover a scheme of arrangement. It is possible to have an English scheme of arrangement in relation to a solvent company, but this was described as "relatively rare" in *Re Equitable Life Assurance Co* [2019] EWHC 3336 (Ch) (where the scheme was addressing the emergence of an investment category "*which can properly be described as an unfair distribution of capital among remaining policyholders*" (§39)). Even then, a scheme of arrangement brings about a compulsory and collective alteration of creditors' rights. Moreover, the word "arrangement" is used in the same phrase as "composition", a concept entailing curtailment of creditors' rights.

146. A further link to insolvency is that the proviso to Article 24.3(b), applicable where the aircraft has been delivered, means that an Event of Default under Article 24.2(n) ("*Insolvency*"), 24.2(o) ("*Voluntary Bankruptcy*") or 24.2(p) ("*Involuntary Bankruptcy*") terminates the leasing "*automatically and with immediate effect without any notice or further action from LESSOR*". There is good reason from a lessor's point of view for termination to be automatic in insolvency situations, given the laws in various jurisdictions restricting the exercise of creditors' contractual rights in insolvency. In the US Bankruptcy Code, for example, Chapter 11 § 365 provides that:

> "(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on— (A) the insolvency or financial

> condition of the debtor at any time before the closing of the case; (B) the commencement of a case under this title; or (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement".

In Canada section 34 of the Companies Creditors Arrangement Act 1985 provides:

> "(1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent. (2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

In Australia, where a compromise or arrangement is proposed between a company and its creditors under section 411 of the Corporations Act 2001, section 415D imposes a stay on enforcing rights when there is an announcement that the company will be making an application under section 411, or an application is made under section 411 or the compromise or arrangement is approved. One effect of the restriction is that a right to terminate a contract will not be enforceable to the extent that those rights are triggered by the body becoming the subject of such an announcement, application, compromise or arrangement.

147. None of these considerations means that the phrase "*suspends or threatens in writing to suspend payment with respect to all or any of its debts or other payment obligations*" in Article 24.2(n) is necessarily confined to situations where the lessor is actually insolvent or about to become insolvent. It may, as the Claimants suggest, cover events indicating financial difficulties that will not necessarily lead to more formal insolvency-type events. However, read in context, the provision is evidently intended to cover only some form of general suspension (actual or threatened) of payments, with the potential to lead to alteration or curtailment of recoveries by the Lessee's creditors in general or at least a category of them.

148. In addition, both the context and the language "*its debts or other payment obligations*" suggest that the phrase concerns actual or threatened non-payment of debts/payments obligations that (a) actually exist (even if they have not yet fallen due for payment), i.e. are not merely contingent, and (b) are not seriously disputed. By way of loose analogy as regards point (b), the court will not wind a company up where the petition relies on a debt that is disputed in good faith on substantial grounds (see, e.g., Goode, "*Principles of Insolvency Law*" (5th ed.) § 5-12; Fletcher, "*The Law of Insolvency*" (5th ed.) § 20-015; Totty, Moss & Segal, "*Insolvency*", § D1-74). Situations where the parties are genuinely at odds over the existence of a liability are not in my view part of the province of § 24.2(n).

149. A second relevant factor is the relationship between Article 24.2(n) and other parts of Article 24.2. In particular, failure to take delivery, non-payment and breach of contract

in general are addressed by Articles 24.2(a), (b) and (f), which for ease of reference I reproduce below:

> "(a) Delivery. LESSEE fails to take delivery of the Aircraft when obligated to do so under the terms of this Lease and such failure continues for 5 Business Days;"
>
> "(b) Non-Payment. (i) LESSEE fails to make a payment of Basic Rent or Agreed Value within five Business Days after the same has become due or (ii) LESSEE fails to make a payment of any other amount due under this Lease or any of the other Operative Documents (including amounts expressed to be payable on demand) after the same has become due and such failure continues for seven Business Days;"
>
> …
>
> "(f) Breach. LESSEE fails to perform or observe any other covenant or obligation to be performed or observed by LESSEE under this Lease or any other Operative Document, which failure is not cured within 21 days after written notice thereof to LESSEE, provided that, if such failure cannot by its nature be cured within 21 days, LESSEE will have the reasonable number of days necessary to cure such failure (not to exceed a period of 30 days) so long as LESSEE uses diligent and all reasonable efforts to do so;"

150. It would be strange if a threat not to accept delivery of an aircraft could in itself be an Event of Default under Article 24.2(n) when an actual failure to accept delivery would be such an Event only if it continued for 5 Business Days. Similarly, it would be strange if a threat not to make a particular payment could be an Event of Default under Article 24.2(n) when an actual failure to pay would be such an Event only if it continued for 7 Business Days. (I note in the latter context that the words "*all or any of its debts or payment obligations*" are not on their face confined to debts/payment obligations in the plural.) Further, if the actual non-acceptance of delivery or actual non-payment of a particular debt were an Event of Default under Article 24.2(n), then that would also cut across the scheme of Articles 24.2(a) and (b), which is to provide grace periods. *A fortiori*, it would cut across the scheme if an Event of Default could arise from a mere threat not to pay a particular future debt or debts, especially one that remained contingent.

151. A third consideration is the automatic operation of Articles 24.2(n) and 24.3(b) in cases where the aircraft has been delivered. Although MSN 3361 had not been delivered in the present case, it is unlikely that Article 24.2(n) has a different meaning depending on whether the aircraft has been delivered or not. The dramatic effect of automatic termination is relevant in considering how broadly Article 24.2(n) should be construed. On the Claimants' case, for example, the Defendants' letter of 18 March 2020 resulted in the automatic termination of the 2018 leases, even though that does not appear to have occurred to anyone at the time, and even though in due course the Defendants in fact made (and the Claimants accepted) rental payments under them. Among other things, this underlines the point made in the preceding paragraph about the relationship

between § 24.2(n) and §§ 24.2(b) and (f). It would be particularly odd if failing to make a payment, or threating to fail to pay it, resulted in automatic termination, when the parties have in fact specifically agreed a form of grace period. The possibility of a Lessor deciding not to 'rely on' termination having occurred (presumably involving, legally, some kind of novation) does not in my view affect these points.

152. These considerations taken together indicate, in my view, that the relevant part of Article 24.2(n) should not be broadly construed, and applies only where there is a clear and unequivocal suspension of payments or threat to suspend payments, which relates to the Lessee's debts in general (or at least a category of them), indicative of financial difficulties carrying a risk of insolvency or other curtailment of creditors' rights, and where the debts are existing (not merely contingent) and are not disputed in good faith on substantial grounds. Further, it is clear from Article 24.3 that the suspension or threat must still be continuing at the time of termination (where termination is not automatic).

(2) Application to present case

153. The Claimants submit that there was a sufficient threat to suspend payments because:

i) Ryanair's 18 March 2020 letter was a statement of unilateral intent, not a mere proposal for discussion. It was a statement of Laudamotion's then-present intention and therefore a "threat" as to future action.

ii) It is irrelevant that the Claimants thereafter discussed a commercial resolution with Ryanair which would have taken the form of a Global Amendment Agreement.

iii) The fact that the threat was merely to defer the start date of the Leases makes no difference. The contractual obligation on the part of the Lessee was to start paying rent from a date shortly before the Scheduled Delivery Date (see Article 5.2.2). What Laudamotion was threatening to do was not to pay what was due when it was due. This may be illustrated by the case of MSN 3425. The Final Delivery Date was (Sunday) 31 May 2020. Three Business Days before that was 27 May 2020. Thus Laudamotion's obligation was to pay the first instalment of Base Rent of $180,000 at the latest on 27 May 2020. Its letter was an absolute statement that it would not pay that sum when due.

iv) The 20 April 2020 letter was also a threat not to pay monies when they fell due, and did not amount to a mere proposal. In respect of the 2018 aircraft, Laudamotion was unequivocally stating that it would not continue to pay what was contractually due each month. In respect of the 2019 aircraft, it was a categorical statement that Laudamotion would not take delivery at any time. That was necessarily a statement that Laudamotion would not pay what was due by way of rent, both before and after the Scheduled Delivery Date. The concluding words "*Please confirm your agreement*" cannot be said to convert a unilateral statement of intent into any sort of meaningful proposal. No rational commercial party would be expected to agree to a "proposal" to extinguish all its rights in relation to the 2019 leases (more so in the context of the total collapse of the relevant market).

v) There was in the present case a threat to suspend payments in general, or at least aircraft lease payments in general. The Defendants' letters set out their approach to their lessors in general, not only the Claimants, and Mr Norton said in evidence that the 20 April letter was "*a commercial letter that went to not just AerCap but to all of our lessors around all of the aircraft that we had, each one of them, around looking for rent reductions and then we were looking to get to a point where we could negotiate the existing leases and the delivered leases*" and "*part of a commercial letter that went to each of our lessors, not just AerCap, around trying to find a way of getting an amendment of our existing leases and also our own delivered aircraft"*.

vi) The Claimants' further correspondence before terminating did not waive their rights to do so. Article 27.10 provides that:

> "The rights of LESSOR hereunder are cumulative, not exclusive, may be exercised as often as the LESSOR considers appropriate and are in addition to its rights under general Law. The rights of LESSOR are not capable of being waived or amended except by an express waiver or amendment in writing. Any failure to exercise or any delay in exercising any of such LESSOR's rights will not operate as a waiver or amendment of that or any other such right. Any defective or partial exercise of any rights of LESSOR will not preclude any other or further exercise of that or any other such right and no act or course of conduct or negotiation on LESSOR's part or on its behalf will in any way preclude LESSOR from exercising any such right or constitute a suspension or any amendment of any such right."

vii) The Claimants accepted that such a clause would not prevent affirmation of the lease, and said they had done so in relation to the 2018 leases. The Court of Appeal in *Tele2 International Card Company v Post Office* [2009] EWCA Civ 9 held that a similarly worded clause could not prevent the fact of an election to abandon a right to terminate from existing: the general law demands that a party who has a contractual right to terminate a contract must elect whether or not to do so. At most, the clause emphasised the requirement that election to abandon a right requires a clear and unequivocal communication of an election to abandon the right to terminate and to continue the contract. The continued performance of the contract, without any protest regarding the breach giving rise to the right to terminate and without any reservation of rights, was such an election.

viii) Nonetheless, the Claimants were entitled, before terminating, to a 'grace period' during which they called on the Defendants to perform their obligation (see, e.g., *Yukong Line v Rendsburg Investments* [1996] 2 Lloyd's Rep. 604, 608, albeit that case was not cited before me). That is all the Claimants were doing in the period between the Defendants' letters of 18 March and 20 April 2020, and the Claimants' termination notice on 15 May 2020.

154. I am unable to accept those submissions.

155. First, on a point of detail, Article 5.2.2 provides that the first payment of Base Rent will be paid no later than three Business Days before the Scheduled Delivery Date. That date is defined in Article 1.2 (for MSN 3361) as "*a date falling during March 2020 … as advised by Lessor in writing …*", and in Article 3.2 (quoted earlier). It thus presupposes a Scheduled Delivery Date having been validly identified by the Lessor pursuant to Article 3.2. § 7.2.1 goes on to provide that *"[o]n the Delivery Date"* (my emphasis), the Lessee will pay to Lessor the first instalment of Base Rent "*in accordance with Article 5.2.2*". There is a tension between these provisions as regards the date for payment. However, it is clear that an obligation to make the first Base Rent payment can arise only after the Lessor has at least complied with Article 3.2. Further, it is arguable that, in the light of § 7.2.1, no rent obligation would in fact arise unless and until the Lessor made a contractually valid tender of the aircraft.

156. Secondly, Ryanair's 18 March 2020 letter advised that Laudamotion was deferring or postponing taking delivery of the 2019 aircraft, i.e. complying with four particular leases, for a period anticipated to be a few months. That carried the implication that Laudamotion would also not pay rent instalments when they contingently fell due: 'contingently' since rent would begin to fall due only if the Claimants (at least) validly fixed a Scheduled Delivery Date in compliance with Article 3. It remained to be seen whether that would happen. The letter said nothing about Laudamotion's position in relation to other lessors. Thus so far as payments were concerned, it went no further than to imply that Laudamotion would defer payment of certain specific contingent future obligations to pay rent. That was not sufficient in my view to trigger the relevant part of Article 24.2(n).

157. Thirdly, following Ryanair's letter of 18 May 2020, the Claimants did not purport to terminate the leases for almost two months. In the meantime, they took various steps that went beyond simply calling on Laudamotion to perform its obligations. The Claimants' communications of 23 and 27 March and 15 April 2020, far from demanding that Laudamotion must accept the aircraft on the Scheduled Delivery Dates as and when notified by the Claimants, indicated a willingness to reach an agreement to defer the lease start dates in the way Ryanair's letter had indicated. In due course, Peregrine went on to purport to tender MSN 3361 for delivery under its lease. By those actions, the Claimants in my view affirmed the leases.

158. Fourthly, the 20 April 2020 letter indicated that Laudamotion would make a unilateral rent reduction in relation to the 2018 leases, under which Laudamotion did have existing undisputed payment obligations falling due from time to time. However:

    i) The letter was not wholly unequivocal about those payments. Although some of the language indicated that Laudamotion was determined to make these reductions, the relevant paragraphs also indicated a wish to "*work with us to agree this reduced rental*", and ended by seeking confirmation of AerCap's agreement. The sentence about redelivering the aircraft if the rent reductions were not acceptable indicated that Laudamotion was "prepared" to do so "by agreement", but did not state in terms that Laudamotion would necessarily take the unilateral step of walking away from the 2018 leases.

    ii) The letter did not say that Laudamotion would be implementing rent reductions in relation to all its existing leases, still less that it was suspending payment of its debts more generally. It is true that Mr Norton said in evidence that a letter

in such terms was being sent to all Laudamotion's other lessors, but (leaving aside the fact that the Claimants' had no knowledge of that at the time) all the letter said was that Laudamotion needed to respond by "*preserving cash and cutting out payment obligations*". There is no evidence in the letter, or from Mr Norton, about precisely what approach Laudamotion was taking to other lessors, including its stance with other lessors as regards the need to reach agreement on a case by case basis before reducing or postponing rental payments.

iii) By the date of purported termination, 15 May 2020, any threat in relation to the 2018 leases was much attenuated and still less unequivocal. Laudamotion had in fact continued paying the rent in full. It is true that it purported to do so only *"[o]n the understanding that you will engage constructively with us to deliver a mutually agreeable position by 15 May 2020"*, but (a) that was an obviously commercial posture, far too vague to have been considered a purported legal condition, and (b) after the Claimants on 29 April rejected Laudamotion's purported precondition, Laudamotion nonetheless continued to pay rent in full on 6, 7 and 8 May 2020.

159. Fifthly, as to the position taken in the 20 April letter about the 2019 leases, any obligations to pay rent amounted to certain specific contingent future obligations to pay rent. The letter did not contain a threat to suspend payments of accrued debts/obligations, nor of Laudamotion's aircraft lease obligations more generally.

160. Sixthly, the request for agreement at the end of the letter introduced an element of equivocation. Moreover, although the statements made in the letter were not later expressly withdrawn, the letter has to be read in the light of subsequent communications between the parties. The discussions on 23, 24 and 27 April 2020 indicate that both parties' actual position was one of looking for a consensual resolution, in particular a possible rent reduction on all delivered and undelivered aircraft. Laudamotion's letter of 28 April, whilst referring to Laudamotion's "position" as set out in the 20 April letter, made clear that the Defendants wished to reach a mutually agreeable position.

161. Seventhly, the Claimants' response of 29 April 2020, rather than calling on Laudamotion to perform its existing contractual obligations, agreed to continue discussions about potential lease modifications to accommodate the Defendants. Then on 1 May 2020, the Claimants purported to tender MSN 3361 for delivery. Those actions in my view involved a further affirmation of the leases postdating Laudamotion's letter of 20 April.

162. Eighthly, by the date of purported termination, Peregrine had purported to tender MSN 3361 for delivery, but had not done so in compliance with the contract (see section (G) below), and Laudamotion had pointed this out to Peregrine (albeit, as I find later, not all of Laudamotion's objections were valid). Thus in relation to that lease, the position was now that any subsisting threat by Laudamotion not to pay related to alleged obligations that were genuinely disputed on substantial grounds.

163. For these reasons, I do not consider that there was an Event of Default under Article 24.2(n).

(3) Effect of the Claimants' termination notice

164. The Defendants raised another point about the Claimants' alleged right to terminate under § 24.2(n), which it is not strictly necessary to decide in light of my conclusion in section (2) above. However, in case I am wrong in that conclusion, I consider the further point below.

165. The termination notice served on 15 May 2020 in relation to MSN 3361 and MSN 3396 said this:

> "1. Reference is made to the Leases. Capitalized terms used herein and not otherwise defined have the meanings ascribed to such terms in the Leases.
>
> Lease MSN 3361
>
> 2. Reference is also made to: (i) the letter from Lessor to Lessee dated 1 May 2020 wherein Lessee was informed that, pursuant to Article 3.2 (Scheduled Delivery Date) of Lease MSN 3361, the Scheduled Delivery Date would be 7 May 2020; and (ii) the letter from Lessor to Lessee dated 7 May 2020 wherein Lessor tendered Aircraft MSN 3361 for Delivery on 7 May 2020 at the Delivery Location.
>
> 3. Lessee failed to take Delivery of Aircraft MSN 3361 at the time and manner specified in Lease MSN 3361. Lessee's failure to take Delivery of Aircraft MSN 3361 constitutes an Event of Default under Article 24.2(a) of Lease MSN 3361 (the "Lease MSN 3361 Delivery Default"). Without prejudice to the foregoing, as of the date of this Notice certain additional Events of Default and breaches have occurred and remain outstanding under Lease MSN 3361. Lessor is therefore entitled to exercise any or all of its rights and remedies under Lease MSN 3361 and/or applicable Law including its rights under Article 24 (Default of Lessee) of Lease MSN 3361.
>
> 4. By this Notice and pursuant to Article 24.6(c) of Lease MSN 3361, Lessor hereby demands immediate payment of the amount of $10,014,824 being the sum of all Base Rent which would have been due during the Lease Term of Lease MSN 3361, discounted in accordance with Article 24.9 (Present Value of Payments) of Lease MSN 3361.
>
> Lease MSN 3396
>
> 5. The occurrence and continuation of the Lease MSN 3361 Delivery Default and the additional ongoing Events of Default under Lease MSN 3361 constitute an Event of Default under Article 24.2(q)(iii) of Lease MSN 3396. Without prejudice to the foregoing, as of the date of this Notice certain additional Events of Default and breaches have occurred and remain outstanding

> under Lease MSN 3396. Lessor is therefore entitled to exercise any or all of its rights and remedies under Lease MSN 3396 and/or applicable Law including its rights under Article 24 (Default of Lessee) of Lease MSN 3396.
>
> 6. By this Notice and pursuant to Article 24.6(c) of Lease MSN 3396, Lessor hereby demands immediate payment of the amount of $9,999,665 being the sum of all Base Rent which would have been due during the Lease Term of Lease MSN 3396, discounted in accordance with Article 24.9 (Present Value of Payments) of Lease MSN 3396.
>
> IN THE FURTHER EXERCISE OF ITS RIGHTS UNDER ARTICLE 24.3(a) OF EACH LEASE, LESSOR: (I) HEREBY TERMINATES LESSEE'S RIGHT TO LEASE AIRCRAFT MSN 3361 AND LESSOR's OBLIGATIONS UNDER LEASE MSN 3361; AND (II) HEREBY TERMINATES LESSEE'S RIGHT TO LEASE AIRCRAFT MSN 3396 AND LESSOR'S OBLIGATIONS UNDER LEASE MSN 3396.
>
> This Notice does not terminate Lessee's obligations under the Leases and such obligations (including Lessee's indemnification obligations) are ongoing. This Notice and Lessor's actions hereunder and instructions set forth herein are without prejudice to, and Lessor hereby expressly reserve and does not waive, all other rights and remedies of Lessor under the Leases, at law and at equity, with respect to Lessee's defaults under each Lease including, but not limited to, Lessor's rights to recover all past and future damages on account of Lessee's defaults. No failure or delay on the part of Lessor to exercise or enforce any right, power or remedy under any Lease shall operate as a waiver thereof, nor shall any single or partial exercise or enforcement by Lessor of any right, power or remedy under a Lease preclude any other further exercise or enforcement thereof or the exercise of enforcement of any other right. For the avoidance of doubt, the omission of a reference to any Event of Default or breach which has also occurred does not and will not prejudice, nor constitute a waiver of, any rights Lessor may have either generally, under the Leases or in respect of this Notice. This Notice will be governed by Articles 26.1 (Governing Law) and 26.2 (Jurisdiction) of each Lease, which will be deemed to be incorporated by reference herein."

166. The notice accordingly did not make any express reference to Article 24.2(n), though it did include the words:

> "Without prejudice to the foregoing, as of the date of this Notice certain additional Events of Default and breaches have occurred and remain outstanding under Lease MSN 3361. Lessor is therefore entitled to exercise any or all of its rights and remedies

> under Lease MSN 3361 and/or applicable Law including its rights under Article 24 (Default of Lessee) of Lease MSN 3361."

167. The Claimants submit that the absence of explicit reference to Article 24.2(n) does not matter because:

i) there is no contractual obligation in Article 24 to identify the Events of Default relied upon: a valid notice under Article 24.3(a) could validly assert the existence of an Event of Default without specifying it;

ii) the present case is distinguishable from cases (such as *ED&F Man Commodity Advisers Ltd v Fluxo-Cane Overseas Ltd* [2010] EWHC 212 (Comm) and *Sucden Financial Ltd v Fluxo-Cane Overseas Ltd* [2010] EWHC 2133 (Comm), [2012] 2 CLC 216) where the relevant event of default involved a subjective judgement on the part of the party invoking it (in *ED&F Man*, it provided "*we reasonably consider it necessary or desirable for our own protection*"), in relation to which it has been held that it is necessary that the relevant party had in mind and relied upon the relevant event of default even though he did not mention it expressly; and

iii) that principle does not apply to Article 24.2(n) which involves no element of judgement or opinion. Here, the general principle in *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) LR 39 Ch D 339 applies: the terminating party is entitled later to rely upon, in justifying termination, any breach which it did not rely upon or even know about at the time that it treated its counterparty's conduct as entitling it to bring the contract to an end.

168. Under the principle in *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, a party who terminates a contract for a bad reason can defend itself against a claim for wrongful termination by reference to a good reason that existed at the time of termination, even if the party was unaware of it. *Chitty* states the principle in this way:

> "The general rule is well established that, if a party refuses to perform a contract, giving a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal." (§ 27-067)

169. However, the question is whether it follows that a party purporting to terminate can rely on the unstated good reason as a basis on which to claim damages for repudiatory breach by the other party.

170. In *Boston* itself, the defendant had counterclaimed damages for wrongful dismissal as a director. The question was whether it mattered that the ground given at the time for his dismissal was a bad one, whereas a good reason subsequently emerged which the company had been unaware of at the time. Cotton LJ said at p.352 that it was not disputed that, if such circumstances existed, it was immaterial whether the company knew about them at the time: it could still justify his dismissal based on those circumstances. Bowen LJ said at p.364:

> "It is said if the transaction be one of very old date, that in some way deprives the master of his right to treat it as a breach of faith. As the Lord Justice has pointed out, the age of the fraud may be a reason in the master's mind for not acting on his rights; but it is impossible to say that because a fraud has been concealed for six years, therefore the master has not a right when he dis-covers it to act upon his discovery, and to put an end to the relation of employer and employed with which such fraud was inconsistent. I, therefore, find it impossible to adopt Mr. Justice Kekewich's view, or to come to any other conclusion except that the managing director having been guilty of a fraud on his employers was rightly dismissed by them, and dismissed by them rightly even though they did not discover the fraud until after they had actually pronounced the sentence of dismissal."

Boston was thus a case of relying on an unknown ground in order to resist a claim for breach of contract.

171. In *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599 Christopher Clarke J stated:

> "143. The same conduct may be such as to give rise to a contractual right to terminate and a common law entitlement to accept a repudiatory breach. This will typically be so if (i) the guilty party has failed to make the payments stipulated by the contract, (ii) that failure either amounts to a repudiation or is, by the terms of the contract, to be treated as such, and (iii) there is a contractual right to terminate which is applicable to the circumstances giving rise to the breach. In such a case the innocent party can exercise either his contractual or his common law right of termination. Prima facie he can rely on both. He is not disentitled to rely on the latter on the ground that recourse to the former constitutes an affirmation of the contract since in both cases he is electing to terminate the contract for the future (ie to bring to an end the primary obligations of the parties remaining unperformed) in accordance with rights that are either given to him expressly by contract or arise in his favour by implication of law. If he can rely on both there is no reason in principle why, if he terminates the contract without stating the basis on which he does so, he cannot be treated as doing so under any clause which entitles him to do so and in accordance with his rights at common law. ''Termination'' is capable of meaning both a termination pursuant to a contractual clause and the acceptance of a repudiation: *Aktieselskabet Dampskibsselskabet Svendborg v Mobil North Sea Ltd* [2001] 2 Lloyd's Rep 127. Even if he refers to a particular clause upon which he relies, that would not inevitably mean that he was only relying on that clause. If that were so an innocent party who, in the face of a repudiatory breach, terminated the contract by reference to a clause which

> was in fact inapplicable, might, on that account, find himself disentitled to terminate at all.
>
> 144. The fact that service of a contractual notice of termination is not inconsistent with the acceptance of a repudiation does not, however, mean that in all cases such a notice amounts to such an acceptance. If the notice makes explicit reference to a particular contractual clause, and nothing else, that may, in context, show that the giver of the notice was not intending to accept the repudiation and was only relying on the contractual clause; for instance if the claim made under the notice of termination is inconsistent with, and not simply less than, that which arises on acceptance of a repudiation: *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 QB 54, 65, 68. In the present case markedly different consequences would arise according to whether or not there was a termination under clause 14.4 or an acceptance of a repudiation. … In those circumstances it should take effect in, and only in accordance with its express terms, namely as a determination under clause 14.4."

