Neutral Citation Number: [2024] EWHC 3337 (Comm)

Case No: CL-2022-000467
CL-2024-000466
CL-2024-000467

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 23 December 2024

Before :

MR JUSTICE BRIGHT

- -

Between :

FW Aviation (Holdings) 1 Limited

Claimant in CL-2022-000467

(1) Natixis
(2) Natixis (Singapore Branch)

Claimants in CL-2024-000466

BNP Paribas S.A.

Claimant in CL-2024-000467

- and -

VietJet Aviation Joint Stock Company

Defendant

- -
- -

Robin Lööf (instructed by Quinn Emmanuel Urquhart & Sullivan UK LLP) for the Claimant in CL-2022-000467
Michael McLaren KC and Rebecca Loveridge (instructed by Jones Day) for the Claimant in CL-2024-000466
Conall Patton KC and Jarret Huang (instructed by Linklaters LLP) for the Claimant in CL-2024-000467
Tom Sprange KC and Kabir Bhalla (of King & Spalding International LLP) for the Defendant

Hearing dates: 17, 18 December 2024

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Approved Judgment

This judgment was handed down remotely at 10:00am on 23/12/24 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

The actions and the parties

1. This judgment concerns claims made by the Claimants in all three actions ("FWA", "Natixis" and "BNP", respectively, in each action) for anti-suit injunctions ("ASIs") against the Defendant in all three actions ("VietJet"). I determined the claims on a final basis, at a hearing that took place on an expedited basis because of pending litigation in Vietnam. Because of the urgency of the matter, this judgment is handed down during the High Court vacation.

2. Also before me were challenges to the jurisdiction of this court, made by VietJet in the actions commenced by BNP and Natixis (but not as against FWA, in CL-2022-000467, "the FWA Proceedings").

3. FWA is a company incorporated in Jersey, which holds and pursues rights in respect of aircraft. Its affiliate FitzWalter Capital Partners (Financial Trading) Limited ("FWC") is trading company established in England. It was represented by Mr Lööf.

4. Natixis and BNP are well-known banks. They were represented by Mr McLaren KC and by Mr Patton KC, respectively.

5. VietJet is an international low-cost airline incorporated in Vietnam and Vietnam's second-largest airline. It was represented by Mr Sprange KC.

6. The Claimants' claims for ASIs arise from various exclusive jurisdiction clauses ("EJCs") in some of the relevant agreements, which VietJet contended are not applicable. VietJet's jurisdictional challenges also turn on whether the EJCs relied on by the Claimants are applicable. In their submissions, all Counsel focussed on the ASIs, leaving the jurisdictional challenges until last and dealing with them very briefly. I follow the same course below.

The JOLCO structure

7. In 2018 and 2019, VietJet took delivery of four Airbus A321 aircraft. As is common in the aviation industry, this was pursuant to leasing finance. In relation to two of the aircraft (referred to as the "CEO" aircraft), the banking syndicate was led by BNP. In relation to the other two (referred to as the "NEO" aircraft), the banking syndicate was led by Natixis. BNP and Natixis acted as Security Trustee for each of the respective banking syndicates.

8. In all four instances, the financing of the aircraft took the form of a Japanese Operating Lease with Call Option (or "JOLCO"), structured as follows:

   (1) Each aircraft was purchased from the manufacturer by an SPV representing a group of Japanese investors, which stepped in as assignee under a purchase agreement previously concluded with the manufacturer by VietJet. The purchase in each case was funded in part by the SPV's equity and in part by a loan from banks, under a loan facility ("the Loan Agreement").

(2) The SPV in each case leased the aircraft to a Lessee under a leasing agreement ("the Head Lease"); the Lessee then sub-leased it to VietJet under a further leasing agreement ("the Sub-Lease"). The Lessees/Sub-Lessors were all related to VietJet.

(3) The rental payments that were to flow up the line would repay the financing loans obtained by the SPV in each case. At the end of the period of the JOLCO arrangements, VietJet would be entitled to exercise a call option and so end up as the owner of the aircraft.

9. Thus, the three principal agreements in relation to each aircraft were (i) the Loan Agreement between the banks and the SPV, (ii) the Head Lease between the SPV and the Lessee and (ii) the Sub-Lease between the Lessee/Sub-Lessor and VietJet. These agreements act together to make up the core of the JOLCO structure.

10. Each was governed by English law. Each contained an EJC in favour of the courts of England and Wales. Annex 1 to this judgment sets out the relevant provisions of the Sub-Lease for one of the aircraft. It was agreed that the equivalent provisions in the Sub-Leases for the other aircraft are not materially different.

11. In addition, each Loan Agreement was supported by a mortgage over the relevant aircraft in favour of BNP/Natixis as Security Agent/Security Trustee; and the SPV (under the Head Lease) and the Lessor/Sub-Lessee (under the Sub-Lease) assigned to BNP/Natixis (as Security Agent/Security Trustee) certain rights under the Head Lease/Sub-Lease (respectively) ("Security Rights"), including the right to rental payments.

12. The closeness of the relationship between the Loan Agreement, the Head Lease and the Sub-Lease, and the practical connections that link them, are important. Because the rental payments under the Sub-Leases were intended to fund the payments under the Loan Agreement, the payment obligations under each were, deliberately, precisely matched. The instalments of rent payable by VietJet under each Sub-Lease were identical to the corresponding payments of principal and interest that would fall due under the relevant Loan Agreement.

13. Thus, the Sub-Leases for the CEO aircraft incorporated by reference the payment schedule under the Head Lease. That schedule not only set out rental payments that were identical to the sums that would fall due under the relevant Loan Agreement, but it also expressly acknowledged that those amounts had been calculated on the basis of assumptions for the correct calculation of sums due under the Loan Agreement, and stipulated that those amounts should be revised if those assumptions were incorrect.

The termination of the Sub-Leases and the FWA Proceedings

14. The Covid-19 pandemic and its effect on air travel caused severe financial problems for VietJet, as it did for many other airlines. VietJet fell behind with its payments. Ultimately, BNP and Natixis served Notices of Termination in respect of the Head Leases and Sub-Leases for all four aircraft. This led to the commencement of the FWA Proceedings. Natixis served Termination Notices for the NEO aircraft on 18 October 2021. BNP served Termination Notices in relation to the NEO aircraft on 22 and 26 October 2021.

15. The FWA proceedings gave rise to a judgment of Picken J, handed down on 31 July 2024: [2024] EWHC 1945 (Comm). In that judgment, Picken J gave an uncontroversial explanation of a typical JOLCO structure at [7] to [17]. He then summarised the JOLCO arrangements specific to these four aircraft [18] to [22] of his judgment. Before me, all the parties involved helpfully confirmed that they accepted paragraphs [18] to [22] as correct[1]. My own summary is largely drawn from them.

16. FWA was the claimant in those proceedings because it claimed to be the assignee of Security Rights under the Sub-Lease for each aircraft. This came about because FWC had acquired rights under the Loan Agreements, and because the Security Rights under the Leases and Sub-Leases had been assigned to FWC by BNP and Natixis, and then by FWC to FWA. The background to this was outlined by Picken J in his judgment at [48] to [61].

17. VietJet denied that the Security Rights had been assigned to FWA on a number of specific grounds, which Picken J had to determine. His conclusions meant that the assignments of Security Rights under the Sub-Leases were valid and effective. Before me, all the parties helpfully confirmed that they accept that conclusion (unless, of course, the Court of Appeal may overturn it).

18. More broadly, at issue before Picken J was whether the Security Rights included the right to terminate the Sub-Leases, and whether the Sub-Leases had been terminated by the Termination Notices; and whether FWA was entitled to claim the rental payments (with interest) that were outstanding upon termination, and damages.