172. In *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090, a building contractor had purported to terminate the contract and was being sued by the employer for non-performance (see §1). The contractor had terminated the contract relying on a clause (28.2.4) which permitted it to terminate the contract if the employer repeated a previous default. Its notice specified a previous default of non-payment in January 2006, but there was in fact no such default in payment. It was conceded by the employer that clause 28.2.4 did not require the contractor to specify the default relied on (§ 48). The contractor was able to rely on another previous default from May 2005 (§ 45). At § 51 Hooper LJ held:

> "The Appellant's contention is inconsistent with the general principle of contract law that if a party refuses to perform a contract, giving a reason which is wrong or inadequate, or giving no reason at all, or terminates a contract under a contractual provision to that effect, the refusal or termination may nevertheless be justified if there were at the time facts in existence which would have provided a good reason for the refusal: *Chitty on Contracts* 29th ed paragraph 24-014. That principle is often used in relation to facts unknown to the party refusing at the time of its refusal, but there is no reason why it should not be used in relation to facts which were known to that party at that time. Waiver can apply to qualify that principle, but only in cases of, in effect, estoppel."

173. In *Stocznia Gdynia v Gearbulk Holdings* [2009] 1 Lloyd's Rep 461 ("***Gearbulk***"), a buyer served notice purporting to terminate a shipbuilding contract on the grounds of the shipyard's delay, and claimed damages for loss of bargain. The buyer had terminated the contract under a contractual provision, and the question was whether it had thereby affirmed the contracts and lost its right to treat them as repudiated and recover damages at common law. The Court of Appeal held that it had not. The court also made certain *obiter* observations about whether the letters from the buyer, which

did not state in terms that the buyer was accepting the yard's conduct as a repudiatory breach discharging the contract, were nonetheless effective to have that result:

> "*Acceptance of repudiation*
>
> 43. The arbitrator held that the yard had repudiated each of the contracts by the time Gearbulk sent its letter of termination. As a result counsel on both sides addressed the court at some length on whether the letters of 7 November 2003 and 4 August 2004, neither of which purported in terms to accept the yard's conduct as a repudiatory breach discharging the contract, was none the less effective to bring about that result. We were referred in that connection to a number of authorities, including *Stocznia Gdanska SA v Latvian Shipping Co* [2001] 1 Lloyd's Rep 537; [2002] 2 Lloyd's Rep 436 (Court of Appeal), and *Dalkia Utilities Services plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599. In view of the conclusion to which I have come on the construction of the contracts this question does not arise in the present case and I therefore propose to express my view on it shortly.
>
> 44. It must be borne in mind that all that is required for acceptance of a repudiation at common law is for the injured party to communicate clearly and unequivocally his intention to treat the contract as discharged: see *Vitol SA v Norelf Ltd* [1996] 2 Lloyd's Rep 225; [1996] AC 800, pages 810G to 811B per Lord Steyn. If the contract and the general law provide the injured party with alternative rights which have different consequences, as was held to be the case in *Dalkia Utilities v Celtech*, he will necessarily have to elect between them and the precise terms in which he informs the other party of his decision will be significant, but where the contract provides a right to terminate which corresponds to a right under the general law (because the breach goes to the root of the contract or the parties have agreed that it should be treated as doing so) no election is necessary. In such cases it is sufficient for the injured party simply to make it clear that he is treating the contract as discharged: see *Dalkia Utilities v Celtech*, para 143 per Christopher Clarke J. If he gives a bad reason for doing so, his action is nonetheless effective if the circumstances support it. That, as I understand it, is what Rix LJ was saying in *Stocznia Gdanska SA v Latvian Shipping Co* [2002] 2 Lloyd's Rep 436, para 32, with which I respectfully agree.
>
> 45. In the present case the parties accept, and indeed the arbitrator has found, that the breaches on the part of the yard which entitled Gearbulk to terminate the contracts were in each case sufficient to amount to a repudiation. … in its letters of 7 November 2003 and 4 August 2004 Gearbulk purported to terminate the contract pursuant to article 10.1(b) and (c) and not under the general law, but each of the letters made it clear that it

> was treating the contract as discharged and in those circumstances each was sufficient to amount to an acceptance of the yard's repudiation. In its letter of 30 November 2004 Gearbulk sought to rely on both. Mr Dunning said that letter was equivocal as between reliance on the terms of the contract and reliance on the general law. Perhaps it was, but it was quite unequivocal as to Gearbulk's intention to treat the contract as discharged and that was all that was necessary."

174. *Gearbulk* thus involved a slightly different situation from the present case, because the rights to terminate (under the contract provisions and at common law) arose from the same breaches (see the first sentence of § 45 quoted above). The Claimants nonetheless rely on the observations in the last two sentences of § 44, citing *Stocznia Gdanksa v Latvian Shipping* [2002] 2 Lloyd's Rep. 436. The relevant passage in that case was also *obiter*:

> "31. Thus in the case of contracts 3−6, they did not come to an end pursuant to clause 5.05 by reason of the yard's notices of rescission, even if those notices may have acted at common law as marking an acceptance of Latreefers' repudiation of those contracts by way of anticipatory breach. The judge indeed found that that was what had happened. He said (at para 179):
>
> > "It is clear that no particular form or formality is required for the acceptance of a repudiation. Although the letters referred to the termination under clause 5 of the contract, they made it clear that the Yard considered the contract at an end and neither party was under an obligation of any further performance. If the Yard had a right to terminate for repudiation, the fact that they did not set that out does not in my view make any difference, as it is well established that a party terminating a contract can rely on grounds other than those he gives. The important matter is that the letters unequivocally stated that the contractual obligations were at an end. I therefore conclude that there was an acceptance by the Yard."
>
> 32. It is established law that, where one party to a contract has repudiated it, the other may validly accept that repudiation by bringing the contract to an end, even if he gives a wrong reason for doing so or no reason at all. Mr Glennie did not dispute that principle. …"

175. In *Shell Egypt West Manzala v Dana Gas Egypt* [2010] EWHC 465 (Comm), Tomlinson J, on an appeal from an arbitration award, indicated approval of a concession, the broad effect of which was that the claimant's loss of bargain damages claim would fail if its termination letter (properly construed) purported to terminate only under a contractual provision that would not give rise to comparable liabilities.

176. In *Loefelis v Lonsdale Sports* [2012] EWHC 485 (Ch) and [2012] EWCA Civ 985, Leofelis had purported to terminate a licence agreement on the ground that Lonsdale

was in repudiatory breach, by reason of an injunction obtained from the German courts. That was a bad ground for termination, but there was a real prospect that at a trial Leofelis might establish a different repudiatory breach by Lonsdale which would have justified its termination, but of which it had been unaware when purporting to terminate. Roth J at first instance held that damages for repudiatory breach could not be claimed where a contract had been purportedly terminated in ignorance of, and thus irrespective of, the breach in question. On appeal from Roth J, the Court of Appeal rejected an argument that damages could be claimed merely on the basis that a ground for repudiation existed and the claimant had purported to terminate for breach, albeit not the breach in question. Lloyd LJ said it was well established (even before *Boston*) that "*an acceptance of a repudiation of a contract, even if expressed to be on a basis which turns out not to have been justified, can be found to be valid and effective if there were at the time facts, even though unknown to the accepter of the alleged repudiation, which would have entitled that party to accept a repudiation*". However:

> "The principle underlying the *Boston Deep Sea Fishing* case has never been put forward as being that the unknown but justified ground for accepting a repudiation is to be read into the letter or other communication by which the unjustified reason is asserted. I do not see that the principle can or should be understood as extending that far. It does not allow the innocent party to assert that it did accept repudiation on the correct (though unknown) ground; rather it allows that party to meet a claim that its conduct in terminating the contract, though apparently unjustified because done on the wrong ground, is to be taken as justified because it could have been done on the right ground, not because it was done on the right ground. It operates as a shield against a claim for damages on the basis of wrongful termination, not as a sword to claim damages (for the future) on the basis of justified termination. For that reason it seems to me that, if Leofelis is to overcome the problem of its reliance on the German injunction in the letters of 14 and 28 September 2007, which is a causation issue, it must do so by showing that the German injunction was so closely connected with the wrongful SIA arrangements that the termination of the contract by the letter of 28 September 2007 cannot be seen as independent of Lonsdale's breach of contract, but rather that it was part of the chain of causation connecting Lonsdale's repudiatory breach with Leofelis' termination of the contract. In effect Leofelis would need to prove that, if Lonsdale had not undertaken its course of action aimed at interfering with Leofelis' exclusivity under the 2002 licence and favouring Mr Schotsman's companies, it would not have sought or obtained the German injunction, or at any rate that, once Evans-Lombe J had held it to have been unjustified, Lonsdale would have had it discharged." (§ 33)

Lewison LJ and Pill LJ agreed. Pill LJ added:

> "… If the premature determination of the contract is for reasons other than those that subsequently emerge, a claim for post-

> termination loss cannot be sustained. Here, it is submitted, the reasons are sufficiently linked with those relied on at the time to enable a claim for post-termination loss to be brought." (§ 44)

Leofelis was given permission to seek to reformulate its claim on that basis, i.e. to plead facts that could arguably show the necessary causal link between the alleged repudiatory breach of contract and its own termination of the licence (§ 37).

177. In *Phones 4U Ltd (in Administration) v EE Ltd* [2018] EWHC 49 (Comm), Andrew Baker J, in the light of *inter alia* the cases mentioned above, concluded that a loss of bargain damages claim requires the claimant to show that the termination of the contract resulted from the relevant repudiatory or renunciatory breach; and that that in turn requires the claimant to show that it terminated the contract by exercising its common law right to terminate for that breach or renunciation:

> "… The loss of bargain damages claim requires EE to show that the termination of the contract, which created the loss of bargain, resulted from the repudiatory breach or renunciation by Phones 4U that it is presently to be assumed EE might prove at trial. That in turn requires EE to show that the contract was terminated by its exercise of its common law right to terminate for that breach, respectively that renunciation. (No allegation is made, akin to that made in *Leofelis v Lonsdale* on appeal, that the termination resulted in any event from (the facts constituting) the alleged repudiation.) If, as Phones 4U says, EE's termination letter communicated only a termination under clause 14.1.2 independent of the repudiatory breach or renunciation now alleged, then the contract was not terminated at common law for repudiation. That it could have been so terminated (if EE makes good its allegation of repudiation) cannot be used to re-characterise the facts." (§ 117)

> "*Shell Egypt* was also criticised by Liu [2011] LMCLQ 4 …. Leaving aside the point actually decided by Tomlinson J (as to the purport of Shell's termination letter, on its proper construction), Liu's criticism of the judge's approach as a matter of principle seems to me to have depended on the proposition that it is sufficient, for the loss of bargain claim at common law, that the claimant should have communicated unequivocally that it treated the contract as discharged, whatever it might say as to why. There were dicta that could be read as supporting that proposition (e.g. per Rix LJ in *Stocznia v Latvian Shipping* at [32], per Moore-Bick LJ in *Stocznia v Gearbulk* at [44]-[45]). However, it has now been authoritatively rejected by *Leofelis v Lonsdale*. It remains true, as Liu emphasised, that 'acceptance' of a repudiation requires no particular formality or form of words (see *Vitol v Norelf*). But it must communicate a decision to terminate for the repudiation later said to found the claim, in exercise of the common law right to terminate arising upon that repudiation, if a normal loss of bargain claim at common law is to be viable (i.e. leaving aside the inventive alternative claim

> suggested on appeal in *Leofelis v Lonsdale*). Otherwise, the claimant cannot say the termination and therefore its loss of bargain resulted from the repudiation sued upon." (§ 122)

Andrew Baker J held that if a termination letter communicates clearly a decision to terminate only under an express contractual right that has arisen irrespective of any breach, then it cannot be said that the contract was terminated for breach, so a claim for damages for loss of bargain at common law cannot run (§ 121).

178. *Lombard North Central Plc v European Skyjets Ltd* [2022] EWHC 728 (QB) involved a claim by a bank for repayment based on 'calling' an alleged default. Foxton J stated:

> "103. Lombard accepts that a party who wishes to exercise a contractual right of termination by notice must strictly comply with any conditions for the exercise of the right: *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 773 and 776. Ascertaining what those conditions are is an exercise in the construction of the contractual right (embracing within that term both the interpretation of the words used and any implications which the law requires to be made).
>
> 104. Reverting to clause 9.2(a), it requires that:
>
> i) the Notice be sent after the occurrence of an Event of Default; and
>
> ii) the Notice must cancel the Facility and require the Borrower immediately to repay the loan together with accrued interest and all other sums payable under this Agreement.
>
> 105. Clause 8.1 of the Mortgage provides that "upon the occurrence of an Event of Default and at any time thereafter, the Lender may by written notice to the Borrower declare the security constituted by this Mortgage to have become enforceable".
>
> 106. Neither provision requires the Event of Default to be identified, and I am not persuaded that this is a necessary implication. There is no "cure period" provided for, such that it might be said that the borrower needs to know what default is being contended for in order to address it. In circumstances in which it is possible to terminate at common law for breach without identifying (or correctly identifying) the breaches justifying termination *(Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 352, 364), and where this is the usual position so far as contractual termination clauses are concerned (*Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090, [51]) I am satisfied that it cannot be said to be so obvious a requirement of clause 9.2 that the Event of Default justifying termination is identified that this goes without saying. Those conclusions derived from first principles are amply supported by authority:

> i) In *Byblos Bank SAL v Al-Khudhairy* [1986] 2 BCC 99, 548, Nichols LJ permitted the bank to rely on a ground for accelerating the debt and appointing a receiver (the borrower's inability to pay its debts) which had not been invoked prior to appointment.
>
> ii) In *Brampton Manor (Leisure) Ltd v McLean* [2007] BCC 640, Evans-Lombe J made a finding to similar effect: see [11], [43] and [52].
>
> 107. In circumstances in which clauses 9.2 of the Loan Agreement and 8.1 of the Mortgage do not require Lombard to identify the Event(s) of Default relied upon in the Notice I am satisfied that the validity of the Notice is not impugned if Lombard chooses to mention one such ground which has not in fact arisen. As I have stated, clause 9.2 does not form part of a machinery which envisages Skyjets having an opportunity to consider and cure any breach (nor does clause 8.1 of the Mortgage). In these circumstances, Skyjets is no worse off by reason of the inclusion of an invalid ground than if nothing had been said at all."

179. The Defendants point out that Foxton J's attention was not drawn to the conclusions reached in *Leofelis* or *Phones4U* about the limits of the *Boston* principle. The three cases cited to Foxton J were examples of the party terminating seeking to resist a claim, not to sue for damages. *Reinwood* is summarised earlier. *Byblos Bank* and *Brampton Manor* were not contractual termination cases. Both involved claims that the appointment of receivers had been wrongful, which were resisted by the banks. In *Byblos* the bank had purported to appoint the receiver because of the company's failure to pay a demand, but that demand had been premature. In defence to the claim that the appointment had been wrongful, the bank justified the appointment by reference to another reason not given at the time, namely that the company was insolvent. The guarantor conceded that the bank could rely on reasons not given at the time. *Brampton Manor* at § 43 followed *Byblos*.

180. The Claimants suggest that *Phones4U* is distinguishable because the party there had terminated solely under a specific contract provision, and could not say they had terminated for repudiatory breach. The Claimants in the present case, on the other hand, made clear that they were terminating for an Event of Default, and nothing in the contract prevented them from relying on a different Event of Default if the facts supported it. That was also the case in *Lombard*, which was correctly decided. Insofar as *Leofelis* indicates a need for a causal link between the particular ground relied on and the contract coming to an end, the decision was *per incuriam* the decision in *Gearbulk*.

181. I do not consider that *Leofelis* can be said to have been *per incuriam* the decision in *Gearbulk*, since the relevant observations in *Gearbulk* were expressly *obiter dicta*. In my view *Leofelis* establishes that where damages are claimed for repudiatory breach, a chain of causation must be shown connecting the repudiatory breach with the termination of the contract. That may not exist if the contract is terminated on grounds other than the (actual) repudiatory breach.

182. The question here would be (were it necessary to decide the point) whether the same reasoning applies where rather than common law damages for repudiatory breach, the terminating party is suing for sums due under express terms of a contract. That must be a question of construction of the contract in question (cf. the statement of Foxton J in *Lombard* § 103). Foxton J concluded on the facts of that particular case that the relevant contract provisions did not require the termination notice to specify the Event of Default at all, and that the lender could be in no worse a position as a result of having incorrectly specified one.

183. In the present case, the position would I think be more finely balanced. Article 24.3(a), pursuant to which the Claimants' termination notice was served, does not expressly require the notice to specify the Event of Default. Moreover, some of the Lessor's rights and remedies arise, on their face, without any express requirement to serve a notice at all (e.g. those set out in Article 24.3(e), (i) and (j) quoted earlier).

184. On the other hand, Article 24.4, which allows the Lessor to deregister and export the aircraft, contemplates or at least assumes that any termination of the leasing will be causally linked to an Event of Default: *"If an Event of Default has occurred and is continuing and as a result thereof, the leasing of the Aircraft has been terminated …"*. In addition, the Claimants' claim for accelerated rent is brought under Article 24.6(c), as cited in their termination notice. Article 24.6, as quoted earlier, begins with the phrase:

> "24.6 LESSEE Liability for Damages. If an Event of Default occurs, in addition to all other remedies available under applicable Law, LESSOR and each other Indemnitee has the right to recover from LESSEE, and LESSEE will indemnify LESSOR and each other Indemnitee on LESSOR's first written demand against, any Expenses which LESSOR or any other Indemnitee may sustain or incur directly as a result, including …" (my emphasis)

The clause thus contemplates that the ensuing heads of recoverable expenses, including accelerated rent under Article 24.6(c), are items recoverable "as a result of" the Event of Default.

185. Reflecting this, the Claimants claim under Article 24.6 "*any Expenses sustained or incurred by Peregrine as a result of the Events of Default which occurred under Article MSN 3361*" (Amended Particulars of Claim § 43(1)). Paragraph 44 of the Amended Particulars of Claim indicated that the Claimants were in the process of assessing the relevant Expenses "*in addition to the sums demanded in the notices mentioned in paragraphs 40 … above …*". Paragraph 40 referred to the termination notice for MSN 3361 including the demand for accelerated rent under Article 24.6(c).

186. An Event of Default can occur and cause recoverable loss without the lease being terminated. However, the alleged Events of Default under Article 24.2(n) in the present case cannot be said to have caused loss unless they gave rise to the termination of the leasing of the aircraft. Following the reasoning in *Leofelis*, I would conclude that the Expenses claimed cannot be regarded as arising "*as a result*" of an Event of Default, within Article 24.6, unless the leasing was brought to an end by reason of the Event of Default. Further, I do not consider that the Claimants' inclusion in their termination

notice of the words "*certain other additional Events of Default and breaches have occurred and remain outstanding under Lease MSN 3361*", in the absence of any reference in the termination notice (or preceding correspondence) to Article 24.2(n) or its substance, enables the Claimants to establish that they terminated in part by reason of an Event of Default under that provision. There is no evidence that any perceived breach under Article 24.2(n) gave rise to the termination.

187. For these reasons, I would on balance have concluded that the Claimants were in any event not entitled to bring claims under Article 24.6 on the basis of an Event of Default under Article 24.2(n).

(G) WAS LAUDAMOTION OBLIGED TO TAKE MSN 3361 ON 7 MAY 2020?

188. The answer to this issue depends on the following sub-issues:

i) whether Peregrine validly set a Scheduled Delivery Date of 7 May 2020, or whether (as Defendants suggest) its tender of MSN 3361 on that date was invalid because it had failed to consult Laudamotion, or to notify or give it reasonable notice of the delivery date, pursuant to Article 3.2;

ii) whether MSN 3361 was, or (more precisely) was contractually to be regarded as being, in deliverable condition on 7 May 2020, having regard to:

a) the lack of the documents referred to in Exhibit B § 4, i.e. an ECoA, CAT.IDE statement and EASA letter;

b) the fact that it was still on lease to Flynas;

c) the Claimants having prepared it for storage; and

d) the condition of the aircraft including (in particular) its documentation.

(1) Consultation, notification and reasonable notice

189. Article 3.2 provides:

> "As of the date of this Lease, delivery of the Aircraft from Prior Lessee to LESSOR and LESSOR to LESSEEE is scheduled to occur during March 2020. LESSOR will notify LESSEE from time to time and in a timely manner of the exact date on which LESSOR expects Delivery to take place (and LESSOR agrees to consult with LESSEE prior to making such a determination as to such date and shall provide LESSEE with reasonable notice in respect of such date), (the 'Scheduled Delivery Date')."

190. The Defendants make the following submissions:

i) A Scheduled Delivery Date, giving rise to an obligation to accept delivery of the aircraft, could only be validly set by complying with Article 3.2. Alternatively, the Lessor could not take advantage of its own breach of contract by tendering an aircraft for delivery on a date that had been set without complying with the

obligations to consult and provide timely and reasonable notice set out in Article 3.2.

ii) By way of further alternative, compliance with Article 3.2 of the Scheduled Delivery Date was a condition precedent to any obligation to take delivery of the aircraft, cf. Lewison, "*Interpretation of Contracts*", §16.11:

> "The expression condition precedent is also used to describe a contingency which must be fulfilled in order to bring a particular contractual obligation into operation. That contingency may be the performance by one party of a contractual obligation of his own, or it may be some other event (such as the giving of a notice)".

As Flaux J stated in *AstraZeneca UK Ltd v Albemarle International Corp* [2011] EWHC 1574 (Comm),:

> "… in the absence of an express term, performance of one obligation will only be a condition precedent to another obligation where either the first obligation must for practical reasons clearly be performed before the second obligation can arise or the second obligation is the direct quid pro quo of the first, in the sense that only performance of the first earns entitlement to the second." (emphasis added)

That was obviously the case here. Otherwise, the Lessee would have the invidious choice of risking an Event of Default by refusing to accept the aircraft, or accepting the aircraft without having had a chance to complete its verification exercise and finding itself without recourse for any defects by reason of the "as is, where is" and "conclusive proof" provisions of Articles 8.1 and 8.4 (quoted earlier).

iii) Article 3.2 obliged the Lessor to "consult" the Lessee "prior to making a determination as to such date", i.e. the exact date on which Lessor expects delivery to take place.

iv) However, there was no consultation about 7 May 2020 being the delivery date, even though there was nothing to prevent such consultation (as Mr Anderson accepted in cross-examination). Peregrine simply informed Laudamotion on 5 (or 1) May 2020 that it would tender the aircraft for delivery on 7 May. Peregrine had never asked Laudamotion about that date, or any other around that time, still less with an open mind. The lease anticipated delivery in or around March 2020, and there had been some discussions of June delivery, but no suggestion of delivery in early May.

v) Peregrine was also obliged under Article 3.2 to give "reasonable notice" of the delivery date. What constituted "reasonable notice" is to be determined objectively, as at the time of giving notice, having regard to the purpose for which notice was required (cf. *Hamsard 3147 v Boots* [2013] EWHC 3251 (Pat)). Here, after receiving notice of the delivery date, Laudamotion would need time to arrange for representatives to return to Fokker during the midst of

a global pandemic, physically inspect MSN 3361, complete its document review, ensure that all issues concerning the condition of the aircraft and its documents had been resolved (so that Laudamotion could be satisfied that it could sign a Technical Acceptance Certificate accepting the aircraft "as is, where is"), and arrange for two pilots to attend Fokker for the ferry flight.

vi) Very short notice was given despite the Defendants having made clear to the Claimants, on 25 March 2020, that "*Lauda will still require a final physical inspection prior to TA [technical acceptance], since they're aware the aircraft wasn't ready the last day I was onsite i.e. Saturday 14th March.*" As at 27 March 2020, there were 186 open items in the OIL which included the review of documents concerning 41 repairs, 40 mandatory service bulletins, dealing with missing DFPs and certificates, reviewing a revised electrical load report, loose equipment inventory, the records inventory and engine fan DFPs, reviewing the final statements and statuses, and being ready and able to sign off the Technical Acceptance Certificate. The best evidence of the amount of time Laudamotion needed to complete its records inspection was Eirtech's email of 1 April 2020 to Ryanair, when Eirtech's Head of Technical Services told Ryanair's Mr Clear that it would take Eirtech 10 days to complete work on the 186 open items assuming the documents were readily available. Laudamotion also needed time to input the information onto its systems.

vii) Under Exhibit B § 2, Peregrine was obliged to provide for review all the aircraft's records for a period of 10 Business Days "prior to the Scheduled Delivery Date". "Reasonable notice" must allow Laudamotion to know at least 10 Business Days prior to the Scheduled Delivery Date when that date is, so it can exercise its right to 10 Business Days' inspection of the documents.

viii) Even if Laudamotion's 1 May 2020 letter is deemed to have been delivered on that date, it was sent at 5.51pm on the Friday evening before a Bank Holiday weekend and gave only two Business Days' notice of the delivery date. ("Business Day" is defined in the lease as a weekday on which the banks are open for business where the Lessor's bank is located (the US) and in Austria. Austria observes a public holiday on 1 May.)

ix) It is incorrect to take account of the Claimants' letter dated 22 April 2020. That letter merely said that "the 2019 Aircraft will be tendered for Delivery in accordance with the Lease Agreements", but gave no date and did not fulfil any of the requirements of Article 3.2.

x) The Claimants are wrong, on the facts and the law, to suggest that their obligations under Article 3.2 were modified or obviated in some way by Laudamotion having by early May stopped work on the document review for five weeks and indicated that it would not complete it because it would not accept the four aircraft; and wrong to suggest that Peregrine was not required to give a longer period of notice for Laudamotion to complete a task it had made clear it would not complete and which it in fact made no attempt to complete.

xi) As to the facts, Mr Anderson "invented" a call between Mr Kelly and Mr Sorahan which he said "superseded" any conversation between Mr Merry and Mr Norton; and Mr Peacock "made up" the content of the conversation between

Mr Norton and Mr Merry on 1 May 2020, by saying Mr Norton had told Mr Merry that Laudamotion would not take the four aircraft: neither of those matters having been pleaded or put to Mr Norton. Mr Norton made clear that Laudamotion did not say to Mr Merry it would not take the four aircraft, and that Laudamotion was trying to find an agreed way forward with the Claimants. Mr Akhrif said in his email to Mr Spencer dated 27 March 2020 "I'm sure Colin Merry and John Norton will be discussing the way forward/new arrangements for these transitions so we will react/plan when we hear back from them". During the discussions between Mr Merry and Mr Norton it is common ground that they were discussing June delivery dates. No-one ever suggested that Laudamotion go back to Fokker or start reviewing documents again. Laudamotion did not say it would not accept the aircraft and would not complete its review of the documents. On the contrary, on 27 April and 1 May 2020 Mr Norton asked Mr Merry whether the Claimants were willing to accept rent reductions on all four aircraft (and the evidence shows Mr Anderson considering the financial implications of this).

xii) As to the law, none of those matters obviated the need for Peregrine to consult and give timely and reasonable notice if it wanted to make an earlier delivery of MSN 3361 in May 2020. The underlying purpose of that consultation and reasonable notice was to give Laudamotion a meaningful opportunity to participate in the delivery process and in particular to decide whether it could accept the aircraft.

xiii) The Claimants cite Lewison, "*Interpretation of Contracts*" § 6.135, stating that "where performance of the contract cannot take place without the cooperation of both parties, it is implied that cooperation will be forthcoming". However, Article 3.2 expressly obliged the Claimants to "consult with the LESSEE prior to making a determination" about the Scheduled Delivery Date and to give reasonable notice.

xiv) A duty to cooperate will be implied into a contract only if it is necessary to make the contact workable: see the general test stated in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; and, in relation to duties of cooperation in particular, *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014, 1018E and *Ukraine v Law Debenture Trust Corp Plc* [2018] EWCA Civ 2026 § 207. Proof of mere normality of practice, or even of a high degree of desirability, falls far short of establishing the existence of a contractual duty owed by the buyer to be implied as a contractual term (*Siporex Trade S.A. v. Banque Indosuez* [1986] 2 Lloyd's Rep 146, 161-162 per Hirst J). There is no need to imply any such term into Article 3.2: the Claimants were able to comply with it, without needing the Defendants' cooperation.

xv) Moreover, there is also no need to imply a term that the Lessee would proceed diligently with the document review and other pre-delivery processes. The terms of the lease required the Lessor to put the aircraft in deliverable condition (Article 7.4.8), and Exhibit B §§ 2 and 3 give the Lessee the right, rather than the duty, to inspect the aircraft and its documents. The duties imposed on the Lessee in relation to delivery (by Articles 6.5, 7.1 and 7.2) of the lease do not include a duty of the kind the Claimants propose. The lease is workable without

the need to imply such a term. The proposed implied term would in any event be too vague.

xvi) These points apply *a fortiori* where, as here, the lease contains an express term relating, in substance, to cooperation and which requires a request first to be made by the other party. Article 27.11 provides:

> "Further Assurances. Each party hereto agrees from time to time to do and perform such other and further acts and execute and deliver any and all such other instruments as may be required by Law, reasonably requested by the auditors of the other party or requested by the other party to establish, maintain, protect or perfect the rights, interests and remedies of the requesting party or any Relevant Party or to carry out and effect the intent and purpose of this Lease and the other Operative Documents."