19. Picken J held, and on 18 October 2024 made an order declaring, that the Termination Notices had been effective and that the Sub-Leases were terminated on the dates when they were served. On 31 July 2024 he had awarded FWA sums representing the outstanding rental payments (with interest). In due course, there will be further hearings before Picken J, which I understand will determine the remainder of FWA's claim (notably, its claims for the Termination Value under the Sub-Leases and for other damages). The first of these hearings has been listed to take place on 13 January 2025.

20. Picken J granted permission to appeal. I understand that the appeal will be determined at a hearing listed for 20 May 2025.

21. Before me, however, it was accepted that I should proceed on the basis of Picken J's judgment – always subject to the outcome of the appeal. In particular, it was accepted, on this basis, that:

    (1) BNP and Natixis were original contracting parties to the Loan Agreements for the CEO and NEO aircraft (respectively).

[1] Subject to minor and immaterial points raised by BNP and VietJet: As to [20], even for the CEOs, the Lessor's consent for assignment was not required if the new lender was a Qualifying Lender, whether or not there had been an Enforcement Event: see cl 17.2(a) of the CEO Facility Agreements. As to [21], clause 7.1(g) of the CEO Facility Agreements does not exist; see cl 16.2 of the CEO Facility Agreements on acceleration instead. As to [52], FWC also took assignments of the CEO Loan Agreements on 27 October 2021.

(2) BNP and Natixis acquired Security Rights under the corresponding Head Leases and Sub-Leases as Security Agent/Security Trustee and as assignees, around the time the aircraft were delivered (i.e., 2018/2019).

(3) The Head Leases and Sub-Leases were terminated on 18-26 October 2021.

(4) FWC took assignments of the Loan Agreements on 26-29 October 2021.

(5) FWC became the Security Agent/Security Trustee on 2-3 November 2021, and acquired as assignee the Security Rights previously held as Security Agent/Security Trustee by BNP and Natixis in the Head Leases and Sub-Leases.

(6) FWC's rights under the Head Leases and Sub-Leases were then assigned by it to FWA on 8-9 November 2021.

The issue before Picken J re agreement between VietJet and Natixis

22. At the hearing in June 2024, it was asserted by VietJet that it had reached a binding agreement with Natixis such that VietJet was not in default when the Termination Notices were served in respect of the NEO aircraft. No similar argument was raised by VietJet in relation to BNP/the CEO aircraft.

23. This binding agreement was alleged to be comprised by an offer made by Natixis by its email of 20 September 2021 (and repeated by Natixis's further email of 29 September 2021), and an acceptance by VietJet by its email of 7 October 2021. VietJet's pleaded case as to the nature of the agreement was set out in its Re-Amended Defence in the FWA Proceedings, as follows:

> "By the Restructuring Agreement, the date for payment of the unpaid Rental under the NEO Sub-Lease Agreements was postponed to 30 June 2022 and the NEO Lenders and NEO Lessors and the Security Trustee agreed to waive and/or not to rely on any Events of Default under clause 18(a) of the NEO Sub-Lease Agreements which had by then occurred."

24. In substance, therefore, VietJet's case on this was that VietJet as Sub-Lessee and Natixis as Security Trustee and assignee made an agreement the effect of which was to vary the terms of the Sub-Leases – as Picken J observed at [186]. The significance of the reference to Natixis as "the NEO Lenders and the NEO Lessors" was that it acknowledged, at least implicitly, that any such agreement would also have implications for the NEO Loan Agreements and Head Leases.

25. Given that the Sub-Leases and the other agreements making up the JOLCO structure were all expressly subject to English law, it is no surprise that no-one seems to have suggested before Picken J that the issues arising for him fell to be determined under any system of law other than English. As a matter of English law, he rejected VietJet's case. He did so not on the basis that Natixis's emails of 20 and 29 September 2024 did not offer terms that would, if accepted, have had the effect that VietJet contended for. He did so on the basis that there had been no agreement on those terms: see at [175] to [183] and [188].