The Claimants' proposed implied term would cut across this scheme.

191. Having summarised those submissions, I make clear straight away that I do not accept the Defendants' contention that Mr Anderson invented a conversation between Mr Kelly and Mr Sorahan. As counsel for the Claimants pointed out, the contemporary documents provide clear indications that there were conversations going on during this period, including or potentially including these individuals, not all of which are documented or relied on in statements of case. There is no warrant for concluding that Mr Anderson was giving untruthful evidence. Equally, I do not accept the suggestion that Mr Peacock was giving untruthful evidence about his understanding of the conversation on 1 May between Mr Norton and Mr Merry. Mr Peacock said:

> "I understood that Mr Merry had a discussion with Mr Norton in the morning of 1 May to find out if there was a commercial resolution and the answer was they weren't taking the aircraft. A deal team – our meeting was convened after that call. Again, the contents are privileged, but the outcome of that was we were going to proceed and deliver, because everything was in place."

Mr Peacock did not refer to the Norton/Merry 1 May conversation in his witness statement, but plainly that conversation did occur, and, as Mr Peacock went on to say, he was the individual in legal and leasing responsible for Ryanair and generally informed by Mr Merry of correspondence and discussions. The Claimants did not waive privilege over the subsequent conversation between Mr Merry and Mr Peacock, and hence cannot rely on Mr Peacock's account of what Mr Merry told him about the conversation with Mr Norton. However, there was and is no proper basis for the suggestion that Mr Peacock lied.

192. Turning to the Claimants' submissions, they say that all of the matters provided for by Article 3.2 have to be seen in the context of the Defendants' deliberate and unjustifiable decision to disengage, as from March 2020, from the entire delivery process. They make the following points:

i) The Defendants did not attempt to lead any factual evidence that it was impossible for the Claimants to deliver, or for the Defendants to take delivery

of, the 2019 aircraft because of Covid-19. The highest that it is put in the Defendants' witness evidence (which is not, in any event, evidence from anyone involved in the technical side of delivery) is that the delivery of aircraft became slower from March 2020.

ii) No Material Deviations are alleged by the Defendants in respect of the physical condition of the 2019 aircraft. All the pleaded complaints relate to alleged deficiencies in aircraft documentation. However, the records review was conducted almost entirely remotely by the Claimants' and the Defendants' consultants, and (as Mr Gwihs accepted in cross-examination) that records review could have continued despite Covid-19.

iii) The unchallenged evidence of Mr Anderson and Mr Akhrif was that the Claimants continued to deliver and take redelivery of aircraft throughout the pandemic. Moreover, the documents show, and Mr Norton accepted in cross-examination, that Laudamotion itself took delivery of an Airbus A320 aircraft (MSN 5015) from another major lessor, Avalon, in or around June 2020. This exposes the lack of realism in the Defendants' approach. It cannot sensibly be said that the pandemic caused any insurmountable difficulties in delivering the 2019 aircraft. The evidence suggests that the MROs continued to function throughout, and that parts and materials continued to be moved across the world, albeit with some delays from time to time.

iv) The real relevance of the pandemic is that it explains the Defendants' commercial motivation for unilaterally disengaging from the delivery process for the 2019 aircraft in late March 2020 and wrongly refusing to accept delivery of MSN 3361 when it was tendered by Peregrine on 7 May 2020.

v) It is common ground on the statements of case that the process of delivery of a commercial aircraft is one "requiring the active participation, cooperation and collaboration" of the lessor, lessee, and others; and thus the lessor's and lessee's technical teams work together to identify, record and correct deviations from the requirements of the lease. The leases are premised on a willing lessee: they simply do not envisage a situation in which the lessee disengages from the delivery process, withdraws its technical team, refuses to accept the aircraft, and then seeks to justify that by reference to alleged deviations not articulated before or even at the time of tender.

vi) Once the process of delivery commences, and until it concludes, each party owes the other a contractual duty of co-operation. That is "an ordinary implication in any contract for the performance of which co-operation is required" (*Swallowfalls Ltd v Monaco Yachting & Technologies SAM* [2014] EWCA Civ 186 § 32). Here, it is common ground that co-operation was at a practical level essential; and it follows that there was an implied contractual obligation to co-operate, owed by both lessor and lessee. Thus once the delivery process commenced, neither party was entitled unilaterally to withdraw its co-operation unless and until the lease were terminated.

vii) Laudamotion's withdrawal of its technical team on 26 March 2020 involved the unilateral cessation to comply with its contractual duty of co-operation. As a result, its failure to progress matters after 26 March 2020 was entirely due to its

failure to comply with a critical obligation. Laudamotion is not entitled to rely on that failure on its part to say that it required more time to accept delivery of the aircraft by early May 2020, particularly where it had indicated that it had no intention of accepting the aircraft and withdrawn from the steps necessary to accept the aircraft.

viii) The Article 3.2 duty to notify to Lessee from time to time when delivery is expected contemplates a lessee willing to take delivery. While Laudamotion was engaged, there was a dialogue about delivery dates. For example, the documents show discussions in early March about possible delivery dates including 20 March, consistent with the timing of the borescope tests and demo flight (usually done about two weeks before delivery). But once Laudamotion instructed its technical team to disengage, Laudamotion withdrew from that dialogue. Far from Peregrine having decided not to tell Laudamotion what the revised schedule was, Ryanair told the technical team not to engage. Mr Spencer's e-mail of 26 March 2020 made clear that they would only be back in contact if instructed to re-engage. This never happened.

ix) In any event, a failure to update on developments in relation to likely delivery dates would not render invalid a determination by Peregrine of the Scheduled Delivery Date under Article 3.2 even if Laudamotion had wanted the aircraft.

x) Similarly, an obligation to "consult" only works in relation to a party who is engaged in the delivery process. It is a co-operative process and once Laudamotion withdrew its co-operation any "consultation" would have involved whistling in the wind. By 1 May 2020, Laudamotion had not merely disengaged from the delivery process but made it abundantly clear that in no circumstances would it accept delivery. One cannot realistically continue to consult with someone who is not engaging and does not want the aircraft. In that situation, there cannot be meaningful consultation with the Lessee because of the Lessee's own stance; and of that the Lessee cannot complain.

xi) In any event, a failure to consult does not invalidate the appointment by the Lessor of the Scheduled Delivery Date.

xii) As to notice, Article 3.2 provides for the giving of "reasonable" notice rather than requiring a fixed amount of notice. What is reasonable for the purposes of Art 3.2 is contextual and depends on the circumstances pertaining at the time. Moreover, what is reasonable at a particular point in time must take account of what has gone before as well as what remains to be done, including that on 22 April 2020 the Lessor had made clear it would tender the aircraft for delivery. Before Laudamotion disengaged from the delivery process, what the parties had in mind was a delivery in short order, by the end of March 2020. By 1 May 2020, the demonstration flight had long since taken place and MSN 3361 was physically ready. All that remained was for Laudamotion to satisfy certain conditions precedent on its side (which in the event were waived by Peregrine tendering the aircraft without their being met) and complete its document review.

xiii) As noted above, the Lessee cannot, having failed to comply with its duty of co-operation and failed to progress the delivery process, then say that it ought to be

allowed more time to do the things it would have done had it not withdrawn its co-operation (especially where it indicates that it has no intention of accepting the aircraft and invites the Lessor to seek other lessees for the aircraft). By early May, not merely had Laudamotion spent approximately five weeks not working on that document review but it had made plain that it would not complete it because it would not accept the aircraft. In these circumstances, Laudamotion was not entitled to a longer notice period than it was given.

193. Dealing first with the effect of Article 3.2, in my view compliance with it was a precondition to a valid tender of the aircraft, essentially for practical reasons connected with the fair operation of the contract as intended by the parties. The complexity of the process makes it unlikely that the parties contemplated that the Lessee could be expected to take delivery of an aircraft on a date notified at short notice and without consultation. Even where the Lessee had proceeded diligently with the aircraft's physical and documentary review, there would inevitably be documents that could be finalised only at or very close to delivery (see further § 282 below). The fact that Article 3.2 expressly requires the Lessor to consult with the Lessee "*prior to making a determination as to*" the delivery date underlines the close link between the Article 3.2 obligations and the fixing of the delivery date. I do not consider that the two can be disengaged, with the result that the Lessor can fail to provide adequate notice and then argue that it would have made no difference. That would be unfair to the Lessee, by giving it the invidious choice of (a) accepting an aircraft without having had a proper chance to complete the final checks of its physical or documentary position, or (b) refusing to accept it, with the result that the lease could be terminated even though the Lessee (given proper notice) would have accepted delivery. The contract is workable in my view only if the obligation to take delivery is conditional on the Lessor having provided reasonable notice in accordance with Article 3.2.

194. I am not persuaded that it is necessary to imply a term that the Lessee should cooperate in the sense of proceeding with the document or other review process. The lease is workable without such a term for the reasons the Defendants give. A Lessee who chooses not to proceed with the review process with reasonable speed runs the risk of leaving itself with insufficient time before delivery to complete all the checks it might otherwise have wished to do. The Claimants are to that extent correct to say that a Lessee cannot simply buy more time pursuant to Article 3.2 by failing to proceed with the review process.

195. However, it does not follow that a reluctant or recalcitrant Lessee loses altogether the right to be notified, consulted and given reasonable notice under Article 3.2. The notification and consultation obligations remain important in that context. Those stages must, under the terms of Article 3.2, precede the fixing of a delivery date (giving reasonable notice of it to the Lessee).

196. If a Lessor gives periodic updates, by way of notification under Article 3.2, of the expected delivery date, and consults with the Lessee about it (by inviting any comments the Lessee may wish to make about it), then even a reluctant Lessee at least has the opportunity to ensure that it is conducting the review process quickly enough to be able to satisfy itself as to the condition of the aircraft and its documents by the delivery date subsequently notified to it.

197. In the present case, had Peregrine some time before 1 May 2020 notified that date as a prospective delivery date, after consulting Laudamotion about it, then Laudamotion would have been on notice that Peregrine was likely to fix that date (giving reasonable prior notice) as the delivery date, and could have taken steps accordingly. If it chose not to do so, then that would have been at its own risk. As it is, however, the absence of notification (after March 2020) and absence of any consultation meant that the delivery date of 7 May came completely out of the blue on 1 (or 5) May. It does not assist the Claimants to point out that delivery had originally been envisaged in March 2020. Delivery then would still have required compliance with Article 3.2, and by April 2020 the idea of a March delivery had gone. The Claimants' 22 April letter did not give any information about a contemplated delivery date, and I agree with the Defendants that it did not fulfil any of the Article 3.2 requirements. Nor did the statement in the Claimants' 29 April letter that they reserved their right to deliver each of the 2019 aircraft in accordance with the terms of the lease agreements.

198. In all these circumstances, the notice given cannot be regarded as having been reasonable. It left Laudamotion virtually no real time to take even rudimentary steps to assess whether the aircraft and its documents were ready for delivery, so as to be able to demonstrate (if necessary) any Material Deviations. I consider that the tender on 7 May was therefore invalid.

(2) 'Deliverable' condition: the Exhibit B § 4 documents (ECoA etc.)

(a) Relevant provisions

199. The Defendants contend that Laudamotion was not obliged to accept delivery of MSN 3361 because Peregrine failed to provide the documents required by Exhibit B § 4.

200. Article 6.4 of the lease provides that:

> "Nothing in this Lease will obligate …. (ii) LESSEE to accept delivery of the Aircraft from LESSOR, if the other party has not complied with its respective obligations contained in Articles 7.1, 7.2 and 7.4."

201. Article 7.4 states:

> "7.4 Conditions Precedent to be Satisfied by LESSOR. On or before the Scheduled Delivery Date, LESSOR shall deliver the following to LESSEE, each in a form and substance reasonably satisfactory to LESSEE and at no cost to LESSEE:
>
> …
>
> 7.4.8 the Aircraft conforms to the condition set forth in Exhibit B or otherwise conforms to such condition whereby LESSEE is obligated, pursuant to Article 6.2, to accept delivery of the Aircraft".

202. Article 6.2, discussed in further detail below, has the effect that the Lessee is not obliged to accept the aircraft if there are "Material Deviations" from the Delivery Condition, unless the Lessor corrects them at its own cost by the Final Delivery Date.

203. Exhibit B § 4 states:

> "(a) On or before the Delivery Date, LESSOR will provide LESSEE a valid export certificate of airworthiness with respect to the Aircraft.
>
> (b) At LESSEE's request, LESSOR at its cost will demonstrate that the Aircraft meets the requirements for issuance of an EASA Certificate of Airworthiness for transport category aircraft issued by an EASA member country by delivering to LESSEE at LESSOR's option either a Certificate of Airworthiness issued by an EASA member country (if the Aircraft is already or is to be registered in an EASA member country) or a letter or other document signed by an aviation authority of an EASA member country or another Person acceptable to LESSEE stating that such Person has inspected the Aircraft and Aircraft Documentation (including records and manuals) and has found that the Aircraft meets the requirements for issuance of a Certificate of Airworthiness for transport category aircraft issued by an EASA member country in accordance with EASA Part 21 and, in addition, meets the operating requirements of AIR OPS Part-CAT.IDE and Eurocontrol with no restrictions imposed."

(b) Facts

204. In the present case, Exhibit B § 4 required the production of three items:

i) an ECoA (subparagraph (a));

ii) a CAT.IDE statement (subparagraph (b)); and

iii) an EASA compliance statement (subparagraph (b)).

The lease imposed no obligation on Laudamotion to make a specific request for these items. However, Laudamotion did in fact identify the first two as being required, in the OIL: on 3 January 2020 for the ECoA (item FS004) and on 20 March 2020 for the CAT.IDE statement (item FS109). In addition, an internal email from Mr Akhrif dated 27 April 2020 stated "*The CAMO will have the ARC ready this week, this was requested by Lauda, as for compliance with ops mod CAMO the Lauda consultant had asked for it and the CAMO is ready to issue it.*" Mr Akhrif explained in his oral evidence that the ARC recommendation is a document sent to AustroControl recommending the issue of a certificate of airworthiness, and that it includes the EASA compliance statement.

205. The chronology in relation to the ECoA was this:

i) On 24 April 2020, the Claimants' Deputy Chief Technical Officer, Mr Burke, sent an email to Mr Akhrif underlining that delivery of MSN 3361 was "*subject to Cayman CAA*".

ii) On 30 April 2020, Mr Akhrif asked the Cayman CAA whether Flynas had submitted the application for an ECoA. The Cayman CAA responded the same day, saying the application was still being prepared.

iii) On 7 May 2020, MSN 3361 was tendered at 9.18am and Laudamotion responded at 10.25am.

iv) Thereafter, at 18.34 on 7 May 2020, Mr Akhrif sent an email to the Cayman CAA stating, "*can you please advise when we can expect the ECoA to be issued*", and the next day said, "*We badly need this ECoA, so anything we can do from our side as Lessor, please let us know*".

v) On Sunday 10 May 2020, the Cayman CAA informed Mr Akhrif that Flynas had provided it with additional information for the ECoA.

vi) The ECoA was issued on 12 May 2020. However, it was never provided to Laudamotion.

206. The need for a CAT.IDE statement derives from the part of Exhibit B §4(b) providing for the Lessor to provide a letter or other document signed by an aviation authority of an EASA member country, or another person acceptable to Lessee, stating that such person has inspected the aircraft and aircraft documentation (including records and manuals) and have found that the aircraft meets the operating requirements of AIR OPS Part-CAT.IDE and Eurocontrol with no restrictions imposed. Those requirements cover a range of safety equipment such as seat belts and their signs, flight data recorders and underwater locating devices.

207. The need for an EASA compliance letter derives from the part of Exhibit B §4(b) requiring a letter or other document signed by an aviation authority of an EASA member country, or another person acceptable to Lessee, stating that they have inspected the aircraft and aircraft documentation (including records and manuals) and has found that the aircraft meets the requirements for issuance of a Certificate of Airworthiness for transport category aircraft issued by an EASA member country in accordance with EASA Part 21.

208. The chronology in relation to these documents was:

i) In the evening of 7 May 2020, Mr Akhrif chased Celairion (the CAMO) to generate the EASA compliance letter and CAT.IDE statement, stating "*Lauda is arguing these items are holding the delivery*".

ii) They then had a call, and Mr Akhrif sent an email to Ms Bettinger of Celairion quoting part of the language of Exhibit B § 4 to indicate what Mr Akhrif was seeking.

iii) Celairion responded late on 7 May saying that they would draft a letter for Mr Akhrif's review and would sign it once he was happy with it.

iv) At 11.20am on 8 May, Celairion sent an unsigned draft to Mr Akhrif. There were then exchanges about the content of the draft before it was signed on 13 May 2020.

v) The CAT.IDE statement and EASA compliance letter were never provided to Laudamotion.

209. The Defendants' case is that the absence of these three documents on 7 May 2020 was a breach of Peregrine's obligations under Exhibit B §4 and meant that the aircraft (defined to include the 'Aircraft Documentation') was not in the condition set out in Exhibit B. These were Material Deviations, so the condition precedent under Article 7.4.8 was not satisfied. In those circumstances, Peregrine could not tender the aircraft and the Defendants were not obliged to accept it.

210. The Claimants make submissions on two aspects of the matter. The first relates to whether they were in fact required to have these three documents available on or by 7 May 2020. The second concerns whether the Defendants were able, pursuant to Article 6.2, to "demonstrate" that these were Material Deviations at Delivery.

(c) Whether the documents needed to be provided on 7 May 2020

211. As to the first aspect, the Claimants submit as follows:

i) The use of "Delivery Date" in Exhibit B § 4 is deliberate and is to be contrasted with the use of "Scheduled Delivery Date" in § 2. The obligation is to provide the document, at the latest, "On" the Delivery Date – that is, the date of Delivery, which as defined includes "acceptance of the Aircraft by LESSEE". This formulation "On or before" a particular date rather than "Prior to" (used in § 1) is important: the baseline obligation on the Lessor is not to provide the ECoA prior to Delivery taking place, but rather to provide it on the day that Delivery is intended to take place consensually. It assumes a willing Lessee. If Delivery is not feasible as envisaged by the lease, because the Lessee is not prepared to accept the aircraft at all, there can be no Delivery Date as defined.

ii) In other words, the obligation to "provide" the ECoA arises if the Lessee is willing in principle to take delivery. If the Lessee makes plain prior to the time fixed for delivery that it will not, whatever is done, take delivery, there is necessarily no obligation to provide the ECoA because the Delivery Date will never occur.

iii) In the present case, Laudamotion made entirely clear well before 7 May (in particular, by the letter dated 20 April 2020) and on 7 May 2020 itself (by its letter of that date, which asserted that the lease was void) that it would not take delivery whatever the state of the documents in relation to MSN 3361. The result was that there was no contractual obligation to provide the ECoA as at 7 May 2020.

iv) The same analysis applies to the CAT.IDE statement and EASA compliance letter. Exhibit B § 4(b) does not refer to a specific time for compliance. By implication, the relevant time is the same as provided by para 4(a), that is, no later than the Delivery Date.

v) Thus the fact that the experts agreed that the absence of the documents required by Exhibit B § 4 can be regarded as material is not determinative. Whilst the documents were not actually available on 7 May 2020, each was available in short order thereafter. If it had been the case that the documents could not be available (for example, because the condition of the aircraft as at 7 May 2020 meant that they could be issued), that would have been a Material Deviation. But in circumstances where there was nothing about the condition of MSN 3361 or its documents to prevent the documents required by Exhibit B § 4 from being issued then, looked at as at 7 May 2020, their being issued in short order was an inevitability. The Claimants were plainly willing and able to obtain these documents in short order at their own expense and certainly within the meaning and timescale envisaged by Article 6.2.

vi) The process of delivering the aircraft was one requiring the co-operation of both parties. Had Laudamotion been engaged in the process (that is, had it been performing its contractual duty to co-operate, rather than simply refusing to engage in or take any meaningful part in the delivery process after 26 March 2020), then the position in relation to the Exhibit B § 4 documents would have been the subject of dialogue. Dialogue between the parties would have demonstrated that the documents would become available in very short order. Their absence at 7 May 2020 was therefore not a Material Deviation.

vii) Where the Defendants were not willing to accept the aircraft and any deviation which might have been demonstrated could have been cured in short order (in this case well in advance of the Final Delivery Date), there was no non-compliance with Exhibit B and certainly not one which could properly be deemed material.

viii) Moreover, Article 6.2 requires that *"LESSOR and LESSEE agree to co-operate with each other to ensure that, to the extent reasonably possible, any such delay is minimized"* (the reference here to "any such delay" being to any delay to delivery caused by the existence of properly demonstrated Material Deviations). This recognises that it is in the interest of neither party for there to be unnecessary delay. In a case in which a particular document is absent at the time the aircraft is tendered, but will shortly be available, that duty requires the Lessee to accept the aircraft with the document to follow once it is available, subject to the Lessee's rights referred to in the preceding sub-paragraph.

212. I am unable to accept those submissions. The opening words of Article 6.2 make clear that the Lessee's obligation to accept delivery is conditional on there being no Material Deviations from the condition set out in Exhibit B:

> "If LESSEE is able to demonstrate that at Delivery there are deviations from the condition set forth in Exhibit B which are material or affect the airworthiness of the Aircraft ('Material Deviations'), LESSEE will not be obligated to accept the Aircraft unless LESSOR corrects such Material Deviations at its own cost. …"

213. The words "at Delivery" in this context plainly mean at the time the aircraft is tendered for delivery on the Delivery Date, fixed in accordance with Article 3.2, rather than upon

acceptance of delivery. They expressly contemplate – as is no more than common sense – that the Lessee can decline to accept delivery if the aircraft is materially non-compliant with Exhibit 4. This is an example of the definitions in the lease applying, per Article 2, *"[e]xcept where the context otherwise requires*".

214. The same must apply to the words "[o]n or before the Delivery Date" in Exhibit B § 4(a), as well as to other paragraphs of Exhibit B (such as §§ 7 and 8) which set out requirements the aircraft must satisfy "[a]t Delivery". The whole point of Exhibit B is to prescribe the condition which the aircraft must be in on delivery (physically and as regards documentation); and the clearly intended effect of those provisions when read with Article 6.2 is to require the Lessor to tender an aircraft that does not materially deviate from that condition. If there are Material Deviations, then Article 6.2 requires the Lessor to cure them before the Lessee is required to accept the aircraft.

215. In addition, it would be strange for the lease to have provided for the Exhibit B § 4 documents to be provided "on or before" the Delivery Date if the Lessor were required to produce them only upon acceptance of the aircraft by the Lessee.

216. It makes no difference, in my view, that a Lessee may have shown greater or lesser degree of reluctance to accept the aircraft during the period leading up to the Scheduled Delivery Date. The Lessor is entitled to require the Lessee to take the aircraft, but only if it is in a position to tender a materially compliant aircraft. A reluctant Lessee does not forfeit its rights under Article 6.2: otherwise, that provision would have the punitive effect of forcing such a Lessee to accept a non-compliant aircraft, following which it would have no redress (by virtue of Articles 8.1 and 8.4, considered earlier). It cannot be suggested that any cooperation from the Laudamotion was needed for Peregrine to be able to obtain the Exhibit B § 4 documents, and in due course it did obtain them without such cooperation.

217. The fact that the documents could, in fact, be obtained in short order does not in my view assist Peregrine. It could not seriously be disputed (and the experts agreed) that the need for them was a material requirement. Their absence was a Material Deviation. Accordingly, Article 6.2 allowed the Lessee to decline to accept the aircraft, but gave the Lessor the opportunity to cure the defect by the Final Delivery Date, upon which cure the Lessee would become obliged to accept delivery. However, Peregrine did not cure the defect because it did not provide the Exhibit B § 4 documents to Laudamotion. Instead, it purported to terminate the leasing of the aircraft.

218. The position is not, in my view, altered by the provision at the end of the first paragraph of Article 6.2. stating *"Without prejudice to the foregoing, LESSOR and LESSEE agree to co-operate with each other to ensure that, to the extent reasonably possible, any such delay is minimized"*. It is not entirely clear what the words "*such delay*" refer to, but the most likely interpretation is that they mean the period during which the Lessor seeks to cure any Material Deviations identified upon tender of the aircraft. The phrase does not require the Lessee to accept an aircraft that is materially non-compliant with the requirements of the lease simply against an assurance from the Lessor that the non-compliance will be cured soon. That would leave the Lessee in a precarious position, and is inconsistent with the scheme of Article 6.2. In any event, no such assurance was given to Laudamotion in relation to the Exhibit B § 4 documents.

(d) Did Laudamotion demonstrate a Material Deviation at the required time

219. Article 6.2 entitles the Lessee to refuse to accept delivery only if it *"is able to demonstrate that at Delivery there are deviations from the condition set forth in Exhibit B which are material or affect the airworthiness of the Aircraft ("Material Deviations")"*. For ease of reference I set it out again here:

> "If LESSEE is able to demonstrate that at Delivery there are deviations from the condition set forth in Exhibit B which are material or affect the airworthiness of the Aircraft ('Material Deviations'), LESSEE will not be obligated to accept the Aircraft unless LESSOR corrects such Material Deviations at its own cost. In the event that any Material Deviations have not been corrected by the Final Delivery Date, either party may terminate this Lease within 10 Business Days of the Final Delivery Date and in the event of such termination, neither party will have any further liability to the other party except that LESSOR will pay to LESSEE an amount equal to the amount of any prepaid Base Rent. If neither party gives notice of termination within such 10 Business Days, both parties lose all right to terminate under this Article 6.2 unless otherwise agreed in writing by the parties. Without prejudice to the foregoing, LESSOR and LESSEE agree to co-operate with each other to ensure that, to the extent reasonably possible, any such delay is minimized.
>
> If LESSEE is able to demonstrate that at Delivery there are deviations from the condition set forth in Exhibit B and such deviations do not affect the airworthiness of the Aircraft or such deviations are not material, then (a) LESSEE will be obligated to accept the Aircraft in its "AS IS" condition with such deviations, and subject to each and every disclaimer and waiver set forth in Article 8, and (b) LESSOR and LESSEE will at Delivery (by express statement by LESSOR on the Acceptance Certificate and not otherwise) mutually agree an appropriate amount of compensation payable to LESSEE for the cost of rectifying each such deviation or adjust the return conditions of the Aircraft set forth in Article 22 accordingly." (paragraph break interpolated)

220. The Claimants contend that Laudamotion failed to provide the necessary demonstration in relation to either the Exhibit B § 4 matters, or in relation to other alleged deficiencies which I consider later.

221. The relevant part of Laudamotion's letter of 7 May 2020 in response to Peregrine's tender of MSN 3361 said this:

> "Exhibit B sets out various conditions that must be complied with before Delivery can occur. These conditions have not been satisfied by the Lessor. In particular, without limitation, we refer to Article 1 (*Technical Report*), Article 2 (*Full Aircraft Documentation Review*), Article 3 (*Aircraft Inspection*) and

> Article 4 (*Certificate of Airworthiness Matters*) of Exhibit B, none of which have been complied with by the Lessor as required by the Lease Agreement."

222. The Claimants note that the letter is headed "without prejudice". It is common ground that it is not in fact a without prejudice letter, but the Claimants suggest that a letter so headed is not the place one would expect to find an attempt to demonstrate something for the purposes of Article 6.2. As to the substance of the letter, the Claimants submit that the paragraph quoted above contains a series of assertions at such a level of generality as to be meaningless. An entirely general assertion of wholesale non-compliance (much of which Laudamotion would have known was untrue – such as the acceptance flight referred to in § 3(b), which had occurred even before it disengaged) does not even begin to undertake that task, let alone discharge the burden Article 6.2 places on the Lessee. Moreover, Article 6.2 envisages the Lessor being able to correct the Material Deviations at its cost – and that it obviously cannot do if the Material Deviations of which complaint is made are not properly identified.

223. The Claimants further submit as follows:

i) The demonstration must be made at the time of tender. It is not enough, for example, that there was an item in an OIL at some point in the past, particularly in circumstances where the Lessee has withdrawn its technical team and ceased to update the OIL (it being the Lessee's responsibility to update the OIL by closing items).

ii) Article 6.2 requires co-operation. There is, first, an express obligation in the middle of the clause to co-operate to minimise delay. Secondly, in relation to non-material deviations, the clause requires a process of agreement between the parties: either to agree monetary compensation or an adjustment of the return conditions.

iii) The process of identifying those Material Deviations is part of the overall co-operative process of delivery. For the Lessee to "demonstrate" the existence of Material Deviations requires (a) that it has in fact ascertained their existence as at the time of the purported demonstration, and (b) that it then identifies them with specificity. It is not open to a Lessee to assert in a state of ignorance the existence of Material Deviations in a wholly scattergun manner without regard to its actual state of knowledge or the duty of co-operation. Such "demonstration" would allow the Defendants to take advantage of the wholesale unilateral disengagement from the process of delivery since late March 2020. The Defendants effectively disabled themselves from demonstrating anything about the prevailing condition of MSN 3361 or its records after 26 March 2020.

I return to these submissions later, after considering the Defendants' case on this issue.

224. The Defendants' primary case on this issue is that Article 6.2 does not in fact require the Lessee to demonstrate anything at all at the time of tender, for the following reasons.

i) Nothing in Article 6.2 either (a) says the Lessee must demonstrate anything, or (b) says that unless it does so, it must accept the aircraft.

ii) The focus is on the state of the aircraft, not what the Lessee does: the words used are not 'If Lessee demonstrates', but 'If Lessee is able to demonstrate', that is, what it could do rather than what it actually does do. No time for the demonstration is specified: 'at Delivery' relates to when the condition of the aircraft is measured, not when the demonstration is made (it is 'if Lessee is able to demonstrate that at Delivery there are deviations…', not 'if at Delivery, Lessee is able to demonstrate that there are deviations').

iii) On that interpretation, it does not matter that the word 'Delivery' is a defined term which includes acceptance.

iv) The lease provides no contractual standard for how any demonstration must occur. "Demonstrate" does not ordinarily mean allege with specificity as the Claimants suggest. If it is given its ordinary meaning, then the Claimants' approach to Article 6.2 would mean that a Lessee who could identify a Material Deviation but not prove it would be stuck with a materially deviant aircraft.

v) Article 7.4.8 states the following condition precedent to delivery:

> "Delivery Conditions: the Aircraft conforms to the conditions set forth in Exhibit B or otherwise conforms to such condition whereby LESSEE is obligated, pursuant to Article 6.2, to accept delivery of the Aircraft."

The words "otherwise conforms to such condition whereby LESSEE is obligated, pursuant to Article 6.2, to accept delivery" refer to the state of the aircraft (and thus what the Lessee is 'able to' demonstrate), not the demonstration the Lessee may have made (which is not a property of the condition of the aircraft). The phrase "condition whereby LESSEE is obligated" refers to the position where the deviations are in fact immaterial and do not affect airworthiness.

vi) Article 6.4 provides that "upon tender of the Aircraft by LESSOR to LESSEE in accordance with this Lease, LESSEE will accept the Aircraft subject to each and every disclaimer and waiver set forth in Article 8". That is inconsistent with the view that the obligation to accept depends, not upon whether the aircraft (or the tender) is 'in accordance with this Lease', but on whether the Lessee makes the 'demonstration' which the Claimants suggest is the critical point.

vii) If the Lessee were always obliged to accept the aircraft unless it 'demonstrates' a Material Deviation 'at Delivery', then there would be no point to Article 7.4.8 at all. The Claimants' approach would mean that the aircraft <u>always</u> 'conforms to the condition set forth in Exhibit B or otherwise conforms to such condition whereby LESSEE is obligated, pursuant to Article 6.2, to accept delivery', since Lessee would always be obliged to accept it unless and until the Lessee made the demonstration 'at Delivery'. So even if the aircraft were in pieces on the hangar floor, the Lessee would be obliged to accept delivery unless it objected.

viii) The Claimants' approach would be grossly unfair to the Lessee, in the light of Article 8. If the Lessee accepts the aircraft, Article 8 requires it to accept the aircraft "as is, where is" and sign an Acceptance Certificate waiving all claims

against the Lessor arising out of failure to comply with Delivery Condition, including waiving claims arising because Lessee "*accepted the aircraft without discovering the nonconformity but Lessee's acceptance of the aircraft was reasonably induced by either by the assurances of the Lessor of any other relevant third party of by the difficulty of discovering any defect prior to acceptance*" (Article 8.2). (For example, in *ACG v Olympic* [2013] 1 Lloyd's Rep 658, a lessee was stuck with an unairworthy aircraft with corroded flight control cables because it had signed an acceptance certificate.) It is easily possible to foresee a situation in which a Lessee is unhappy with the aircraft (or its documents, or the MRO which has been maintaining it) and believes (but cannot at the moment of delivery 'demonstrate') that it is materially deviant. This is particularly likely if the Lessee is given the contractual minimum of ten days to inspect the aircraft documents and may therefore have to 'take a view' without having had the time to look at all the detail.

225. I reject those submissions, which are in my view contrary to the scheme of Article 6.2 and the lease as a whole. The scheme of the lease is, first, for the Lessee to have a reasonable chance to assess the aircraft (including its documentation). That is, for example, why the lease sets out a variety of requirements for information to be made available to the Lessee in advance of delivery (including the minimum 10 Business Days documentation review period referred to in Exhibit B § 2, as well as physical inspections such as the borescope and acceptance flight requirements of § 3), and also requires consultation and reasonable notice of delivery pursuant to Article 3.2. Then, upon tender of the aircraft, the Lessee has the opportunity to identify any Material Deviations pursuant to Article 6.2, leading in turn to an opportunity for the Lessor to correct them prior to the Final Delivery Date. The Defendants' analysis cuts across this scheme as a whole, including the cure period. It would mean that a Lessee could simply refuse to accept delivery of the aircraft, and then at some later date (such as in the course of litigation) identify Material Deviations: thereby nullifying the correction opportunity specifically provided for in Article 6.2.

226. There is no inconsistency between this scheme and the wording of Articles 6.2, 6.4 and 7.4.8. Article 6.2 does not oblige the Lessee to demonstrate anything, but if the Lessee fails to do so then it loses its right to object. The demonstration obviously must occur at or very shortly after the time of tender, otherwise the correction period – which runs from demonstration to the end of the Final Delivery Date – would be ineffective; and the words "at Delivery" must (and easily can be) interpreted accordingly. The words "upon tender … in accordance with this Lease" are expressed to be "subject to" *inter alia* the Lessor having performed all the conditions precedent to Delivery set forth in § 7.4; and § 7.4.8 cross-refers to Article 6.2. The Defendants' contention that the words in § 7.4.8 "otherwise conforms to such condition whereby LESSEE is obligated, pursuant to Article 6.2, to accept delivery" refer to the state of the aircraft (and thus what the Lessee is 'able to' demonstrate), not the demonstration the Lessee has actually made, would for the same reasons undermine the scheme of Article 6.2 and the scheme of the lease as a whole.

227. Nor is there any unfairness in this. The word "demonstrate" must itself be read in the light of the scheme as a whole, including the fact that the demonstration needs to occur during a short time after tender so that the parties know where they stand and the Lessor has a fair opportunity to correct the Material Deviations in question before the Final

Delivery Date. Thus, on the one hand, the Lessee cannot be required to make an exhaustive technical demonstration of the matter in question. In practice, the process is likely to involve pointing out respects in which items that have already been considered and identified on the OIL remain open and amount to Material Deviations. On the other hand, because such demonstration leads to the Lessor's opportunity to correct, it must be sufficiently clear for the Lessor to know what it needs to correct. It follows that a mere general reference to an OIL dating from weeks or months previously is insufficient. The Lessee needs to identify which particular entries on the OIL are said to be material and remain unresolved. That is unlikely to be unduly onerous in circumstances where the Lessee has continued to engage in the process, closing items on the OIL as and when they have been resolved.

228. The Defendants' secondary case is that it is sufficient for the Lessee to demonstrate Material Deviations during the general 'delivery' process contemplated by Exhibit B. The practice in these leases, and apparently generally, is for the parties to use the OILs to identify what needs to be done to get the aircraft delivered; the open items are then reviewed and closed down before the aircraft is tendered. The Lessee cannot be expected to have to repeat itself regarding Material Deviations it has already raised and of which the Lessor is already aware.

229. I disagree, essentially for the reasons given above. By the time of tender, it is reasonable to expect that any open items will be limited in number and already known to the parties. The Lessee can reasonably be expected to object, upon tender, if it considers any of those open items to be Material Deviations, by identifying the items in question and (if only briefly) why it regards them as material. If, on the other hand, the Lessee has failed to update the OIL for weeks or months, then it does not adequately demonstrate the existence of Material Deviations merely by making a general assertion that there were open items on the OIL at that date. Such an assertion is of little or no value to the Lessor when seeking to identify any corrective action required pursuant to Article 6.2.

230. The Defendants' tertiary case is that Laudamotion did demonstrate the Exhibit B § 4 issues by the paragraph of its 7 May 2020 letter quoted earlier. That paragraph specifically included the point that Exhibit § 4 had not been complied with; and Exhibit B § 4 deals solely with the ECoA, EASA compliance letter, and CAT IDE statement, none of which had been provided to Laudamotion.

231. Further, Mr Akhrif accepted in his oral evidence that he knew (or "most likely" knew) that this paragraph of Laudamotion's letter was referring to those three documents. That acceptance is consistent with his renewed efforts to obtain them very shortly after the letter was received, as well as his statements in the 7 May emails quoted earlier that the Claimants *"badly need this ECoA"* and that *"Lauda is arguing these two items are holding the delivery*", meaning the EASA compliance letter and CAT.IDE statement.

232. In considering this argument, it is necessary to return to the points made by the Claimants, summarised earlier, that the process of identifying Material Deviations is part of the overall co-operative process of delivery, so that for Lessee to "demonstrate" the existence of Material Deviations it must in fact have ascertained their existence as at the time of the purported demonstration, and then identify them with specificity. It is not, the Claimants submit, open to a Lessee to assert in a state of ignorance the existence of Material Deviations in a wholly scattergun manner without regard to its

actual state of knowledge or the duty of co-operation. Such an approach would allow the Defendants to take advantage of the wholesale unilateral disengagement from the process of delivery since late March 2020, which meant that (as the Defendants' witnesses admitted) they did not know the technical condition of the aircraft on 7 May 2020.

233. I am not persuaded that Article 6.2 requires any specific state of knowledge on the part of the Lessee as to the Material Deviations it seeks to demonstrate. It is unnecessary to imply any term to that effect in order to make the provision workable. At most, it is arguable that for a Lessee to purport to demonstrate alleged Material Deviations which it positively knew did not exist would be in breach of the agreement to minimise any delay during the correction period, since the inclusion of a plethora of clearly incorrect items might delay the Lessor in its process of deciding what corrections were necessary (though, in practice, I suspect the rogue items would usually be obvious because they either had never appeared on an OIL or had been closed).

234. In any event, the Exhibit B § 4 documents were items required actually to be delivered or provided to Lessee on or before delivery. Laudamotion knew that it had requested these items in the OIL; the evidence also indicates that its consultant had specifically asked for the EASA compliance statement on or shortly before 27 April 2020 (see earlier); and Laudamotion must have known that it had not in fact received any of the three items.

235. Further, although the relevant paragraph of Laudamotion's letter of 7 May 2020 was unspecific in other respects, it was accurate and, in my view, specific in stating that Exhibit B § 4 had not been complied with. None of the Exhibit B § 4 items had been provided to it. Moreover, the evidence of Mr Akhrif mentioned earlier indicates that the Claimants did in fact understand from the 7 May letter that Laudamotion was pointing out this absence: see § 231 above.

236. I therefore conclude that the absence of the Exhibit B § 4 items was a Material Deviation that Laudamotion did demonstrate on tender, and which was not cured prior to the Final Delivery Date. That constituted a further reason why Laudamotion was not obliged to accept delivery of MSN 3361, in addition to the non-compliance with Article 3.2 considered in section (1) above.

(3) Aircraft on lease to Flynas

237. The Defendants submit that Peregrine was not entitled to tender MSN 3361 on 1 May 2020 because it was still on lease to Flynas, the previous lessee, until 5 June 2020.

238. Article 3.3 provides that:

> "Without prejudice to LESSEE's right to terminate the Lease under Article 3.6 and to the return of any Base Rent following any such termination, LESSOR and LESSEE expressly acknowledge that Delivery is subject to and conditioned upon redelivery of the Aircraft by Prior Lessee in accordance with the terms of the Prior Lessee Lease Agreement."

239. As noted earlier, Article 3.3 must be read in conjunction with Article 3.6, which requires the Lessor to notify the Lessee promptly after the Lessor becomes aware that a delay will cause Delivery to be delayed beyond the Final Delivery Date. Each party is then given an option to terminate the lease within 10 Business Days thereafter. The Defendants say Peregrine breached an obligation which Article 3.3 placed on it to secure redelivery from Flynas.

240. The Defendants argue that Article 3.3 is for both parties' benefit, consistent with the fact that it begins with both parties' acknowledgments. So far as the Lessee is concerned, Article 3.3 means that the aircraft cannot be tendered unless it has been redelivered 'in accordance with the terms of the Prior Lessee Lease Agreement'. That means the Prior Lessee will have been obliged to put the aircraft and documents in order, and that will make the new Lessee's task of assessing the aircraft's condition and accepting it into its fleet easier.

241. Further, the Defendants contend:

i) Article 7.4.5 states:

> "On or before the Scheduled Delivery Date [7 May 2020], LESSOR shall deliver the following to LESSEE, each in a form and substance reasonably satisfactory to LESSEE and at no cost to LESSEE….a certificate signed by an officer of LESSOR stating that the representations and warranties contained in Article 20.1 are true and accurate on and as of the Delivery Date [7 May 2020] as though made on and as of such date".

ii) Under Article 20.1:

> "LESSOR represents and warrants the following to LESSEE as of the date of execution of the Lease and as of the Delivery Date [7 May 2020] …. As of Delivery…. (b) LESSOR will be able to lease the Aircraft to LESSEE".

iii) Under cover of the 1 May 2020 letter, Peregrine enclosed a certificate signed by Mr Treacy, stating that "As of Delivery…(b) LESSOR will able to lease the Aircraft to LESSEE and (c) there will be no Security Interests in the Aircraft other than Permitted Liens".

iv) However, the certificate was inaccurate because the Flynas lease was not terminated on 7 May. Peregrine therefore did not comply with the condition precedent in Article 7.4.5.

v) Further, the Claimants took none of the preparatory steps one would expect to see if Peregrine was to be in a position to terminate the Flynas lease on 7 May 2020. There was no draft termination notice prepared, no communication with the legal and contracts department over the right to terminate, no prior communication with Flynas about security deposits and maintenance rent reserves, and no communication with Fokker about the lien it had on the aircraft due to Flynas' indebtedness.

242. I do not accept those submissions. The purpose of Article 3.3, read alongside Article 3.6, was to record both parties' agreement that Lessor would not be obliged to deliver the aircraft under the lease until the Prior Lessee had redelivered it to the Lessor, subject to the parties' right to terminate pursuant to Article 3.6 if the delay exceeded a certain point. If the aircraft was delivered to the Lessee, then the Lessee had the benefit of a quiet enjoyment set out in Article 20.2 of the lease. Article 3.3 did not impose an obligation on Lessor to secure redelivery from the Prior Lessee, nor to do so by a particular date.

243. The requirement set out in Article 7.4.5 was that the Lessor be "able to" lease the aircraft to the Lessee, as of the Delivery Date. Peregrine was able to do so: the terms of the Flynas leases entitled Peregrine to bring it to an end, immediately, even before Flynas put MSN 3361 in redelivery condition (Article 23.14.4 of that lease). Further, the Claimants' evidence, which I accept, was that had Laudamotion been willing to accept delivery, then Peregrine could (in practical terms) and would have exercised the right to terminate the Flynas lease on 7 May 2020.

(4) 'Deliverable condition': storage

244. The Defendants contend that other reasons existed why they were not obliged to accept delivery of MSN 3361. In the light of my conclusions in section (1) and (2) above, it is not strictly necessary to consider these, but I do so fairly briefly below. The first arises from MSN 3361 having been prepared for storage.

245. By 7 May 2020, the aircraft was being prepared for storage because the Claimants had anticipated that Laudamotion would decline to accept delivery of it. As set out in Fokker's routine task card, a number of storage tasks had been performed by that date. It is common ground that these needed to be reversed before MSN 3361 could be flown. They included protection procedures applied to the engines and integrated drive generators (where corrosion inhibitor had been put into the oil system), protection of the APU, protection of the landing gear, protection of the water and toilet system, flushing of the air data system, protection of flight controls, protection of cabin and cockpit, removal of certain equipment, installation of protection equipment and external protection of the aircraft.

246. The Defendants submit that, as a result, the aircraft was not airworthy as required by Exhibit B § 5(f):

> "The Aircraft will be airworthy, conform to type design and be in a condition for safe operation, with all Aircraft equipment, components and systems operating in accordance with their intended use and within limits approved by Manufacturer, the aviation authority and the EASA."

As a result, pursuant to Article 6.2 Laudamotion was not obliged to accept it.

247. The Defendants cite the statement of Teare J in *ACG v Olympic* [2012] EWHC 1070 (Comm):

> "Counsel were unable to refer me to any authority which considered the meaning of airworthiness. However, the meaning

> of seaworthiness in the context of the carriage of goods by sea is well established. The classic test of unseaworthiness, as explained in Scrutton on Charterparties (22nd edn) at paragraph 7-020 is: '*Would a prudent owner have required that the defect should be made good before sending his ship to sea, had he known of it. If he would the ship was not seaworthy*.' Notwithstanding that aircraft maintenance appears to be more detailed, more regulated and more heavily prescribed than ship maintenance (such that one should be cautious in drawing analogies between ships and aircraft, cf *Pindell Ltd v AirAsia* [2010] EWHC 2516 (Comm); [2012] 2 CLC 1 at paragraph 78), I am unable to see any reason for understanding airworthiness in a materially different manner from seaworthiness. On that basis an appropriate test for airworthiness is: 'Would a prudent operator of an aircraft have required that the defect should be made good before permitting the aircraft to fly, had he known of it. If he would the aircraft was not airworthy.'" (§ 119)

248. In my view it is unnecessary to carry across a definition from the shipping context, a far less regulated area than aviation. As the Claimants point out, there is (in the European context) a detailed continuing airworthiness regime (as set out in the Easy Access Rules). A more appropriate definition of airworthiness would be the one proposed by the Claimants:

> "The aircraft and its records have been maintained in accordance with the provisions of Regulation EU 1321/2014 (including rules and guidance issued pursuant thereto) and no maintenance or repair required pursuant to that Regulation (including rules and guidance issued pursuant thereto) remains outstanding."

249. The experts in the present case agreed in their Joint Statement that:

> "as the aircraft was not in operation it was an airworthiness requirement for the Aircraft to be stored and preserved in accordance with the requirements of Airbus".

250. An aircraft can scarcely be regarded as unairworthy by reason of steps having been taken to comply with an airworthiness requirement. Moreover, those steps did not result in any "defect", so even applying the test formulated by Teare J would not lead to the conclusion that MSN 3361 was unairworthy. Although two of Peregrine's witnesses accepted in cross-examination the proposition that an aircraft which is in storage cannot be flown and is not airworthy, their evidence did not address the test that in my view should be applied. Airworthiness is not simply a question of fact that can be approached without regard to regulatory requirements.

251. Moreover, Laudamotion's letter of 7 May 2020 took no issue with the fact that MSN 3361 was being prepared for storage, no doubt because having disengaged from the delivery process they did not know. That, however, is one of the risks they took by disengaging. So, pursuant to Article 6.2 of the lease, the storage point is not one on which Laudamotion could in any event rely as a Material Deviation justifying a refusal to accept delivery.