The Vietnamese Bank Proceedings

26. On 2 February 2023, VietJet filed proceedings against BNP and Natixis in Vietnam ("the Vietnamese Bank Proceedings"), before the People's Court of Hanoi ("PCH"). VietJet's case is set out in a Statement of Claim ("the VJSOC"), now in its fourth version.

27. The VJSOC in some ways resembles an English pleading, but the pleading style is not entirely familiar to English eyes, and I am also conscious that I can only read it in translation. It therefore is necessary to be somewhat cautious when attempting to summarise the case that it sets out, but it proceeds as follows.

28. The VJSOC sets out the JOLCO structure in section 1.1, summarising it (in the heading to this section) as that Natixis and BNP provided credit to VietJet.

29. In the heading to section 1.2, the VJSOC asserts that Natixis and BNP agreed to extend the facility repayment period of VietJet and related companies (i.e., the Lessees/Sub-Lessors). Paragraph 21 says that VietJet sent notices requesting to negotiate an extension of rental payments (i.e., rent under the Sub-Leases) and Facility payments (i.e., principal and interest under the Loan Agreements). In a table that follows, and then at paragraph 25, it is alleged that agreement was reached by specified email exchanges.

30. With Natixis, it is alleged that agreement was reached on the basis of Natixis's email of 29 September 2021 and VietJet's email of 7 October 2021 ("the Alleged VietJet-Natixis Agreement"). These are the same emails as were relied on in the FWA Proceedings and which Picken J concluded did not constitute an agreement. The Alleged VietJet-Natixis Agreement is expressly characterised in paragraph 25 as a "debt repayment extension until June 2023".

31. With BNP, it is alleged that agreement was reached on the basis of BNP's email of 14 September 2021 (effectively repeated by BNP's emails of 21 and 29 September 2021) and VietJet's agreement by its email of 29 September 2021 ("the Alleged VietJet-BNP Agreement"). The Alleged VietJet-BNP Agreement is expressly characterised in paragraph 25 as an "extension of debt payment until June 2023".

32. It is then alleged in paragraph 27 (i) that BNP and Natixis thereby agreed to let VietJet take responsibility for repaying the SPV's debt in each case and (ii) that BNP and Natixis had agreed to restructure "the facility".

33. In the heading to section 1.3, it is alleged that Natixis and BNP terminated the Loan Agreement in each case and sold their respective interests to FW, following which the aircraft were sold. It is alleged in paragraph 29 that the Termination Notices were sent despite the Alleged VietJet-Natixis/BNP Agreements meaning that "there was no longer a breach of Lease and Sub-Lease Agreements".

34. In paragraphs 32 and 33 it is alleged that VietJet responded to the Termination Notices by asking Natixis and BNP if they intended to sell "the Facility", and both banks denied this. However, on 5 and 8 November 2021, BNP and Natixis gave notice that they had sold to FWC (which they should not have done without notice). The paragraphs that follow suggest that the manner in which FWC and FWA became involved was

underhand and suspicious. Paragraph 36 alleges that Natixis and BNP sold their positions to FWC even though they knew of VietJet's "… ability to pay the rental, having secured a loan extension agreement…".

35. Section 2.1 alleges that VietJet was late in paying rent under the Sub-Leases because of the Covid-19 epidemic. This was a force majeure event, meaning that VietJet was relieved from liability by Article 351 of the Vietnamese Civil Code.

36. Sections 2.2 and 2.3 alleged that Natixis and BNP acted in breach of the Alleged VietJet-Natixis/BNP Agreements. The heading to section 2.2 describes the Alleged VietJet-Natixis Agreement as a "rental repayment extension agreement". The heading to section 2.3 describes the Alleged VietJet-BNP Agreement as a "debtloan repayment extension agreement". The alleged breach relied upon in each case is (i) against Natixis, the termination of the NEO Sub-Leases by Natixis and the sale of the debt to FWC (paragraph 55) and (ii) against BNP, the announcement that "it would sell the debt to FW" (paragraph 59).