(5) 'Deliverable condition': aircraft documentation

(a) Absence of demonstration pursuant to Article 6.2

252. The Defendants also allege that there were Material Deviations from the required condition set out in Exhibit B for a number of other reasons, relating mainly to the documentary records of repairs and maintenance of MSN 3361.

253. Because I have concluded that Laudamotion was not obliged to take delivery for the reasons set out in sections (1) and (2) above, it is not strictly necessary to decide these further allegations.

254. Were it necessary to do so, I would reject them on the ground that Laudamotion failed to demonstrate any of these matters, so as to provide a basis for refusing to accept delivery pursuant to Article 6.2. The relevant part of Laudamotion's letter of 7 May 2020 is quoted in § 221 above. I have concluded that as regards the Exhibit B § 4 documents, that amounted to sufficient demonstration: § 4 related to three documents only, each of which was absent, and Peregrine understood Laudamotion's letter to be saying that they were missing. However, those considerations do not apply to the matters considered in this section. I have already made the point that reliance on the out-of-date OIL was insufficient, and the relevant part of Laudamotion's 7 May 2020 did not even seek to do so. Aside from the Exhibit B § 4 matters, Laudamotion's letter failed to provide sufficient specificity to enable Peregrine to assess the complaint made or to take up the opportunity, which Article 6.2 was intended to provide, to correct any Material Deviations.

255. It follows that Laudamotion would not have been entitled to refuse to accept delivery on any of these grounds.

256. Even if that were not the position, I would not have been persuaded that any of these matters was material. I give reasons for that view below.

(b) The Defendants' approach

257. I note at the outset that the Defendants' approach to this part of the case was unsatisfactory, involving a frequently-changing scattergun approach, as part of which alleged defects were sought to be raised long after the event, sometimes even in the course of cross-examination.

258. The Defence served on 30 July 2020 asserted that as at 7 May 2020 MSN 3361 was not in Delivery Condition, relying "*on each of the matters set out in the Schedule [to the Defence], which were material and/or affected the airworthiness of the Aircraft.*" That Schedule had been prepared by reference to the OIL as it stood when Laudamotion instructed its technical representatives to disengage on 26 March 2020. It listed 133 items, some with sub-items. It is clear that no adequate (if any) consideration had been given to the materiality/airworthiness test, as illustrated by the inclusion of the item "*All cabin attendant seat belts require cleaning*".

259. The Defence also contained an entirely general and unparticularised plea that the Lessors "could not place" the final three aircraft into Delivery Condition by the relevant Final Delivery Dates (a matter to which I return later).

260. The Schedule to the Claimants' Reply responded to the Defence Schedule in detail. Then, by a CPR Part 18 Response dated 9 April 2021, the Defendants dropped (a) 43 entire line items from the Defence Schedule, (b) in respect of one line item (No 95), 9 sub-items, (c) in respect of one line item (No 96), 5 sub-items, and (d) in respect of one line item (No 133), 25 sub-items.

261. At the CMC, the court required the Defendants (a) to respond to the Claimants' Reply Schedule, and (b) to particularise their case in respect of the last three aircraft ("*setting out in respect of each of MSN 3396, 3425, and 3475 the regards in which they contend that the relevant Claimant could not have placed the relevant aircraft in Delivery Condition by the Final Delivery Date*.")

262. The Defendants served those Schedules on 5 July 2021, and the Claimants served a responsive document on 20 August 2021.

263. On 24 December 2021, the Defendants' solicitors wrote withdrawing some of the items previously relied upon. That was the same day that the first report of the Defendants' expert Mr Goatcher was served.

264. I agree with the Claimants that, following these stages in the litigation, the proper parameters of the debate about the condition of the aircraft and their documentation are the allegations as advanced in the Defendants' 5 July 2021 Schedule, less those subsequently dropped. The Defendants are not permitted to rely on (for example) new allegations formulated during cross-examination. Nor are they entitled to rely on new points made for the first time in Mr Goatcher's report.

265. The Claimants highlight an example of the latter type of point which is illustrative of the unsatisfactory nature of the Defendants' approach. Laudamotion's technical representatives referred in OIL entry MSN 3361/15 on 23 March 2020 to an apparent typo on the DFP ("dirty fingerprint" engineer's document). The entry said "*Annotated SRM ref 53-00-11-300-23 typo error? (-023)"*), and a response given on 24 March 2020 said "*This is typo and will not be changed. Reference is correct on STD For repair*". Thus, at the time of the OIL, Laudamotion's only complaint was a typographical error in the form of a missing "0", which was missing in one typescript part of the document, but corrected in manuscript in another, and with the correct reference in the wholly manuscript part.

266. It could not seriously be suggested that this matter was material or affected the aircraft's airworthiness. Nonetheless, it was included in the Schedule to the Defence as a material matter. The Defendants' Schedule served on 5 July 2021 asserted that because Peregrine had failed to provide a corrected job card more than 10 Business Days before 7 May 2020, there was a Material Deviation. The pleaded issue thus remained whether the non-provision of a document correcting a minor typographical error was a Material Deviation.

267. However, Mr Goatcher's report instead sought to advance four entirely new points in relation to this item, relating to details of the information said to have been required in but absent from the repair records pursuant to the SRM. Mr Goatcher dropped two of those points after a response from the Claimants' expert, Mr Bull. The two remaining points were raised for the first time on 24 December 2021. No explanation is provided as to how these points could be material, when they were not raised in the OIL, on 7

May 2020 or in the Defendants' statements of case. It is in any event not open to the Defendants to rely on unpleaded points of this nature.

(c) Contractual and regulatory regime

268. Turning to the substance, the relevant obligations in Exhibit B were these:

> "2. Full Aircraft Documentation Review
>
> For a period commencing at least 10 Business Days prior to the Scheduled Delivery Date and continuing until the date on which the Aircraft is delivered to LESSEE, LESSOR will provide for the review of LESSEE and/or its representative all of the Aircraft records and historical documents described in Exhibit N. The Aircraft records and historical documents may have been maintained in an Electronic Records Format, in which case such Aircraft records and historical documents will be provided to LESSEE in CD or other electronic format at the commencement of such period. Any Aircraft records and historical documents not maintained in an Electronic Records Format will be provided for the review of LESSEE and/or its representative in one central room at the Delivery Location at the commencement of such period."
>
> …
>
> "5. General Condition of Aircraft at Delivery
>
> (a) The Aircraft, Engines, APU and Parts will have been maintained and repaired in accordance with Prior Lessee's maintenance program and the rules and regulations of the Civil Aviation Authority of the Cayman Islands.
>
> (b) Aircraft Documentation (including records and manuals) will have been maintained in English and in an up to date status, and may have been maintained in an Electronic Records Format, in accordance with the rules and regulations of the Civil Aviation Authority of the Cayman Islands and in a form necessary in order to meet the requirements of this Exhibit B. The records and historical documents set forth in Exhibit N will be in English.
>
> …
>
> (f) The Aircraft will be airworthy, conform to type design and be in a condition for safe operation, with all Aircraft equipment, components and systems operating in accordance with their intended use and within limits approved by Manufacturer, the aviation authority and the EASA.
>
> …

> (i) All repairs to the Aircraft will have been accomplished in accordance with Manufacturer's Structural Repair Manual (or EASA-approved data supported by DGAC Repair Design Approval Sheets or its EASA equivalent)."

The list of Aircraft Documentation in Exhibit N included:

> "10. Routine and non-routine job cards of the Return Check
>
> 11. Routine and non-routine maintenance work cards for tasks performed during the Lease Term that were not repeated at or superseded by the Return Check
>
> …
>
> 13. Major and Minor structural repairs with applicable approvals"

269. As to the regulatory regime, the EASA "*Easy Access Rules for Continuing Airworthiness*" were introduced under Regulation (EU) 1321/2104. The Introduction states "*Rules and regulations are the core of the European Union civil aviation system*" and that the Rules are "*the single source for all aviation safety rules applicable to European airspace users*". The Easy Access Rules were "*prepared by putting together the officially published regulations with the related acceptable means of compliance and guidance material (including the amendments) adopted so far*." The headings in the Easy Access Rules are colour-coded: blue headings for regulations and implementing rules; orange headings indicate an acceptable means of compliance with the primary regulation or rule; and green headings indicate guidance material.

270. The rules include the so-called "Part 145" which "*establishes the requirements to be met by an organisation to qualify for the issue or continuation of an approval for the maintenance of aircraft and components*." (The nomenclature is somewhat complicated by the use of names derived from the US regime, such as "Part 145" – which is not Part 145 of the EU Regulation, but instead Annex II to it.) Part 145 makes provision relating to MROs (such as Fokker and Vallair) rather than aircraft operators. Part 145 includes a requirement that the organisation, i.e. the MRO, *"shall hold and use applicable current maintenance data in the performance of maintenance, including modifications and repairs"* (§ 145.A.45(a)).

271. Aircraft operators are (or can be) subject to the requirements of Part M (albeit Flynas, an operator outside Europe of aircraft on a non-European register, was not subject to Part M).

272. MA 304 ("Data for modification and repairs") provides that:

> "A person or organisation repairing an aircraft or a component, shall assess any damage. Modifications and repairs shall be carried out using, as appropriate, the following data:
>
> (a) approved by the Agency;

> (b) approved by a design organisation complying with Annex I (Part-21) to Regulation (EU) No 748/2012;
>
> …"

Limb (b) would in this instance include the Structural Repair Manual ("***SRM***") promulgated by Airbus in relation to its aircraft.

273. MA 305 ("Aircraft continuing airworthiness system") states:

> "(a) At the completion of any maintenance, aircraft certificate of release to service ('CRS') required by point M.A.801 or point 145.A.50, as applicable, shall be entered in the aircraft continuing airworthiness record system, as soon as practicable and no later than 30 days after the completion of any maintenance.
>
> (b) The aircraft continuing airworthiness record system shall contain the following:
>
> 1. the date of the entry, the total in-service life accumulated in the applicable parameter for aircraft, engine(s) and/or propeller(s);
>
> 2. the aircraft continuing airworthiness records described in points (c) and (d) below together with the supporting detailed maintenance records described in point (e) below;
>
> …
>
> (e) The owner or operator shall establish a system to keep the following documents and data in a form acceptable to the competent authority and for the periods specified below:
>
> 1. aircraft technical log system: the technical log or other data equivalent in scope and detail, covering the 36 months period prior to the last entry,
>
> 2. the CRS and detailed maintenance records:
>
> (i) demonstrating compliance with ADs and measures mandated by the competent authority in immediate reaction to a safety problem applicable to the aircraft, engine(s), propeller(s) and components fitted thereto, as appropriate, until such time as the information contained therein is superseded by new information equivalent in scope and detail but covering a period not shorter than 36 months;
>
> (ii) demonstrating compliance with the applicable data in accordance with point M.A.304 for current modifications and repairs to the aircraft, engine(s), propeller(s) and any component subject to airworthiness limitations; and

> (iii) of all scheduled maintenance or other maintenance required for continuing airworthiness of aircraft, engine(s), propeller(s), as appropriate, until such time as the information contained therein is superseded by new information equivalent in scope and detail but covering a period not shorter than 36 months.
>
> …"

274. The guidance at GM M.A.305 explains:

> "(a) The aircraft continuing airworthiness records are the means to assess the airworthiness status of a product and its components. An aircraft continuing airworthiness record system includes the processes to keep and manage those records and should be proportionate to the subject aircraft. Aircraft continuing airworthiness records should provide the owner/CAO/CAMO of an aircraft with the information needed:
>
> (1) to demonstrate that the aircraft is in compliance with the applicable airworthiness requirements; and
>
> (2) to schedule all future maintenance as required by the aircraft maintenance programme based, if any, on the last accomplishment of the specific maintenance as recorded in the aircraft continuing airworthiness records.
>
> …
>
> (g) 'Detailed maintenance records' in this part refers to those records required to be kept by the person or organisation responsible for the aircraft continuing airworthiness in accordance with M.A.201 [i.e. the owner or lessee, per MA 201] in order that they may be able to fulfil their obligations under Part M.
>
> These are only a part of the detailed maintenance records required to be kept by a maintenance organisation under M.A.614, CAO.A.090(a) or 145.A.55(c). Maintenance organisations are required to retain all detailed records to demonstrate that they worked in compliance with their respective requirements and quality procedures.
>
> Not all records need to be transferred from the maintenance organisation to the person or organisation responsible for the aircraft continuing airworthiness in accordance with M.A.201 unless they specifically contain information relevant to aircraft configuration and future maintenance. Thus, incoming certificates of conformity, batch number references and individual task card sign-offs verified by and/or generated by the maintenance organisation are not required to be retained by the

> person or organisation responsible in accordance with M.A.201. However, dimensional information contained in the task card sign-off or work pack may be requested by the owner/CAO/CAMO in order to verify and demonstrate the effectiveness of the aircraft maintenance programme.
>
> Information relevant to future maintenance may be contained in specific documents related to:
>
> - modifications;
> - airworthiness directives;
> - repaired and non-repaired damage;
> - components referred in M.A.305(d); and
> - measurements relating to defects.
>
> …"

275. Further, the orange colour-coded material at AMC M.A.305(e)(2) makes clear that:

> "(a) EASA Form 1 and the Certificate of Conformity of the components used to perform a modification/repair are not part of the substantiation data for a modification/repair. These certificates are retained by the maintenance organisation. …"

276. The regulations thus draw a distinction between documents which the operator is required to hold and those which can remain with the MRO. There was some debate between the parties about whether the documentation Peregrine was required to produce to Laudamotion prior to delivery were limited to the former, or whether it also had to make available documents held by the MRO (if necessary, making them available for inspection of the MRO's premises), by reason of (a) the references in Exhibit N (to which Exhibit B § 2 in turn refers) to return check job cards, maintenance work cards or major/minor structural repairs, and/or (b) the requirement in Exhibit B § 5(i) for all repairs to have been accomplished in accordance with the SRM. For present purposes I am prepared to assume, without deciding, that the Defendants are correct on that point.

277. So far as concerns the contents of the SRM, the Defendants rely in particular on certain requirements in chapter 51-11-15 *"Description – Data Recording of Allowable Damage and Repairs*":

i) The 'location of repair that should be recorded in repair data form', including a 'sketch or drawing', 'photograph (optional)', 'detailed location –e.g. between FR XX and FR YY, Stringer A and Stringer B or 200 mm (7.87 in) from STA XXX etc.'.

ii) 'Proximity to adjacent repairs, original doubles, modifications or production joints should be recorded', including 'any repair(s) or damage located on the same or adjacent component (e.g. within one stringer, rib or frame bay of the primary repair'.

iii) 'Dimensions of the repair' include 'length, width or diameter, orientation and any additional dimensions defining the damage or repair geometry'; the repair form Airbus gives also requires 'edge distance in the repair doubler and to cut out in the original part'.

iv) Details of the repair are then to be recorded, including '*fastener type (solid, blind, head shape) including material and number of fastener rows*', '*surface protection*'.

(d) The alleged defects

278. The first group of alleged defects is that eight items were not uploaded to the Box not later than 10 Business Days prior to 7 May 2020, pursuant to Exhibit B § 2 (OIL items MSN 3361/63, 69, 70, 72, 78, 82, 84 and 85).

279. Item MSN 3361/63 related to Exhibit N item 9 "*AD compliance report with original signoffs*". The pleaded complaint is that not all the DFPs showing compliance were uploaded to the Box more than 10 Business Days before 7 May 2020. However, there was no contractual obligation to upload the DFPs to the Box, as opposed to making them available for inspection at Fokker's premises. Further, the Defendants failed to identify the DFPs in question. In any event, it is common ground that all the DFPs were uploaded to the Box by 7 May 2020. There was accordingly no deviation and, in any event, no Material Deviation.

280. Even if there had been an otherwise Material Deviation, under Article 6.2, following demonstration of the deviation by Laudamotion (which, of course it failed to do here), Peregrine would have had the opportunity to correct it by the Final Delivery Date and retender the aircraft. Since, however, the DFPs had in fact already been uploaded by 7 May 2020, the deviation would already have been corrected. (It can hardly be suggested that a delay of a few days in uploading a document could be regarded as an incurable breach – a concept for which Article 6.2 makes no provision – with the result that the Lessee could never be required to accept delivery.) That tends to underline the immateriality of the alleged deviation.

281. Item 3361/78 related to an off-wing escape slide, which lacked the required minimum of 12 months left before removal (removal for overhaul was required by 1 May 2021). However, Laudamotion had recorded in the OIL that it would accept it, and never withdrew that agreement. The item was immaterial.

282. The remaining items in this group were statements which were inherently liable to change on a very regular basis, and which in practice were more practicably provided on or very close to the delivery date: aircraft hard time inspection status, aircraft modification status including service bulletins, APU records rotables list, hard time component records, engine records rotables list, current engine hours and cycles, and engine component report. Mr Goatcher notably accepted that another, comparable, item in Exhibit N (Accident and Incident report, or "Non-Incident Statement") did not have to be available 10 Business Days before delivery. It is unclear why he suggested the position was different for these further items. In cross-examination, Mr Goatcher also expressly accepted that the first item, hard time inspection status, had to be provided at or very close to delivery in order to be accurate, because the status of components changes over time; that APU rotables could easily be changed overnight,

and that the current engines hours and cycles report needed to be current as at the delivery date. The same in my view applied to all of these items. There was no Material Deviation.

283. The second group of alleged defects relates to documentation of repairs. All nine of these items were added to the OIL on 23 March 2020, a few days after Ryanair's letter of 18 March 2020 and a few days before Laudamotion's technical team disengaged from the delivery process. Although it is true that an instruction had been given to update the OIL, it is tempting to suspect that these items were added (at best) for completeness rather than on the basis of any view as to their materiality.

284. A recurring point in this context was Mr Goatcher's reliance on a provision in the Airbus SRM stating, in relation to "Date Recording of Allowable Damage and Repairs":

> "Location of repair that should be recorded in repair data form:
>
> - Sketch or drawing
>
> …
>
> NOTE: Refer to Chapter 51-11-13 for more details."

The further details were not, however, provided. Mr Bull's evidence was that modern practice is often not to sketch with a pencil and paper, but to annotate the aircraft and take a photograph. Since the purpose of a sketch is to provide information in graphic form for practical purposes, it does not appear to me that a suitable photograph of an annotated section of the aircraft fails to comply with the requirement: indeed, it seems likely to be more informative. The fact that a reputable MRO such as Fokker adopts this practice tends to support the view that it is not inappropriate. Pressed on this issue, Mr Goatcher resorted to the suggestion that, rather than sketches, there should in fact be "detailed drawings" for every repair. However, that is not what the requirement states. I prefer Mr Bull's evidence on this point.

285. As to the individual repairs or damage assessments:

i) Item 3361/8 concerns a dent to the left outboard flap repaired by filling. The only pleaded complaint was about the absence of a "Material list and its COC [certificate of conformity]/BN [batch number] (resin repair)" . However, the list of materials was not required to be provided to the operator, and would be retained by the MRO. In any event, Mr Goatcher accepted that the DFP shows that Fokker certified that it used the grade of filler prescribed by the SRM. There was no Material Deviation.

ii) Item 3361/10 involved the assessment of an existing blend above an existing repair to the left-hand engine cowl lipskin. Mr Goatcher's complaints about this item were (a) a lack of dimensions as to the repairs' proximity to each other, and (b) a lack of "approved source data references" (pleaded as Rohr/OEM SRM, Rohr being the component manufacturer). However, the DFP and photograph considered with Mr Goatcher in cross-examination gave a clear view of the relative positions of the two repairs, which almost touched each other; and that

Fokker had stated the Rohr SRM (or "Goodrich SRM", Rohr and Goodrich being part of a combined group) in accordance with which they had carried out the task. The item in question was, Mr Goatcher agreed, a "tiny blend repair". Any deficiency was immaterial.

iii) Item 3361/15 is the item I mention above about a repair to the left-hand fuselage, where the only pleaded complaint (per the Defendants' 5 July 2021 Schedule) related to an obvious typo which required correction. It was immaterial.

iv) Item 3361/19 concerns a repair to the APU door. The pleaded complaint was that the task card cited the wrong SRM reference. The Claimants pointed out in response that Fokker had issued approval for the repair pursuant to their status as an EASA Design Organisation. In any event, Mr Goatcher did not in his evidence pursue the pleaded complaint, instead seeking to advance other matters, on which the Defendants are not entitled to rely even if they had any merit.

v) Items 3361/6, 25, 26, 27 and 28 all concern damage to the Trimmable Horizontal Stabiliser ("***THS***"). In relation to one of these items, 3361/6, Mr Goatcher initially said that it gave rise to a Material Deviation, but in the experts' Joint Statement he agreed with Mr Bull that it did not. Mr Goatcher then, at the start of his oral evidence, rowed back from that and reverted to his original opinion, agreeing that he had done so due to a concern that if he had made a reasonable concession at the joint expert meeting, he would appear unreasonable in continuing to dispute the similar items 26-28 (repair numbers 56, 57 and 58). As to the substance, the complaint in the OIL was "*no damage mapping to show proximity of dents. Photo shows more than 1 dent*". This complaint had an air of unreality, since the THS is a component close to the ground which commonly sustains debris damage in the form of tiny dents, and for that reason has a protective steel cover as opposed to the aluminium used for other parts of the aircraft body. Peregrine's response indicated that the MRO had confirmed that the damaged area was assessed in accordance with the SRM 55-12-11-283-003, which allowed multiple dents to be considered as single damage. Fokker had assessed the damage and found it to be within SMR allowable damage limits, and certified this on the task card. Details in relation to the deepest dent were also recorded, and there were no nearby repairs. There is nothing in this point. There was no Material Deviation.

286. The third group of items (3361/41, 42 and 44) concerned the remedying of three matters identified by AustroControl. The pleaded complaint is that, as at 7 May 2020, there was no document on the Box indicating that these matters had been resolved and/or that AustroControl was satisfied that they were no longer a reason not to issue a certificate of airworthiness. Laudamotion said the relevant task cards fell within Exhibit N § 10.

287. However, Laudamotion did not raise any OIL items in relation to these matters. Their resolution was necessary in order for Peregrine to obtain the EASA compliance statement required by § 4(b), but that is a different matter. The items were identified at an inspection on 24 February 2020 at Fokker's premises by AustroControl and Celairion. Mr Akhrif said in his witness statement that:

> "All these observations were addressed prior to the Demo Flight to the satisfaction of the CAMO (and also AustroControl, who had delegated to the CAMO responsibility for ensuring that their observations from the physical inspection were addressed)";

The demo flight took place on 9 March 2020. Similarly, in oral evidence he said:

> "The inspection was done on 25 February. There were observations raised provided to AerCap and AerCap provided all the answers to the CAMO showing the defect they rectified during their visit to Fokker, the CAMO, they were satisfied, only when the CAMO they decided to go ahead and issue -- submit an ARC to the authority at a later stage, it would be decided to move the aircraft to Austrian Registry, then the authority they start raising queries and clarification regarding this defect or these observations."

He was not challenged on this evidence.

288. The Defendants nevertheless proceeded to embark, in cross-examination, on an exercise of seeking to demonstrate that Fokker in fact had no contemporaneous records of the rectification of these matters, and subsequently had to create DFPs on 12 May 2020 for two of the items and backdate them to 6 March 2020, when it appears the work was done. In my view that was a specific allegation that would have needed to be pleaded in order fairly to be pursued. In any event, Mr Bull explained in his evidence that it is very common when dealing with an aircraft delivery to discover that a document cannot be found and has to be reprinted. Counsel for the Defendants suggested that that could not have been the case here, because the task cards had to be given task numbers at the end of a sequence of cards. However, since the point had never been pleaded, it was not possible for the point to be properly addressed. I also specifically reject in this context the Defendants' pejorative suggestion that Mr Akhrif "made up" a theory about Fokker having lost and having had to recreate documents. Mr Akhrif made the perfectly reasonable points, when presented with documents which the Defendants suggested cannot have existed at the time of the work, that:

> "What may have happened -- and it happened -- it happens very often when you have major check ongoing with hundreds of papers, sometimes the MRO, it does happen, it is very common, they will lose job card, routine card and they will have to reprint them and have them resigned for the original sign-off date.
>
> …
>
> I have no reason to believe that the document did not exist and then it was signed off by the MRO on March 6th. I believe that was the original sign-off by the mechanic when the work was done and that would have been part of their tally sheet as part of the return check."

Mr Akhrif also said it was very common to find missing job cards during any return check, which would then have to be replaced, duplicated and signed off by the engineer;

and that the only person who could answer the question about these specific documents would be the MRO. There is nothing implausible in that evidence. Had the Defendants raised the point on a timely basis, it could have been addressed in more detail. As it is, the Defendants' point does not assist them, and their criticisms of Mr Akhrif are entirely unfounded.

289. Viewing the matter in the round, it seems to me very unlikely that Fokker would have conducted these three tasks without creating any record of their work, so it is more likely than not that task cards would have been created at the time. Had the Defendants identified their omission in the OIL, then steps would have been taken to locate or reprint them. As it is, the available evidence indicates that the work was in fact done, and the Defendants took no point (either in the OIL or on 7 May 2020) on the documentation. In these circumstances, I do not consider these to be Material Deviations, and on any view they cannot be Material Deviations which Laudamotion demonstrated for the purposes of Article 6.2.

290. The fourth item in this category (item 3361/33) is the Airworthiness Directive status report, where the only point identified by Mr Goatcher in the experts' Joint Statement was that the document on the Box (uploaded on 24 April 2020) was dated 13 April 2020 and so was not current as at 7 May 2020. However, following the meeting of experts, it was common ground that there were no further Directives issued after 13 April 2020 that needed to be incorporated, and Mr Goatcher agreed that "in terms of substantive content, there is no dispute that the document in the box showed everything that needed to be provided on 7 May 2020 on your case". The point is therefore not a deviation, and in any event not material.

291. Mr Goatcher also suggested in cross-examination that the document fell within Exhibit N § 4e ("*Letter[] signed and stamped by Prior Lessee confirming … AD compliance during the lease term*"), rather than Exhibit N § 9 ("*AD compliance report with original sign-off"*). That was, however, contrary to the Defendants' pleaded case (which relies specifically on § 9), could not fairly be explored at trial, and cannot therefore be relied on.

292. The fifth point (item (3361/50), relating to the alleged lack of a "deferred maintenance" status. Exhibit N § 4(d) requires a "Summary of Maintenance Program". However, it needed to include a deferred maintenance report only if there was any deferred maintenance, as Mr Goatcher agreed. Mr Goatcher's reports identified no such maintenance. There was no deviation and no Material Deviation.

(e) Conclusion

293. For all these reasons, I would have concluded that Laudamotion was not entitled to refuse to accept delivery of MSN 3361 on these grounds.

(H) CLAIMS IN RESPECT OF THE OTHER THREE 2019 AIRCRAFT

294. As noted earlier, the Claimants allege an Event of Default in respect of all four aircraft under Article 24.2(n), without the need to rely on any of the cross-default provisions considered below.

295. They also allege that Laudamotion's failure to accept MSN 3361 resulted in an Event of Default under Article 24.2(q) in respect of the last three aircraft, specifically:

i) under Article 24.2(q)(iii) in relation to MSN 3396; and

ii) under Article 24.2(q)(i) in relation to MSN 3425 and MSN 3475.

296. For ease of reference, those subparagraphs apply where:

> "(i) any Financial Indebtedness of LESSEE in an aggregate amount of US$2,000,000 or more (or its equivalent in other currencies) is not paid when due (subject to any applicable cure periods) or becomes due and payable prior to its stated maturity"
>
> and
>
> "(iii) An event of default is existing and continuing under any Other Agreement and the same is not cured within the specified cure period"

with "Other Agreements" meaning aircraft/engine leases between the Lessee and the Lessor, its Affiliates, and trustees of the Lessor and its Affiliates, and "Financial Indebtedness" covering "*obligations under capitalized or operating leases ... in respect of aircraft or aircraft equipment" but excluding "any indebtedness under any Other Agreements*".

297. On these various bases, the Claimants served notices on 15 May 2020 alleging Events of Default in relation to MSN 3396 (Peregrine), MSN 3425 (AIL) and MSN 3475 (AIL), and demanding the discounted present value of the Base Rent payable during the terms of the leases of those aircraft.

298. The Defendants say that:

i) insofar as the Claimants rely on failure to pay the accelerated rents demanded under the MSN 3361 lease (following the alleged Events of Default under that lease) as constituting an Event of Default under Article 24.2(q) of other leases, they cannot do so because (a) Articles 24.2(q)(i) and (iii) both require any cure periods to have elapsed, and (b) following their 15 May 2020 termination notice and demand under MSN 3361, the Claimants did not allow for the cure period provided for in Article 24.2(b): the notices in relation to all four aircraft were served on the same day; and

ii) in any event, the Claimants could not have delivered the last three aircraft by their respective Final Delivery Dates.

299. Because I have concluded that Laudamotion did not wrongly fail to accept MSN 3361 and that there was no Event of Default under Article 24.2(n), these issues do not arise. I consider them briefly below, however, as they were the subject of evidence and argument.

(1) Relevance of cure periods to alleged cross-defaults

300. In relation to MSN 3396, Peregrine's termination notice relied on the failure to take delivery of MSN 3361 as being an Event of Default under Article 24.2(a) of the lease of MSN 3361. That provision gave a grace period of 5 Business Days, which had elapsed by the date of the termination notice. On that basis, under the lease of MSN 3396, there was (within Article 24.2(q)(iii)) an Event of Default which was existing and continuing under an "Other Agreement" which had not been cured within the (or any) specified cure period.

301. In relation to MSN 3425 and MSN 3475, AIL took the position that the lease of MSN 3361 was not an "Other Agreement" within Article 24.2(q)(iii) because it is not an affiliate of Peregrine. It therefore relied on Laudamotion's non-payment of the sums demanded under the leases of MSN 3361 and MSN 3396, which exceeded US$2 million, as being a failure to pay Financial Indebtedness (Article 24.2(q)(i)).

302. The demands under the leases of MSN 3361 and MSN 3396 were made under Article 24.6(c) of those leases. Article 24.6 as a whole applies "i[f] an Event of Default occurs" and requires the Lessee to "*indemnify LESSOR … on LESSOR's first written demand against, any Expenses which LESSOR … may sustain or incur directly as a result …"*. The question is whether the cure period under Article 24.2 applies to non-payment of sums so demanded. The relevant wording is this:

> "24.2 Events of Default. The occurrence of any of the following will constitute an Event of Default and material repudiatory breach of this Lease by LESSEE:
>
> …
>
> (b) Non-Payment. … (ii) LESSEE fails to make a payment of any other amount due under this Lease or any of the other Operative Documents (including amounts expressed to be payable on demand) after the same has become due and such failure continues for seven Business Days"

303. The Defendants point out that Article 24.2(b) thus includes amounts expressed to be due on demand, such as sums falling due under Article 24.6. They add that it makes no sense to read Article 24.2(q)(i) as creating a default in the MSN 3425 and MSN 3475 leases for non-payment of a sum that was not itself a default under the MSN 3361 and MSN 3396 leases. Clear words would be required to create that result, especially where (as here) (i) the effect is to create an immediate Event of Default if a sum is not paid within a very short time and (ii) the parties did not agree on an explicit cross-default clause to create the effect the Claimants now wish for, which is to allow them to cross-default between aircraft they manage even if under different ownership.

304. I would not accept those submissions, for two reasons. First, Article 24.2(b) provides for a cure period within which payments can be made late without giving rise to an Event of Default under the lease. However, the indemnification duty under Article 24.6 arises where an Event of Default has already occurred. No purpose would be served by providing for a further cure period before which failure to satisfy the indemnity obligation would amount to a further Event of Default, and I do not consider that Article

24.2(b) has any application to such sums. Secondly, and in any event, the accelerated rent which the Lessor is entitled to demand under Article 24.6(c) is a sum falling within the words "becomes due and payable prior to its stated maturity" in Article 24.2(q)(i), which operate independently of the words "not paid when due (subject to any applicable cure period)".

(2) Whether the Claimants could have delivered the last three aircraft on time

305. Recapping first the actual position of these aircraft in very broad outline, in December 2019 aircraft MSN 3396 had been flown to Fokker and MSN 3425 to Vallair, and pre-delivery maintenance checks started. The technical records were made available to the Defendants and their technical consultants at around the turn of the year for those aircraft, and for MSN 3475 in early February 2020. Initial versions of OILs for all three aircraft were made available by Laudamotion by mid February. By early March, MSN 3475, which had just undergone 6-year and 12-year checks, was flown to Vallair, pre-delivery maintenance checks started and the aircraft was made available for physical inspection.

306. In early to mid March 2020, the parties appear to have envisaged delivering MSNs 3396, 3425 and 3475 around 23 March, 27 March, and April 2020 respectively. However, following some of the events described earlier, Mr Akhrif's email of 1 April 2020 to Celairion envisaged a delay in delivery of all four aircraft until June. The draft Global Amendment Agreement which Mr Merry sent Ryanair on 15 April 2020 envisaged Scheduled Delivery Dates in June and Final Delivery Dates on 31 August 2020 (MSNs 3425 and 3475) or 30 September 2020 (MSNs 3361 and 3396).

307. In the event, following the Claimants' termination notice of 15 May 2020, the ECoAs for the three aircraft were ultimately issued on 21 July 2020 (MSN 3425), 27 July 2020 (MSN 3396) and 10 November 2020 (MSN 3475).

308. It follows that none of them was in fact ready for delivery by their Final Delivery Dates, so the question is whether they would have been but for Laudamotion's (assumed for these purposes) breaches.

309. As noted earlier, the court at the CMC required the Defendants among other things to particularise their case in respect of the last three aircraft ("*setting out in respect of each of MSN 3396, 3425, and 3475 the regards in which they contend that the relevant Claimant could not have placed the relevant aircraft in Delivery Condition by the Final Delivery Date*."). Those Schedules were served on 5 July 2021, and the Claimants served a responsive document on 20 August 2021. The Schedules do not allege any physical defects in the aircraft, or allege that any specific parts were missing, but allege there to have been 47 outstanding documentary matters in relation to MSN 3396, 43 in relation to MSN 3425 and 51 in relation to MSN 3475. The Claimants respond that a considerable number of these had in fact already been made available to the Defendants on the Box, though it is accepted that some remained outstanding. By the time of trial, the numbers of allegedly outstanding material open items had reduced, as indicated below.

310. The Claimants, who would bear the burden of proof on this issue, make the following broad points in relation to each of the three aircraft:

i) MSN 3396: The demo flight took place on 10 June 2020, albeit (necessarily) without Laudamotion representatives present. By mid-June 2020, no physical work or borescope inspections remained: that had all been completed by 16 June 2020. The 22 alleged Material Deviations on which the Defendants rely all relate to documentation issues. Thus the Defendants' case in relation to MSN 3396 comes down to asserting that in the not insignificant amount of time available before the Final Delivery Date in respect of MSN 3396, these documentation issues could not have been resolved had Laudamotion wished to take delivery of the aircraft.

ii) MSN 3425: By the Final Delivery Date, 31 May 2020, no physical work remained to be done to the aircraft. On 28 May 2020, Vallair had signed an unconditional Certificate of Release to Service (as Mr Bull explains, this "certifies completion of the Aircraft maintenance"). All that remained were final engine and APU borescope inspections: the No. 2 engine passed its borescope inspection on 2 June 2020, the APU passed its borescope inspection on 2 June 2020 and the No. 1 engine passed its borescope inspection on 3 June 2020. The 26 alleged Material Deviations on which the Defendants rely all relate to documentation issues. Thus the Defendants' case comes down to the improbable assertion that had they wanted to take delivery of the aircraft, AIL could not have brought forward the borescope inspections by a few days and resolved the other documentary points.

iii) MSN 3475: By the Final Delivery Date, 30 June 2020, the aircraft had been painted, but the maintenance check was still underway and some work remained to be done. However, only shortly before arriving at the MRO, in November-December 2019, MSN 3475 had undergone an extensive 6-year and 12-year check. On the basis of that, it is Mr Bull's assessment that "*it is reasonable to assume that the pre-delivery maintenance work required for MSN 3475 would be a relatively 'light' check plus the painting*." The vast majority of the 41 alleged Material Deviations are documentary points. Mr Goatcher's report does not explain why he says that the remaining maintenance work could not have been completed by 30 June 2020 if Laudamotion had wished to take the aircraft. As with the other aircraft, the Defendants' case involves the assertion that the outstanding documentary matters could not have been resolved in the time available had Laudamotion had any interest in accepting the aircraft.

311. The Claimants' general position on the documentary records, as expressed in its response to the Defendants' Schedules, is that:

i) In many instances, the allegations that certain documents were not available prior to the relevant Final Delivery Date are incorrect.

ii) It is accepted that certain documents were not available by the relevant Final Delivery Date. However, the Claimants deny that this is documentation that would not have been available to the Defendants prior to the relevant Final Delivery Dates.

iii) In circumstances where the leases were terminated prior to their respective Final Delivery Dates, and no new lessee for these aircraft was immediately identifiable, it is unsurprising (and in line with their duties of mitigation) that

the Claimants slowed the pace of work on these aircraft. It is for this reason that in some cases documents were only available after the relevant Final Delivery Date. The Claimants deny that the delay in the production of these documents is indicative of the general difficulties it is alleged they would have faced in producing satisfactory documents within the time available.

iv) It is the Claimants' position that had the 2019 leases remained on foot, they would have been in a position to deliver these three aircraft by their respective Final Delivery Dates, by allocating additional resources (such as other AerCap employees, external consultants and additional resources from Fokker and Vallair) to ensure that the technical and documentary records of the aircraft were in delivery condition by the relevant Final Delivery Date.

312. In support of their case that they could and would have completed the necessary work in time, the Claimants rely on the witness evidence of Mr Akhrif (MSN 3396) and Mr Mallon (MSN 3425 and MSN 3475), and the expert evidence of Mr Bull, as well as the contemporary documents.

313. The witness evidence is at a fairly high level of generality. Mr Akhrif, having explained the progress made in relation to the physical condition of MSN 3396 (including 6-year, 12-year and C-checks (aircraft maintenance checks) completed by early June 2020), physical inspection by Celairion, demo flight and borescope inspections), states that as far as he is aware, there is nothing that would have prevented the Claimants from delivering MSN 3396 to Laudamotion very shortly thereafter, and certainly before 30 June 2020.

314. Mr Mallon explains that after Mr Spencer's 26 March 2020 email, he and Mr Akhrif continued to work to ensure that the aircraft were ready for delivery to Laudamotion, notwithstanding Laudamotion's disengagement from the technical progress. However, from 7 May when Laudamotion failed to accept delivery of MSN 3361, "*we started to slow work on the other three aircraft*" as it appeared Laudamotion would not take them and they were not going to be delivered imminently to a new lessee. Nonetheless, Mr Mallon says, as the maintenance work on MSN 3425 in particular was almost complete, it made sense to complete the work so that it would be ready to be delivered quickly to a new lessee. Hence the max power assurance run test was done on 15 May 2020 and the demo flight at the end of May 2020. He expresses confidence that, but for the termination, MSN 3425 could have been ready to deliver by 31 May.

315. Similarly, Mr Mallon says it made sense to slow down work on MSN 3475, given the market conditions. However, the C-check was around 75% complete by mid May 2020 and could have been completed in short order. However, in light of the termination, the decision was taken to put the aircraft into storage, so the C-check was not done until later in the year. He expresses confidence that, but for the termination, AIL would have been able to get MSN 3475 ready for delivery by 30 June: it would have required some work to be able to do so, but AIL would have allocated the necessary resources. However, Mr Mallon accepted in cross-examination that the C-check on MSN 3475 in fact had been paused because, following the inception of Covid, Vallair had limited resources and could not work on both MSN 3425 and MSN 3475 at the same time; and a 3 April project status report said the C-check had stopped "due to Vallair shutdown". The Claimants therefore asked Vallair to focus on MSN 3425 rather than MSN 3475. The C-check was not recommenced until 8 June 2020.

316. Mr Bull and Mr Goatcher agreed that 50% of the 22 alleged Material Deviations for MSN 3396, 60% of the 26 for MSN 3425, and 70% of the 41 for MSN 3475, concerned documents each of which would be categorised as a final summary, final statement, status or other document that would typically be provided or certified during the final stages of the delivery process. Mr Bull expresses the opinion that, but for the termination, the Claimants would have had the motivation to deliver all the aircraft to Laudamotion (given the state of the market), and had the necessary expertise, as the leading player in the aircraft leasing market, to deal with challenges arising from an aircraft delivery.

317. Mr Bull notes that the contemporaneous documents indicate that Flynas presented and/or created various technical and management issues for the Claimants in relation to the delivery of these three aircraft, leading to the key question of whether the Claimants could have taken possession/control of the aircraft and associated documentation at a time of their choosing in order to manage the deliveries themselves. Assuming that would have been legally possible, Mr Bull assumes that it could have been done after the respective contractual delivery dates under the Flynas leases, namely 10 February 2020 (MSN 3396), 5 March 2020 (MSN 3425) and 17 April 2020 (MSN 3475).

318. As to the records in particular, Mr Bull says that, depending on the agreement reached with Flynas, a different approach would have been required in order to meet the Final Delivery Dates, and it may have been necessary for the Claimants' CAMO (i.e. Celairion) to take control, in full or in part, of the aircraft documentation. He notes that the Claimants had already sent a records consultant to Riyadh, where the aircraft were previously based, to scan and identify in advance any deficiencies with the records, which would have assisted the CAMO. Mr Bull also notes that because Celairion would ultimately issue the EASA compliance letter for each aircraft, it is reasonable to assume, given the extent of involvement that would require, that Celairion would have been able to step in and take over management of all the aircraft documents from Flynas.

319. However, as the Defendants point out:

i) There was no evidence, in particular from the Claimants' witnesses of fact, that the Claimants would in fact have asked Celairion to step in in this way.

ii) The documents suggest that Celairion had not been heavily involved with these three aircraft by the relevant times. There are indications that Celairion stopped work on MSN 3425 on 2 April 2020, and there are no documents establishing that Celairion was working on MSN 3396 before 30 June or on MSN 3475 before October 2020.

iii) Mr Bull accepted that documents would be required from Flynas, but did not know what would be involved in getting them.

iv) Mr Goatcher's opinion was that:

> "looking at the status of the records that were available to review as of early May 2020, it would have been a considerable task for any CAMO to take over the management of the records from Flynas and prepare for the deliveries of the Last 3 Aircraft.

> Whilst it is difficult to be precise, I would see this task taking 2-3 months, provided good co-operation was made available with Flynas, which, in my view, was unlikely to be extended. The CAMO would have needed to recover, rebuild and validate all the required reports, records and documents required to put the Last 3 Aircraft into a condition for delivery. Looking at the basic Flynas document formats (Microsoft Word, PDF and Microsoft Excel-based), this process would have been time consuming and largely manual in nature."

320. I do not therefore consider the evidence to establish that the aircraft documentation process for these aircraft could or would have been significantly accelerated, in the remaining time available, by asking Celairion to take over the process.

321. The contemporary documents indicate that in relation to all three aircraft there were various problems in relation to parts, as well as documentation. The Defendants submit that these need to be taken into account, even though their Schedule does not identify any specific parts problems, because parts problems can lead to delays in the production of outstanding documents (one example being where a part is replaced simply because adequate records cannot be found in relation to an existing part: the documents include an example of this). I do not, however, accept that approach. The Defendants have pleaded their own positive case in relation to these three aircraft very largely in terms of missing documentation, rather than making specific allegations about missing parts. It is not open to them, in my view, to rely on problems about parts shown in the contemporary documentation simply on the basis of the general proposition that such problems can underlie documentation deficiencies. I therefore focus on the position on aircraft documentation.

322. There are some apparent gaps in the contemporary documents. The correspondence indicates that aircraft documentation post-dating the Final Delivery Dates was not disclosed to the Defendants, on the basis that it was not considered relevant. Further, the Defendants were unsuccessful in an application for disclosure of the OILs which Flynas were using in relation to these aircraft. It is not appropriate to seek to reopen such decisions now, but the result is that very limited contemporary documents are available as to the process of completing the aircraft documentation, such as might have shed light on whether or not the process could have been accelerated in the way the Claimants suggest.

323. There is also some lack of clarity about whether the documents support the Claimants' witnesses' statements that, as things actually worked out, following termination there was a slowing of activity on these aircraft. Thus Mr Anderson said:

> "We tendered 3361 for delivery and as a result of that, it made -- as a result of that delivery not going forward, it made no sense to continue preparing the other aircraft for Lauda because it was clear they weren't coming to take delivery."

Mr Akhrif said:

> "I have to mention after the [leases], they were terminated, we were not acting or pushing Flynas in the same way we were doing before…
>
> […]
>
> …we were taking a lot of actions where we were interfering with Flynas in their process. After the leases were terminated, we stopped doing that because that was costing us money.
>
> […]
>
> And before 15 May, we had consultants involved, more consultants, after the 15th we did not see the need to keep incurring costs for additional consultants.
>
> […]
>
> The same for parts. Before 15 May, we were discussing the case, we were told Fokker, go ahead and buy the parts and we take the decision. After May 15, we were not doing that any longer."

Mr Peacock said:

> "…by the end of May, the foot was definitely off the gas in terms of serving these aircraft up to Laudamotion."

and Mr Mallon said:

> "We allowed Flynas to dictate the time from early May. And we allowed them to slow things down. So we didn't -- we did not -- we stopped putting pressure on Flynas to put the aircraft in a condition that was ready for redelivery or delivery."]

324. The Defendants challenged this evidence, relying in particular on certain of the Claimants' "Weekly Board Papers" stating that they were "*continuing to work on all four aircraft so we can demonstrate that all aircraft would have been ready and delivered on time. We are ensuring not to take on any unnecessary additional material costs in the process*" (document dated 18 May 2020). The Claimants' witnesses' evidence was that term "Weekly Board EMEA" was a misnomer, since (a) these documents were not papers presented to any board of directors, (b) the documents are instead unvetted working documents prepared by an assistant to the technical team for the purposes of providing a general update, and (c) items contained in the Weekly Board EMEAs would often be carried over to subsequent weeks and thereby become out of date. There are clear examples of these documents not being properly updated, as pointed out in the Claimants' oral closing by reference to iterations of the document in January and March 2020, and an iteration on 22 June 2020 suggesting that the Claimants were still trying to get all three aircraft ready on time even though the Final Delivery Date for 3425 had already passed three weeks previously on 31 May.

325. On the other hand, the particular comment quoted above first appeared three days after the purported termination of the leases, on 18 May 2020. It remained the same until

after MSN 3361 was redelivered on 5 June, then was changed to refer to 'three' aircraft and to note that the claim had been filed. The comment then continued to appear until 29 June, the last Final Delivery Date. Mr Anderson said he was not surprised to see the comment in the 25 May 2020 document, and that "*as long as there were conversations going on with Lauda, we would have been very conscious on making sure that we could deliver the aircraft*".

326. Other contemporary documents are to somewhat similar effect. An email of 22 April 2020 from Mr Mallon regarding MSN 3425 said "we need to ramp this project up again", one on 27 April said "*We may have to be ready to deliver this aircraft end of May so need to start pushing*", and on 11 May an email from Ms Maniwczak of Vallair said "*MSN 3425 is Vallair's priority #1 because it is the next A/C to be completed*".

327. Overall, I find the comments in the "Weekly Board" documents of some limited help, but only as part of the overall run of documents, and do not attribute to them nearly the same weight as the Defendants suggest. I consider the Defendants' criticisms of the evidence given in relation to them by witnesses called by the Claimants to be overstated. Specifically in relation to Mr Bull, I reject the Defendants' suggestion that it was inappropriate for him as an expert to form a view on whether the Weekly Board documents reflected the true position. He was, entirely properly, seeking to form a view based on the totality of the documentary evidence about the pace of work on, and technical condition, of the various aircraft.

328. Turning specifically to MSN 3425, the same 11 May 2020 email from Ms Maniwczak said:

> "As you know, I have been working from home during 5 weeks, as most of us have done. Since I came back 2 weeks ago, I have been correcting, re-printing, signing and scanning WOs [work orders] for you (31 to be precise), sending them to Stephen for review and adding D&B item number, I cannot let you write that I don't want to do much. … I am working mostly on this A/C (mostly but not 100% because we still have 15 A/C on site) and Stephen is helping me remotely since he is the one with all the details. There are only very few WOs still open for structures and they all shall be closed very soon."

329. A Project Status report on 13 May 2020 noted *inter alia* that "Much work is required by Flynas to close out open issues in the OIL. Communication from Flynas is still slow including instructions to Vallair to perform any work". This was less than three weeks before the Final Delivery Date for MSN 3425 on 31 May. By 26 May 2020, Mr Mallon was saying internally that the aircraft "*should redeliver in June and MSN 3475 will push to July*". Mr Peev on 5 June 2020, after the Final Delivery Date, said that *"[s]canning of the WP is about 50% done"*. An email of 8 June indicated that scanning was expected to be finished that week, and one of 17 June that *"EOL [end of lease] WP is fully scanned. It is currently in review process. Repairs DFP [dirty fingerprint reports] were all uploaded to BOX*". Although the precise activities involved are not entirely clear, it is reasonable to infer that they formed part of the documentary review process needed to get the aircraft ready for delivery.

330. I bear in mind that it is for the Claimants to prove it is more likely than not that, but for the termination, the process would have been complete by 31 May, and that a fairly substantial monetary claim rests on such proof (among other things). The documents referred to above indicate that the Claimants were still making efforts until at least early May to get MSN 3425 ready by 31 May. On that basis, the Claimants' thesis must be that something would have been done differently, in the remaining weeks of May, to complete the process by 31 May had Laudamotion accepted delivery of MSN 3361 on 7 May. Alternatively, the Claimants would need to show that (despite what the documents appear to show) they in fact slowed the pace of work on MSN 3425 at some point before 7 May (e.g. 18 March, the date of the earliest Laudamotion communication alleged to give rise to an Event of Default), and but for Laudamotion's approach would have done something differently to ensure MSN 3425 was ready by 31 May. In my judgment the evidence does not establish either of these matters to have been more likely than not.

331. The Claimants in the cross-examination of Mr Goatcher took a selection of examples of the outstanding items for MSN 3396, as well as the remaining two aircraft, with a view to establishing that they were either immaterial, or items that would ordinarily be expected to be produced only at a very late stage. Mr Goatcher accepted that some items fell in the latter category (as reflected in the Joint Statement). He also conceded that one item (dent and buckle chart) was not a contractual requirement – the requirement was to produce repair records for each repair – though he said industry practice was to provide a dent and buckle chart in this context. However, Mr Goatcher maintained his views that at least some of the other items were material. Given that the contemporary documents indicated, in relation to each of the three aircraft, the Claimants were continuing to take steps, on an ongoing basis, to complete the records review, I consider it unlikely that there were no material items other than typical last-minute items.

332. In relation to MSN 3396, documents from January and February 2020 indicate that the records production process by Flynas was slow and disorganised. Mr Akhrif on 27 April said *"... meantime we continue working with FlyNas on the records discrepancies which is the pacing item for redelivery*." A 29 April 2020 Project Status report indicated "*Tech records remains the pacing item and will delay delivery*". Over the ensuing weeks, some significant records matters were successfully addressed by ordering new parts, enabling the demo flight to proceed on 10 June. Nonetheless, on 14 June 2020 Mr Akhrif said "*We continue pushing FlyNas to address the outstanding records discrepancies which may delay the redelivery*"; and on 23 June "*the pacing items are the update of the records which is ongoing and Cayman Island export CoA issuance*". Mr Akhrif accepted in cross-examination that he was pressing Flynas to address record discrepancies and wanted to show that the aircraft could be delivered before 30 June (though he denied the Claimants were working at the same pace, post the termination). On 29 June, the day before the Final Delivery Date, Mr Akhrif said "*We are pushing Flynas to address/close the outstanding records discrepancies so we can proceed with the redelivery*". An Engineering Project Status report on 30 June said "*Maintenance activities ongoing to resolve records findings prior to issuance of CRS [certificate of release to service*]", apparently envisaging a second such certificate being needed. A Weekly Board update on 6 July 2020 noted that "*we are awaiting final statements from Flynas and the Export C of A. Available from Jul 9, 2020*". The 13 July 2020 Weekly Board update said the same, except that the date was now 23 July 2020.

333. Thus the documents in relation to MSN 3396 indicate that there were problems and delays in obtaining satisfactory records from Flynas, right up to and beyond the Final Delivery Date. I do not consider the Claimants to have provided evidence to demonstrate, with adequate specificity, how this process could and would have been accelerated and with what result.

334. Finally, as regards MSN 3475, it is evident that physical work was still being done on the aircraft well into the summer of 2020, which inevitably will have meant documentation having to be produced after the work was done. As noted earlier, the aircraft was undergoing a C-check, which had to be paused for reasons not arising from Laudamotion's alleged breaches/Events of Default, and did not recommence until 8 June 2020. Mr Mallon agreed in cross-examination that the documents could not be finalised until after Vallair had issued its Certificate of Release to Service, which in turn could not happen until after the C-check closed (ultimately, in the event, on 22 October 2020). There were also delays with Flynas. On 20 April, Flynas were chased for updates to the OIL, an AerCap representative having noted on 13 April that "*There are still a huge number of open items. Many of these items are historical and only Flynas can find the answers for them and help us close them out*". Mr Mallon in cross-examination said Flynas were unresponsive on MSN 3475, focussing on MSN 3425. An update on 5 June 2020 referred to 67% of Job Cards being complete, 7% of Work Orders and Non-Routine Cards complete, and 35% overall completion.

335. A summary from Mr Mallon on 19 June said "*Paint schedule pushed to June 22 … D& B assessment in progress. C-check currently at 70% inspection completed. Expect redelivery late July*". On 29 June, it was reported that numerous items of work still needed to be done including an inspection of a rib in the wing fuel tank, cargo panels had been removed for repair and all the fan blades in the engines had been removed. Mr Mallon accepted in cross-examination that the aircraft was "*nowhere near delivery condition*" by 30 June. On 29 July Mr Mallon said "*We are working on redelivery for 3396 and 3425 this week, but it is taking time and not sure if Flynas can make it happen. There are still open items to be closed and a huge number of statement and statuses to be reviewed and signed. The ECoA has been issued for 3425 but we are waiting on it for 3396. … 3475 will push out to the end of August"*. A Weekly Board update on 27 October said "*Aircraft is technically ready however, we are awaiting historical documentation to start reviewing the APU provided by Flynas. .... Redelivery expected by Nov 6, 2020*."

336. In these circumstances, the Claimants faced a large task if they were to show that, but for Laudamotion's actions, MSN 3475 would have been ready for delivery by 30 June. In my view, their evidence fails to establish that.

337. For these reasons, I would not have found that the Claimants had succeeded in establishing that, but for Laudamotion's (assumed) breaches/Events of Default, MSN 3396, MSN 3425 and MSN 3475 could and would have been delivered to Laudamotion by their respective Final Delivery Dates.

(I) HOW MUCH CAN THE CLAIMANTS RECOVER FROM LAUDAMOTION?

338. This issue too does not arise, given my findings on issues of liability. I therefore deal with it as briefly as possible.

339. The Claimants claimed the losses that they have sustained (or will sustain) directly as a result of Laudamotion's Events of Default, being (a) the sums they would have received under the Laudamotion leases if Laudamotion had accepted delivery of the aircraft, and (b) additional expenses incurred as a result of Laudamotion not doing so. They agreed to give credit for:

    i) the net amount received and to be received under the SmartLynx leases in respect of what would have been the lease term of the Laudamotion leases had Laudamotion accepted delivery of the aircraft; and

    ii) any rent paid by Flynas after the Final Delivery Dates under the Laudamotion leases.

    It is no longer suggested that by entering into the SmartLynx leases, the Claimants failed to mitigate their losses.

340. The issues that arose were:

    i) If Laudamotion had taken delivery of the aircraft, what is the net amount that the Lessors would have received as a result?

    ii) How much of the amounts that the Lessors will receive from SmartLynx must they give credit for, i.e. what is the appropriate 'cut-off date'?

    iii) What is the net amount that the Lessors will receive from SmartLynx?

    iv) How much are the Claimants obliged to give credit for in respect of Flynas?

    v) What additional expenses are the Lessors entitled to recover?

341. As to the principles:

    i) The burden is on a defendant to show that the claimant ought, as a reasonable person, to have taken a particular step, and that had it taken that step it would have reduced the loss: see *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] CLC 825 §§ 22(k), 33 and 38.

    ii) When considering the value of the SmartLynx leases (and the value of a hypothetical further lease, if the court were to conclude that acting reasonably the Lessors should exercise the break option at some future date), the court is not assessing the quantum of the Lessors' loss, but rather the value of the mitigation which goes to reduce that loss. Accordingly the Defendants bear the burden of proof: see *Thai Airways v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm) §§ 83-92.

    iii) In a case of this sort (where the value of the replacement lease depends on utilisation, rather than being at a fixed rent), absolute precision is impossible and the search may be disproportionate: see *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24, [2020] Bus LR 1196 §§ 217-218. It is proper to apply fairly broad assumptions rather than attempt to map out what would have happened had Laudamotion taken delivery, and what will

happen in relation to the SmartLynx leases, in the level of detail that would be necessary to make an assessment of the end of lease condition under the leases.

iv) The court will make reasonable assumptions, erring on the side of the Claimants if necessary: see *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) § 189 per Leggatt J:

> "… the court will attempt so far as it reasonably can to assess the claimant's loss even where precise calculation is impossible. The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties."

v) Damages are calculated on the assumption that a claimant has taken reasonable steps in mitigation, whether it has in fact done so or not: see *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353, §10.

vi) In the present case, Article 24.7 of the leases imposes an express duty on the Lessors to mitigate their losses:

> "Mitigation of Damages. LESSOR will take such reasonable commercial actions insofar as and to the extent that such a corresponding defense exists under English Law to mitigate any damages or losses it may incur as a result of the occurrence of an Event of Default, provided that (a) LESSOR will not be obliged to consult with LESSEE concerning any proposed course of action or to notify LESSEE of the taking of any particular action, (b) LESSOR will not be obligated to take any step that, in its reasonable discretion, could prejudice LESSOR, and (c) this provision is without prejudice to LESSOR's rights under Article 24.6.

I agree with the Defendants that neither sub (a) nor (b) detracts from the requirement for the Lessor to act reasonably.

vii) The claimant need not take unreasonable steps: thus, in *James Finlay & Co v NV Kwik Hoo Tong* [1929] 1 KB 400, the claimant was not obliged to recover its loss by enforcing a contract selling the relevant goods to a third party, when to do so it would have had to rely on a conclusive evidence clause in a way that would injure his commercial reputation. See also, to similar effect, *Banco de Portugal v Waterlow* [1932] AC 452, 471. Nor is a claimant required to take steps other than in the ordinary course of business: *British Westinghouse Electric & Manufacturing Co v Underground Electric Railways Co of London* [1912] AC 673, 689.

viii) The court should not take an unduly demanding approach to the innocent party's acts or omissions:

> "Now I think a Court of Justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. When a road is let down or land let down, those entitled to have it repaired find themselves saddled with a business which they did not seek, and for which they are not to blame. Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer in a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably. In judging whether they have acted reasonably, I think a Court should be very indulgent and always bear in mind who was to blame." (*Lodge Holes Colliery Company v Wednesbury Corporation* [1908] AC 323, 325 per Lord Loreburn LC)

ix) In *London and South East Building Society v Stone* [1983] 1 W.L.R. 1242 a building society which had lent on the basis of a valuation that negligently failed to warn of subsidence was not obliged to sue its borrowers (who had repaid the sum advanced) under their personal covenant to keep the property in repair. That was because the innocent party is not obliged to take the risk of starting an uncertain litigation against a third party: including litigation that may be reasonably certain in outcome but where there is no certainty that the judgment will be satisfied (§§ 204-205). See also *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm) §§ 549-556, holding that proceedings need not be brought under a personal guarantee because (a) the opportunities for technical defences to such claims were well known, making the outcome uncertain, and (b) even if the claim succeeded, there would be no certainty as to what sums, if any, could be recovered in enforcement proceedings.

x) In *Western Trust & Savings Ltd v Clive Travers & Co* [1997] PNLR 295, the Court of Appeal held (distinguishing *Stone*) that the building society there should have at least enforced the security under the mortgage before claiming from the negligent solicitors who failed to advise that there was a pre-existing mortgage in favour of a third party. Phillips LJ said:

> "Where a plaintiff enforces his security he will be in a good position to prove his loss, having regard to these considerations. Where he does not enforce his security, proof of loss presents greater difficulties. In the latter situation it is not easy to distinguish between the duty of the plaintiff to prove his loss and the duty of a defendant who alleges failure to mitigate to prove the extent to which failure to mitigate has affected the financial position of the plaintiff, it seems to me that essentially there are two sides of the same coin."

The Defendants submit that this means that a claimant who has a straightforward claim must advance it: it is *prima facie* reasonable for a claimant to enforce straightforward rights under his existing contracts. However, *Western Trust* was in a way a special case, since irrecoverability under the claimant's mortgage was

> the basis of the loss. Hence *Stone* was distinguished on the basis that in *Western*, the plaintiffs should have had recourse to the very security that was the subject of the dispute: that was necessary in order to establish a loss in the first place. In my view, it is unnecessary to apply a presumption of the kind the Defendants propose. The test, including in relation to the pursuit of claims, is whether the defendant can show that the claimant has failed to act reasonably.

(1) The sums which would have been received from Laudamotion

342. It is common ground that across the term of the Laudamotion leases, the base rent due under the Laudamotion leases was US$43.2 million. Article 24.9 of the Laudamotion leases provides that:

> "In calculating LESSOR's damages hereunder, on the Termination Date all Rent and other amounts which would have been due hereunder during the Lease Term if an Event of Default had not occurred will be calculated on a present value basis using a discounting rate of the prime rate announced by LESSOR's Bank discounted to the date on which LESSOR recovers possession of the aircraft."

343. The relevant prime rate was 3.25%. The total present value of the base rent that the Lessors would have received under the Laudamotion leases is therefore US$39,995,093.

344. As noted earlier, the Laudamotion leases contain what Mr Seymour describes as a "two-way upsy-downsy" adjustment, where if the aircraft was returned in a worse condition than at delivery, Laudamotion would pay the Claimants; and if in a better condition, the Claimants would pay Laudamotion. The Defendants' expert, Mr Seymour, suggested that the effect of the expected utilisation of the aircraft under the Laudamotion leases (the methodology of which was agreed) is that the work Laudamotion would have to do at the lease-end would put them in better condition than when they were delivered, for which Laudamotion would be entitled to a payment of US$12,510,749.

345. However, as the Claimants point out, Article 12.2.4 of the Laudamotion leases (quoted in § 45 above), gave the Lessors a right, in their reasonable discretion, to swap out an engine in favour of another. Mr Dimitroff's evidence was that the Lessors would use this right to ensure that the aircraft was not returned in much better condition than on delivery, in order to avoid having to make a significant EOL (end-of-lease) payment. I do not accept the Defendants' objection that it is speculative whether or not that would have occurred. The Lessor would have a very clear incentive to do an engine swap if it meant avoiding a large liability to the Lessee at the end of the lease. Mr Dimitroff was very frank in accepting that he did not have personal experience of managing leased aircraft, but said he spoke to many lessors and was aware of what they do in situations like this, where they have an older aircraft that they want to manage towards run-out condition. Mr Seymour accepted that in practice engine swaps happen frequently, and had no basis to refute the suggestion that AerCap, following its acquisition of GECAS, would have access to a large inventory of A320 engines.

346. From the Lessee (Laudamotion)'s point of view, Mr Seymour accepted that since Article 22.12.8 provides for adjustment of maintenance payment rates to reflect actual

and demonstrated costs incurred by the parties in performing the relevant workscopes, there was no opportunity for Laudamotion to arbitrage its maintenance rates against the end of lease rates and therefore no incentive for it to resist an engine swap. Even if such an incentive did exist, Mr Seymour accepted that Laudamotion would have no grounds for such resistance provided that the Lessors were acting reasonably.

347. The Defendants suggested in argument that Article 12.2.4 is unenforceable as a mere agreement to agree (cf. *Walford v Miles* [1992] 2 A.C. 128) and that any obligation of good faith did not require one party to sacrifice its commercial interests (*Health & Case Management Ltd v Physiotherapy Network* [2018] EWHC 869 (QB) at §108(vi)). I reject that argument. The entitlement to an engine swap under Article 12.2.4 is clear and precise, and the only lease amendment required is the "appropriate" and mechanical one required to reflect the identity and condition of the replacement engine: a matter easily capable of objective determination (cf. the statement of principles in *Mamidoil-Jetoil Petroleum v Oka Crude Oil Refinery AD (No. 1)* [2001] EWCA Civ 406 § 69).

348. I therefore agree with the Claimants that it is highly likely that the Lessors would have provided replacement engines, if necessary, such as to remove the vast majority of any end of lease payment. I accept Mr Dimitroff's view that it would be in neither party's interest for the aircraft to be returned in a condition that deviated significantly from delivery condition; and that (particularly absent any clear alternative basis of calculation) a nil value should be attributed to this item.

349. A separate issue arose from Schedule 1, paragraph B of the Laudamotion leases, providing that if Laudamotion were obliged to comply with an Airworthiness Directive ("***AD***") event costing more than US$150,000, then the Lessors would be obliged to pay a portion of the amount over and above this threshold, based on how far through the lease term the parties were. Mr Seymour suggested that, over the course of the four Laudamotion leases, this provision would be likely to cost the Lessors US$800,000 in total. He admitted, however, that that figure was an "educated guess" and that he had not attempted any kind of survey of lessors or airline operators to assess the likelihood of an AD event costing more than US$150,000. His estimate was informed by an AD event that affected the Boeing 737/800, which Mr Dimitroff described during cross-examination as "a very, very rare event. There has been one of that magnitude since and there has not been one at all with an A320". Mr Dimitroff had done a survey, finding for example that a large network carrier in North America with an older A320 fleet had reported that "*in the past 10 years, not a single AD had a cost of compliance that was high enough to trigger a lessor cost sharing pay-out*." I prefer the evidence of Mr Dimitroff on this point. In my view, there is no basis on which to ascribe any positive value to the risk of an event of this kind.

(2) SmartLynx leases: cut-off date

350. There was some discussion about whether the Claimants are obliged to give credit for the amounts they will receive from SmartLynx only during what would have been the term of the Laudamotion leases, or during the whole life of the SmartLynx leases. I agree with the Claimants that the former is correct. A claimant is obliged to give credit only for benefits that were legally caused by the defendant's breach or a successful act of mitigation (*Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* [2017] UKSC 43 §§ 29-30; *AssetCo Plc v Grant Thornton UK LLP* [2020] EWCA Civ 1151 §§ 230-233). After the expiry of the

Laudamotion leases, the Lessors would have been able to lease the aircraft. Any revenues generated by leasing the aircraft after that date are therefore not to be regarded as caused by the Defendants' breach and should not be taken into account for the purposes of quantifying the Lessors' claims.

(3) Sums to be received from SmartLynx

(a) Base Rent

351. Mr Dimitroff's evidence was that the Lessors will receive US$10.69 million in PBH (power by hour)/ base rent during what would have been the term of the Laudamotion leases. Mr Seymour's evidence was that they will receive US$20,413,352. The main drivers of this difference were the experts' views on how much SmartLynx would use the aircraft, and whether (as Mr Seymour suggests) in July 2023 the Lessors will use the call option under the leases either to renegotiate with SmartLynx to move to a fixed rent of US$150,000 per month, or to place the aircraft with a new lessor(s) on those terms.

352. As to utilisation, Mr Seymour estimated that SmartLynx would use the aircraft as follows:

	Period	**Utilisation Projection (per month)**
1	December 2021 to December 2022	165 flight hours / 50 cycles
2	January 2023 to lease end	208 flight hours / 68 cycles

353. Mr Dimitroff, on the other hand, in his supplemental report started with actual utilisation data to produce an estimated average utilisation (138 hours a month) for the first 12 months of the SmartLynx leases (June 2021 to June 2022), and then increased that year on year based on the typical long term growth rate of customer traffic, approximately 5% per annum.

354. Starting with Mr Seymour's approach, actual utilisation data received up to the time of oral closing submissions indicated that from December 2021 to June 2022, the four aircraft flew an average of 114.11 flight hours per month, significantly less than the 165 predicted by Mr Seymour for his Period 1, albeit that data excluded several summer months when utilisation might be expected to be higher. Mr Seymour accepted that where there is actual data in respect of a period previously covered by predictions, it was preferable to use that data. I do not accept the Defendants' suggestion that use of these actual figures would necessarily be wrong (or need significant adjustment) because the figures may have been depressed by Covid-19. SmartLynx's low utilisation figures continued even in months such as November 2021, after many restrictions had been lifted and vaccination programmes widely rolled out, and before the Omicron variant hit the European market.

355. Following the trial, however, further actual utilisation data has been provided, with the most recent update following circulation of my draft judgment and covering the 13 months up to and including December 2022. The data thus now covers the whole of Mr Seymour's Period 1. It indicates that monthly utilisation, averaged across the period and the four aircraft, was 164.06 hours, which is very close to Mr Seymour's prediction.

356. As to Period 2, Mr Seymour's projections included the important assumption that the balance between supply and demand in the ACMI (aircraft, crew, maintenance, insurance) market now and in the future will reflect the balance that existed in 2019. However, Mr Dimitroff explained that there is now four times as much A320ceo ACMI capacity as there was in 2019 ("ceo" meaning "current engine option", as opposed the more fuel-efficient "neo" or new engine option), the aircraft in the present case being the ceo variety. The Claimants suggest that one cannot realistically expect commensurate rise in demand (fourfold by January 2023) in circumstances where airlines are yet to make full use of the aircraft that are already in service, and 18% of the A320 fleet is still currently parked or in storage and therefore could be brought into service without airlines having to have any recourse to ACMI providers. Mr Dimitroff also makes the point in his supplementary report that during a period of low demand, January 2020 to March 2022, 553 A320neo aircraft entered service but only 120 A320ceo were retired, representing a significant net increase; that demand will take time to catch up, and even then the arrival of further A320neo aircraft will reduce the extent to which demand for A320ceo recovers.

357. I also do not accept the Defendants' suggestion that a boost in utilisation could be expected as ACMI carriers step in to fill cancellations caused by staff shortages: as Mr Dimitroff pointed out, not all cancellations are due to staff shortages. Many are due to lack of demand (as airlines try to increase supply in advance of demand that may not materialise) or no-one being allowed to fly that route at all, whether ACMI or otherwise. In any event, as Mr Dimitroff said, any increase in utilisation caused by these kinds of opportunities was likely to be temporary, as eventually airlines would recover their staffing levels.

358. I do not consider that the fact that Mr Seymour's prediction for Period 1 has turned out to be broadly accurate undermines the general considerations set out in §§ 356 and 357 above, which focus on likely developments in the market over the next few years.

359. On the other hand, the force of the Claimants' "fourfold increase" point is mitigated to a degree by the fact that it represents only an increase from 20 to 80 aircraft, in the context of an overall fleet of 2,000 leased A320s. There are also more positive signs of growth that may make Mr Dimitroff's assumed 5% rather conversative. These are not based on estimates or actual figures for overall traffic, since that is not a reliable guide to the position in the ACMI market (where very specific supply and demand factors apply). However, what can fairly be noted is that:

    i) Mr Dimitroff's benchmark period June 2021 to June 2022 included downturns in passenger numbers due to Covid, and the month of June 2021 when the SmartLynx leases had just started and the four aircraft flew very little;

    ii) we now have the actual utilisation figures for the period December 2021 to December 2022, indicating an average monthly utilisation of 164.06 hours;

iii) Mr Dimitroff agreed that the ACMI market will grow in the long term as global traffic grows;

iv) an article in AeroTime on 5 February 2022, shown to Mr Dimitroff in cross-examination, referred to a recent Market Monitor Global report predicting global ACMI growth of 6.9% compound per annum and the ACMI market by 2027 being almost double its size in 2020: Mr Dimitroff had not been shown the underlying data and could not comment in detail, but said the predictions did not seem wildly unreasonable to him. He noted that the 6.9% predicted annual increase might be based partly on new aircraft and partly on higher utilisation;

v) SmartLynx itself reported in May 2022 that "*Aviation support services and passenger ACMI expected to show significant improvement in 2022 following dropped pandemic restrictions*". There is an indication in the documents that SmartLynx is expanding its existing fleet of 33 aircraft by a further 22 aircraft; and

vi) Mr Dimitroff agreed that SmartLynx is one of the pre-eminent A320 ACMI operators in Europe, Middle East, and Africa, and that SmartLynx has a number of quality customers including easyJet, Tui and Jet2.

360. These matters are of course difficult to assess. Before seeing the actual utilisation data, I would have been inclined not to accept Mr Seymour's estimates (which did not appear to me to be soundly based), and to prefer Mr Dimitroff's approach as being sound in principle, subject to modest adjustments by (a) eliminating the distorting effect of including the month of June 2021 in the benchmark period, and (b) increasing the compound annual increase thereafter from 5% to 6.5% (i.e. a figure slightly discounted for the Market Monitor Global prediction to reflect the inherent uncertainties involved). Now that the actual utilisation data for Period 1 is available, I would (had it been necessary to decide the issue) have used that data for Period 1. As to Period 2, I would still have preferred Mr Dimitroff's general approach, for the reasons given above, but would have used the actual utilisation data to December 2022 as providing a new benchmark, to which compound annual increases of 6.5% would then be applied thereafter.

(b) The Call Option

361. The experts indicated that it was common in the market during Covid-19 for PBH rates to revert to fixed monthly rates after a period, sometimes as little as 3-6 months as market prospects improved. The SmartLynx leases do not contain a term requiring the PBH rate to switch to a fixed monthly market rate at any point in the lease. Instead, Side Letter No.1 to the SmartLynx leases contains a Call Option giving the lessors a right from 1 January 2022 to give 90 days' notice terminating the SmartLynx leases, if the Base Rent and Profit Share do not reach certain target amounts. Paragraph D of the Side Letter provides that the Call Option cannot be used if SmartLynx has generated Rent and Profit Share in the previous 12 months of US$1.5m for 2021, US$1.7m for 2022 and US$2m for 2023. The experts agreed that the purpose of the Call Option is to ensure that SmartLynx is required to pay the market rate as it improves coming out of Covid-19.

362. Mr Seymour suggests that the Claimant lessors will be able to use the Call Option to renegotiate the SmartLynx leases because:

    i) by June 2023, the Lessors will be receiving US$85,000 a month in base rent and US$60,000 in profit share, and will therefore be receiving almost US$150,000 already (or about US$1.75 million per annum); and

    ii) the Lessors will be able to show that they have offers in excess of US$150,000 per month, which SmartLynx will wish to match (or accept a PBH rate of around US$750 per hour which Mr Seymour presumably believes would equate to around US$150,000 per month).

363. Estimate (i) above does not tally with the prediction in Table 24 of Mr Seymour's first report that between January 2023 and June 2023 the Lessors will receive US$133,158 per aircraft in profit share, equivalent to only US$22,193 a month; and I do not therefore consider it reliable. In any event, incomes at the levels indicated in (i) above would suggest that the Lessors would have little incentive to exercise the Call Option.

364. Estimate (ii) above is based on Mr Seymour's projection that the Market Lease Rate ("***MLR***") for A320s will increase at a consistent rate from today's rate to around US$170,000 a month (a little less than the US$190,000 levels in December 2019 for 2008 vintage A320s), meaning that by July 2023 the MLR will have returned to around US$155,000. The Defendants say that is consistent with an exchange in cross-examination where Mr Dimitroff expressed the view that there was an "equal chance" of the aircraft commanding a rate of US$400 an hour during the life of the leases, since the Call Option would be worth exercising once the market rose over that level.

365. However, Mr Seymour accepted that between January 2020 and 31 March 2020 there has been a net increase in the supply of A320s of 433, so demand for A320ceos would need to grow significantly in order to reach 2019 MLR levels. In fact, market data from January to April 2022 showed that MLRs were still significantly behind where Mr Seymour had projected in his first report. Mr Dimitroff explained that the primary issue was that the number of aircraft coming off lease equalled or exceeded the number of lease placements, rather than the effect of the Omicron variant of Covid, and I accept his evidence on that point. Further, in or around March 2022, IBA (Mr Seymour's company) forecast that, as a result of the invasion of Ukraine, "*the industry's recovery from the pandemic will be delayed by at least two months*", and in May 2022, Ryanair was warning of "*a fragile recovery in airline passenger numbers*". Fuel prices have increased significantly compared to what they were in 2019: a factor likely to affect particularly the A320ceo as compared to the more efficient neo version. Higher energy prices and inflation also create the risk of reduced consumer demand. All these factors cast doubt on the likelihood of Mr Seymour's predicted MLRs being reached.

366. In addition, I broadly accept Mr Dimitroff's view that the market in 2019 was overheated in the sense that there was significantly greater demand than supply That is not inconsistent with Mr Dimitroff's graph showing lease rates remaining almost flat during the 2 year period between 2017 and 2019, because (Mr Dimitroff explained) one would ordinarily have expected a decline in the A320ceo MLR as it neared the end of production (to be replaced by the A320neo). Mr Dimitroff's view was that a balanced market for 2008 vintage A320ceos would be achieved by about July 2023, when they would peak in the range US$142,000 to 145,000 a month. Based on the evidence before

me, I consider that a realistic estimate, and I prefer it to Mr Seymour's higher estimate for the market rate.

367. It is also necessary to take into account (a) uncertainty about whether another customer can be found who will pay a higher rent (bearing in mind that other lessors may be willing to undercut the MLR to reduce a stock of unlet aircraft), (b) the limited market for A320ceos (European short-haul), (c) the cost of terminating a lease and reletting, which Mr Dimitroff explained could be in excess of £1 million, and (d) the relatively high maintenance rent payable under the SmartLynx leases.

368. Bearing in mind all these factors, I would not have considered there to be a sufficiently high likelihood of the Call Option being exercised to justify taking it into account when estimating the amount the Lessors will receive by reletting the aircraft following the termination.

(c) Maintenance rent

369. Mr Dimitroff's evidence was that SmartLynx will be liable to pay US$23.75 million in maintenance rent during what would have been the term of the Laudamotion leases. Mr Seymour's evidence was that SmartLynx would be liable to pay US$23.38 million. Given the closeness of the figures, the Claimants were willing to accept Mr Seymour's figure, and I would have adopted it on that basis.

(d) Change in maintenance condition

370. Ordinarily, maintenance rent (or maintenance reserves) are used to fund maintenance on the aircraft. In this case, however, the experts agree that no maintenance is likely to be undertaken to the aircraft by SmartLynx. They say the decision not to perform maintenance will be driven by AerCap wanting to retain the maintenance rent rather than having it spent to improve the aircraft condition.

371. The Lessors will therefore receive back aircraft that are in a worse condition than they were delivered in, so the change in value needs to be deducted. Mr Dimitroff estimated this at US$18.43 million for the four aircraft in aggregate. As was explored in cross-examination, Mr Dimitroff's view was in part based on estimated utilisation of the aircraft by SmartLynx, with Mr Seymour estimating higher utilisation and hence worse final delivery condition. As indicated in section (3) above, I would not have accepted Mr Seymour's utilisation estimates, and would have accepted Mr Dimitroff's subject to the modifications indicated in § 360 above. I would, likewise, have accepted Mr Dimitroff's figure for change in maintenance condition, subject to an appropriate upwards adjustment (which might have to be the subject of further evidence) to reflect that modification to the estimated utilisation.

372. I note that Mr Seymour approached this issue in a different way from Mr Dimitroff, based on the likelihood that at the end of the Laudamotion leases the aircraft would be re-let whereas under the SmartLynx leases they will probably be 'parted out' i.e. dismantled and used for parts. His approach therefore involved an attempt to work out the underlying value of the aircraft itself, as opposed to merely the change in maintenance condition. However, I would have preferred Mr Dimitroff's approach, which was that since ultimately the court had to compare the effect of the two sets of leases (to Laudamotion and to SmartLynx), the core asset values (aside from their

maintenance condition) would be expected to depreciate equally under both leases when compared over an identical timeframe, so it should not be necessary to introduce opinions of the aircraft's residual values into the calculation.

(e) SmartLynx Profit Share

373. Schedule C2 of Schedule 1 to the SmartLynx leases provides for SmartLynx Malta to put aside 33% of its net profit before tax earned on passenger aircraft operations (as specified in the audited consolidated financial statements of SmartLynx Malta) into a profit share pool. Each lessor then receives a portion of that pool based on the proportion of the SmartLynx Malta passenger fleet that was made up of aircraft provided by that lessor (expressed in terms of aggregate days).

374. SmartLynx Malta had, at least by the time of trial, not yet published its audited consolidated financial statements. On the other hand, the accounts of its ultimate holding company (Avia Solutions Group) had been published, meaning that SmartLynx's own audited accounts must have been prepared, and Mr Finegan's understanding was that discussions were under way about profit share with AerCap's contracts department. It is unclear why the audited accounts were not produced in evidence, or evidence about the position in the profit share discussions; and it is reasonable to infer against the Claimants that some positive profit share figure is likely.

375. In the absence of the accounts, it would be necessary to estimate: (a) what SmartLynx Malta's net profit earned before tax will be for each relevant year; (b) what proportion of this will be earned on passenger aircraft operations (as opposed to cargo); and (c) how many passenger aircraft SmartLynx Malta will have in its passenger fleet in each relevant year.

376. Mr Dimitroff's view was that these variables were so uncertain that it was not possible to estimate with any acceptable degree of accuracy what the profit share was likely to be.

377. Mr Seymour estimated that from the start of the SmartLynx leases to June 2023 (at which point he believed the profit share would be replaced as part of the negotiations leading to a fixed fee), SmartLynx would be liable to pay the Lessors a total of US$747,139. To derive that figure, Mr Seymour started with the published accounts of SmartLynx's immediate holding company, the Latvian company SmartLynx Airlines, which show that it made profits in each year from 2015 to 2019 before making a loss during Covid. Mr Seymour calculated the profit per aircraft that would have been made had the Profit Share applied to that company. He also used SmartLynx's own accounts for 2019, when it operated only one aircraft but would have generated a Profit Share of US$50,601 for 2019. For future years Mr Seymour took account of SmartLynx now having 18 aircraft in its fleet. For 2022, he applied a 2.7% pre-tax margin, representing the minimum achieved by SmartLynx Airlines in 2015-2019; and a 7% margin in 2023, reflecting the average margin in 2015-2018. These assumptions produced estimated annual Profit Shares of zero for 2021, US$53,627 per aircraft in 2022 and US$133,158 for the six months to June 2023. Mr Seymour then estimated that from July 2023 SmartLynx will not be paying PBH or a Profit Share and instead will be paying a fixed monthly rate of US$150,000 per aircraft: though in section (3)(a) above I have not accepted that evidence.

378. The Claimants point out that Mr Seymour's estimates involve a series of assumptions or guesses, namely: (a) that SmartLynx Malta's future profitability can reliably be estimated using historical data for the profitability of its parent company, SmartLynx Airlines, despite the parent also owing an Estonian entity as well; (b) that the profitability of SmartLynx's cargo operations, which it added in 2020, would be the same as its profitability on passenger operations; (c) that SmartLynx Airlines' revenue from 2015-2019 was an accurate guide for its likely revenue in 2021; (d) that SmartLynx Airlines' revenue in 2022 would be the average of its revenue in 2019 and its estimated revenue in 2021; and (e) that SmartLynx's growth from 2022 to 2023 would be equal to pre-pandemic levels, with its leased passenger fleet increasing by 10%.

379. However, I would not accept the Claimants' conclusion that the logical result must be to assess the value of the profit share at zero. Estimates of future trends such as these inevitably have to involve significant assumptions, but such evidence as was available (and I note above that the Claimants may have been in a position to produce further evidence) suggested that a positive figure was likely. The just course in those circumstances would in my view have been to take Mr Seymour's figures and applied a substantial percentage discount (which I would have put at 50%) to reflect the considerable uncertainties involved. It would then also have been necessary to place a value on the profit share post June 2023 by applying a similar methodology, i.e. using the assumption that the SmartLynx leases would not have been switched (by actual or threatened exercise of the call option) to fixed rent leases with SmartLynx or another lessee.

(f) Discount rate

380. Article 24.9 of the leases provides that the rent that would have been paid over the five-year term of the Laudamotion leases is to be discounted to present-day value by "*a discounting rate of the prime rate announced by LESSOR's Bank discounted to the date on which LESSOR recovers possession of the aircraft".* The Claimants' bank used the prime rate of 3.25%. Against that, the Claimants would have had to give credit for the sums received to date from SmartLynx, and the sums estimated to be received in future as considered above (in addition to certain Flynas payments as discussed later).

381. For SmartLynx, Mr Seymour's evidence was that a discount rate of 7.54% should be used. That was based on SmartLynx having the same credit rating as a bond issued by a subsidiary of SmartLynx's ultimate parent company, Avia Solutions Group, which was rated BB. However, Mr Seymour accepted that he did not know anything about this bond issue (e.g. whether it was secured); and that it could not be assumed that SmartLynx's creditworthiness was the same as this other group company.

382. Mr Dimitroff used a discount rate of 8.79% for SmartLynx, based on a 5-year US treasury rate of 2.69%, and a credit spread of 6.1% for a B+ rated company That was based on the fact that, as he said during cross-examination, "*nobody views the subsidiary's credit to be equal to the parent, especially when the leases are not guaranteed by the parent*", and so the credit rating of the subsidiary should be a couple of grades lower, in this case B+.

383. This issue would have involved some complexity due to the experts' having approached the matter in different ways, and a general rise in interest rates between May 2020 and trial.

384. Mr Dimitroff's approach was simply to apply a B+ credit spread to the treasury rate. Mr Seymour applied his company's more conservative approach, which includes a typical 5% minimum discount rate, under which a 5% discount rate would be applied to Ryanair and a 7.54% rate to SmartLynx's parent, SmartLynx Airlines.

385. General interest rates have risen substantially. For example, Mr Dimitroff cited the US Treasury rate of 0.31% for a 5 year term as at 15 May 2020, which had risen to 2.69% by April 2022. The rate for the future Laudamotion rental payments under Article 24.9 of the lease is based on the Prime Rate as at the date the aircraft are recovered, meaning for present purposes the termination date in May 2020. The rise in general interest means that simply to take the current discount rate for SmartLynx would not be comparing like with like. A fairer way approach would be to use the Article 24.9 rate for the Laudamotion payment and adjust it to reflect any difference in credit spread.

386. Even that is not entirely straightforward, since the lease rate may assume that Laudamotion's payments are guaranteed by Ryanair (as the lease envisages), whereas in fact only one of the leases was so guaranteed. The relevant credit spread difference would therefore be between those of Laudamotion (assuming no guarantee) and SmartLynx. Mr Dimitroff assumed a BBB rating for Laudamotion, based on a Ryanair guarantee, and a B+ rating for SmartLynx (two notches below Avia Solutions' BB rating). On Mr Dimitroff's approach Laudamotion would typically be rated two notches below Ryanair's BBB rating, hence BB+. Taking a rough and ready approach, and starting from the premise that the Article 24.9 rate has (contractually) to be used for the Laudamotion payment, an appropriate rate for the SmartLynx income stream would be the Article 24.9 rate increased by the percentage difference in discount rates between lease income streams for BB+ and B+ rated entities.

387. There was, finally, a difference about whether any discount applied to sums due from SmartLynx should also be applied to any figure reflecting the change in maintenance condition of the aircraft. The Claimants say not, since the change in maintenance condition is not dependent upon SmartLynx's credit risk. Nonetheless, I would have taken the view that the sums would nonetheless need to be discounted to reflect the time value of money. The Claimants' point about irrelevance of credit risk could properly be addressed by using the Treasury rate with no addition for credit spread for these sums.

(4) The Flynas Payments

388. The disputed issues were:

i) Must the Claimants give credit from the date when the Laudamotion leases were terminated or the Final Delivery Dates?

ii) Are the Claimants obliged to give credit for the double rent and default interest provided for in the Flynas leases?

iii) If not, should the Claimants be obliged to give credit for more single rent than they current offer?

(a) Start date

389. If Laudamotion had accepted delivery of MSN 3361 then the Lessors would still have had until 31 May/30 June 2020 to deliver the remaining aircraft. During that time, the Lessors would have been entitled to charge Flynas rent. The receipt of that rent, therefore, would not have been causally connected to Laudamotion's breach and should not be taken into account.

(b) and (c) Single and double rent

390. Under the Flynas leases, the Claimants had the right to charge base rent under Article 5.3 at around US$285,000 per month. Under Article 23.14.3, if Flynas did not return the aircraft by the lease "Expiration Date", Flynas was liable to pay double rent until the aircraft was returned in the Redelivery Condition. Under Article 5.7, default interest was payable on late payments at 3% over JP Morgan's Prime Rate.

391. It is common ground that the Flynas leases continued after 15 May 2020, the date of purported termination of the Laudamotion leases. The Defendants contend that the Claimants must give credit for the amount they were contractually entitled to receive from Flynas. They had straightforward contractual claims against Flynas and rendered invoices for rent to it. The Defendants allege, by reference to the detailed correspondence, that in certain respects the Claimants relieved Flynas of their obligations to pay single or double rent even where Flynas were not fulfilling criteria the Claimants had set for that purpose, relating to Flynas making reasonable efforts to redeliver the aircraft on time having dealt with all outstanding documentary matters. In some cases the Claimants' witnesses agreed that there had been generous concessions.

392. I would not have accepted the Defendants' contentions on these matters. The evidence indicated that Flynas is a low-cost Saudi-incorporated airline which was in financial difficulties, and appeared to operate an entirely leased fleet. There was no basis for thinking it could or would have paid voluntarily. Mr Anderson and Mr Finegan's evidence was that it was in financial distress. On 21 April 2020, Flynas wrote to the Lessors advising that it was projected to incur losses of $220-340m for the year, against cash balances of $80m, and therefore was unable to make any further payments to the Lessors.

393. Although the Flynas leases contained non-exclusive English jurisdiction clauses, proceedings may well have been defended, and the Claimants would likely have needed to try to enforce in Saudi Arabia, a country with which the UK has no bilateral enforcement treaty. In the meantime, the already significant problems the Claimants were encountering trying to get documents from Flynas would be likely to have been exacerbated. The Claimants were in a difficult position, and on my assessment of the evidence the approach they took was not unreasonable.

394. The Defendants sought in closing to raise an unpleaded point, which was not squarely put to the Claimants' witnesses, that the Claimants had security from Flynas that could have been used to satisfy its obligations to pay single and double rent, but the relevant documents had been redacted. The Claimants pointed out in a letter of 21 July 2022

that the point had not properly been raised, and that the sums in question had in fact been spent on other matters (providing details). The Defendants responded that it was the Claimants who were making a positive assertion that Flynas would have been unable to pay. In my view, however, the overall burden is on the Defendants, and had they wished to make the point that money was available for the Claimants to use to satisfy Flynas's liabilities, then the point would have had to be taken (and any disclosure issues resolved) much earlier.

395. Accordingly, I would have required the Claimants to give credit only for such sums as were actually received from Flynas in respect of the relevant period.

(5) Additional expenses

396. Under Article 24.6, Laudamotion would be obliged to indemnify the Lessors against any Expenses (as defined) they incurred as a result of Laudamotion's Events of Default, subject to the Lessors' obligation under Article 24.7 to mitigate their losses.

397. The Defendants argued that some of the expenses were either unreasonable in amount or would have been incurred in any event.

398. Since these matters too do not arise, given my findings on liability, I deal only, very briefly with the disputed points highlighted in the parties' closings.

399. The costs of putting MSN 3361 into storage were incurred following an airworthiness requirement by Airbus communicated in an Operators Information Transmission circulated in March 2020, leading to a work order dated 20 April 2020. They are not attributable to an alleged breach or Event of Default by the Defendants.

400. Certain costs in relation to MSN 3361 and MSN 3396 from June to September 2020 were referred to on invoices as "parking and storage", whereas the Claimants' evidence was that parking at Fokker was provided free. However, Mr Akhrif's evidence, which I accept, was that the services provided and charged for in fact related only to storage costs.

401. The new point raised in cross-examination, but not in the Defendants' counter-schedule, that some of these storage costs were incurred prior to the date of technical acceptance from Flynas, so that Flynas were liable for them, is not open to them.

402. Where an aircraft is put into short-term, as opposed to long term, storage, then a 'parking resetting flight' is needed every three months. The Defendants suggest that all four aircraft, not only MSN 3361, should have been put into long-term storage, given the depths of the Covid pandemic, thereby avoiding the costs of those resetting flights. I disagree. I accept Mr Akhrif's evidence that, taking into account the large amount of work needed at the outset to prepare an aircraft for long-term storage, the overall costs are broadly similar. Further, since the progress of the pandemic was unpredictable, it was perfectly reasonable for the Claimants to keep their options open by placing one of their aircraft (MSN 3361) into long-term storage and keeping the remaining aircraft in short-term storage. On the same basis, I would reject the Defendants' apparent objection to the 'permit to fly' i.e. the cost of the CAMO reviewing the paperwork ahead of the flights that MSN 3475 was obliged to undertake while it was in short-term storage.

403. The recoverable storage costs would include the associated costs of sending wheels to a repair shop for inspection.

404. I reject the Defendants' contention that the aircraft should have remained registered in the Cayman Islands, where Celairion is an authorised CAMO, instead of incurring the costs of registering them in Austria, when the next lessees could have been from any jurisdiction in the world. I accept Mr Akhrif's evidence that at the relevant time there was still a chance of Laudamotion taking delivery of some or all of the aircraft; that the Claimants had already appointed an Austrian CAMO who had already certified the aircraft as being in compliance with EASA regulations, and who had worked previously with both AustroControl and Laudamotion; that if Laudamotion would not accept any of the aircraft then the fact that the Austrian CAMO had been through the process of certifying compliance with EASA regulations would make the aircraft more attractive for European lessees than leaving the aircraft on the Cayman Islands register; and that Austrian registration is highly reputable and widely accepted by other jurisdictions.

405. The Claimants would have been entitled to recover the additional costs of having to update their aircraft records in order to lease them to SmartLynx, over and above the cost (which the Claimants would have had to bear in any event) of doing so for the intended leases to Laudamotion. I see no sufficient basis for the Defendants' proposed reduction in the figure claimed.

406. Some of the records consultants' invoices refer to the litigation. However, unless otherwise recoverable as legal costs, such charges would be likely to be recoverable under Article 24.6(e) and (i) of the lease. Further evidence or argument may have been necessary to resolve any outstanding issues in this regard.

407. The Defendants submit that certain elements of the record consultants' work in relation to the last three aircraft would have had to be undertaken to deliver the aircraft to Laudamotion anyway, and is therefore irrecoverable. However, the Defendants conceded in relation to MSN 3361 that some work from records consultants would be required prior to the delivery of the aircraft to the new lessee, even if the records review had been completed for Laudamotion, as seems inherently likely. In principle these amounts would have been recoverable.

408. Insofar as the Defendants maintain an objection to certain records consultation work having been done by a consultant based in Istanbul, I do not accept it. The records review was largely done remotely, and there is no reason why it should not be done in part by individual based there.

409. The Claimants would have been entitled to record the costs of the installation of Laudamotion branded carpets (which Mr Akhrif confirmed they were) installed on the aircraft; and for CAM (cabin assignment module) debranding given that (as Mr Akhrif confirmed) the CAM had been customised for Laudamotion.

410. The Claimants would also have been entitled to recover the cost of a Low-Frequency Underwater Locator Device modification, which (Mr Akhrif explained) was mandated by EASA for aircraft operations over water with a distance of more than 180 nautical miles from the shore. It was needed by SmartLynx although Laudamotion would not have needed it. The fact that Laudamotion could have requested it is not relevant: Laudamotion expressly confirmed that it was not required, and so it is not a cost that

the Claimants would have had to incur in order to earn the rents due under the Laudamotion leases.

411. The Defendants challenge the claim for the costs of investigating and repairing all defects that were discovered by the MRO or were otherwise required to be remedied before delivery to SmartLynx, on the basis that they would have been discovered by Laudamotion and therefore would have had to be put right at the Claimants' expense in any event. The objection is valid only to the extent that the defects were in existence prior to the dates that the aircraft would have been accepted by Laudamotion. I would accept it only to the extent that it was suggested to Mr Akhrif, and he accepted, that there were certain items (a fan cowl opening bracket, radio panel and lavatory housing sign) in that category.

412. Insofar as there were some other items of possible dispute not fully addressed in the parties' closing (including insurance costs and various other costs for MSN 3475), they would have had to be the subject of further submissions.

(J) FOR HOW MUCH IS RYANAIR LIABLE AS GUARANTOR?

413. This is a further issue that does not arise, in the light of my findings on liability, but which I address briefly as it was the subject of argument.

414. It was intended that Ryanair would guarantee Laudamotion's obligations under all four of the 2019 leases (and Article 7.1.1 of the leases obliged Laudamotion to procure such guarantees). In the event, it only ever executed guarantees for the MSN 3361 lease. It also guaranteed Laudamotion's obligations under the 2018 leases. The Claimants contended that Ryanair was nonetheless liable in relation to its claims concerning the last three 2019 aircraft, because they were recoverable as expenses under the provisions of the MSN 3361 lease (for MSN 3396) and the 2018 lease for MSN 3131 (for MSN 3425 and MSN 3475).

(1) MSN 3396

415. Peregrine was the Lessor in respect of MSNs 3361 and 3396. As noted earlier, Article 24.6 of those leases provides an indemnity in these terms:

> "If an event of Default occurs … LESSOR and each other Indemnitee has the right to recover from LESSEE, and LESSEE will indemnify LESSOR and each other Indemnitee on LESSOR's first written demand against, any Expenses which LESSOR or any other Indemnitee may sustain or incur directly as a result, including [without limitation] …."

I have interpolated the words "without limitation" because Article 27.14 provides that the word "including" is "used in this Lease without limitation".

416. Article 16.1 defines "Expenses" as:

> "any and all liabilities, obligations, losses, damages, fines (whether criminal or civil), penalties, claims, demands, actions, suits, proceedings, judgments, orders, or other sanctions,

> payments, charges, fees, costs, disbursements and expenses (including legal fees and expenses) of every kind and nature".

and defines "Indemnitee" as including the Lessor's Affiliates.

417. Article 24.6(c) includes in the list of directly sustained expenses "*any losses suffered by LESSOR or Owner because of an inability by LESSOR or Owner to place the Aircraft on lease with another lessee or to otherwise utilize the Aircraft on financial terms as favorable to LESSOR as the terms of this Lease …*", and provides for the acceleration of lease payments in this context.

418. Peregrine contends that:

i) The Event of Default in relation to MSN 3361 triggered an Event of Default in relation to MSN 3396.

ii) The Expenses suffered in relation to MSN 3396 were sustained or incurred "directly as a result" of the MSN 3361 Event of Default.

iii) Laudamotion is therefore liable under the indemnity in the MSN 3361 lease in relation to MSN 3396; and in turn Ryanair is liable on the guarantee it gave in relation to the MSN 3361 lease.

419. In support of this line of argument Peregrine makes the point that the words "any Expenses" are not limited to expenses relating specifically to MSN 3361. Further, Peregrine's separate decision to terminate Lease MSN 3396 did not break the chain of causation. In *Borealis AB v Geogas Trading SA* [2010] EWHC 2789 (Comm) §§ 44-45 Gross LJ (sitting at first instance) said:

> "… in order to comprise a novus actus interveniens, so breaking the chain of causation, the conduct of the claimant "must constitute an event of such impact that it 'obliterates' the wrongdoing…" of the defendant: Clerk & Lindsell on Torts (19th ed.), at para. 2-78. The same test applies in contract. For there to be a break in the chain of causation, the true cause of the loss must be the conduct of the claimant rather than the breach of contract on the part of the defendant; if the breach of contract by the defendant and the claimant's subsequent conduct are concurrent causes, it must be unlikely that the chain of causation will be broken. In circumstances where the defendant's breach of contract remains an effective cause of the loss, at least ordinarily, the chain of causation will not be broken…."
>
> "… it is difficult to conceive that anything less than unreasonable conduct on the part of the claimant would be capable of breaking the chain of causation. It is, however, also plain that mere unreasonable conduct on a claimant's part will not necessarily do so…."

In the present case, it was both reasonable and foreseeable that Peregrine could call an Event of Default under the MSN 3396 lease based on the cross-default provision, and

it was directly based upon and flowed from the original wrongdoing. It is no answer to say the loss arose from a concurrent cause outside the scope of the clause: see *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1, [2021] AC 649, at §§ 162-176.

420. I do not accept those submissions. Enquiring whether the calling of an Event of Default under the MSN 3396 lease, resulting in a further liability for Laudamotion, broke the chain of causation does not in my view ask the right question. The question is whether the liability arising under the MSN 3396 lease is an expense that Peregrine has sustained or incurred directly as a result of Laudamotion's breach or Event of Default under the MSN 3361 lease. It might be fair to regard it as an expense (in the broad sense envisaged by Article 24.6(c)) indirectly resulting from that breach or Event of Default, but it is not a direct result of it.

(2) MSNs 3425 and 3475

421. In relation to MSN 3425 and MSN 3475, where the Lessor was AIL, the Claimants submit that:

i) The failure to pay the sums due following the event of Default in relation to MSN 3361 amounted to an Event of Default in relation to the 2018 leases, including the lease of MSN 3131, under Article 24.2(q)(i) (considered earlier). That triggered Events of Default under AIL's leases in respect of MSNs 3425 and 3475.

ii) AIL is an Affiliate of AICDAC, the lessor of MSN 3131, so AIL is an Indemnitee for the purposes of Article 24.6 of the MSN 3131 lease.

iii) The Expenses suffered in relation to MSN 3425 and 3475 were sustained or incurred "directly as a result" of the MSN 3131 Event of Default.

iv) Laudamotion is therefore liable under the indemnity in the MSN 3131 lease and in turn Ryanair is liable on the guarantee it gave in relation to that lease.

422. In response to two specific points made by the Defendants, the Claimants say it makes no difference that (a) AICDAC has not sought to terminate the MSN 3131 lease, and (b) neither AIL nor AICDAC has suffered a loss under the MSN 3131 lease. There is no requirement that an Event of Default should have resulted in termination in order for a liability to arise under Article 24.6, nor that an Indemnitee have an interest in the lease: merely that it have suffered loss "directly as a result" of the Event of Default.

423. The Claimants may well be right about those points. However, I am unable to accept their basic contention. As with the MSN 3396 lease, or probably *a fortiori* given the more tenuous connection, the rental loss under MSN 3425 and MSN 3475 do not arise directly from any Event of Default in respect of MSN 3131.

(K) CONCLUSION

424. For the reasons set out above, the Claimants' claims fail and must be dismissed.