37. Thus, the first cause of action relied on against Natixis and BNP is contractual: breach of the Alleged VietJet/Natixis/BNP Agreements.

38. Then, in section 2.4, it is alleged that BNP and Natixis "deceived VJA about loan repayment period extension". I understand this to be what, in England, would be regarded as an alternative to the case based on the Alleged VietJet-Natixis/BNP Agreements: if (contrary to the primary case) there were no such agreements, the allegation is that Natixis and BNP led VietJet to believe that it was negotiating in good faith for such agreements (paragraphs 60 to 64), and concealed its transactions with FWC (paragraphs 66 to 70).

39. BNP and Natixis thereby caused VietJet to misunderstand that they allowed VietJet to continue to operate the aircraft and to "request a debt rescheduling" (paragraph 71).

40. The deception gives rise to a cause of action under Article 584.1 of the Civil Code. Offering to agree, but then withdrawing, was in breach of Article 386.

41. Thus, the second cause of action relied on is non-contractual: essentially, it is concerned with Natixis and BNP allegedly misleading VietJet about the prospect that negotiations in relation to the prospective Alleged VietJet-Natixis/BNP Agreements would succeed (i.e., on the hypothesis that those negotiations did not, in fact, succeed).

42. The remainder of the VJSOC sets out the relief claimed. In brief, damages are sought which include not only the sums paid as rent prior to termination of the Sub-Leases, but also the income that VietJet would have earned but could not, plus damages to indemnify VietJet in respect of its liability to FWA under the FWA Proceedings.

The Emails Underlying the Alleged VietJet-Natixis/BNP Agreements

43. In relation to the Alleged VietJet-Natixis Agreement, the critical emails were as follows:

(1) First, an email from Natixis of 20 September 2021:

"Hi Madam Phung, Mr. Nam and Danny,

Hope you had a nice weekend.
Following our call last Thursday, as requested by VJ, we had further checked your counter-proposal with the lender and lessor group across our four VJ JOLCO facilities and I am afraid and as we alluded again during the call with your team, the lender group and lessors won't be able to accept any deferral period that is beyond June 30 2022 – that was the worst case scenario that the lenders and lessors could consider. That is all the deferred JOLCO rentals that are originally due in June, August, September, November and December 2021 and Feb, March and May 2022 shall be settled subject to the prepayment of the then unpaid rentals as soon as the proceeds under the CBs, private placements and etc., VietJet is currently planning to issue becomes available; provided that after the prepayment of the then unpaid JOLCO rentals no further rental deferral should be permitted. Other conditions in the proposal are as follows:
 Default interest (1% plus the interest rate) to be paid on a quarterly basis at each original payment date of respective JOLCO facilities;
 Any unpaid IR fees and FA/ST fees to be paid as soon as practical
Also as spoken re: repayment period, JOLCO transactions unlike traditional operating lease transactions do not have such thing as a "repayment period" (this indeed technically works for op leases, but not under JOLCOs) concept and won't be relevant in our discussion here.
Two things that we would like to put emphasis on again is that:
1. the lender group needs to begin **processing this internal deferral waiver process as soon as possible (and have the approval obtained by the end of September – and it takes at least a week to be processed)**, otherwise, the JOLCO facilities will be treated as a non performing loan for the lenders and I am afraid it will trigger an EoD if the waiver approval is not obtained. We look forward to continuing to support VietJet in this difficult time in any way we can; and
2. As mentioned several times now, some of the lender group has been approached by distressed buyers or hedge funds that are showing interest in potentially buying the VietJet JOLCO debts. There is a higher likelihood now that banks may opt for exit sooner than later and we strongly suggest VJ and lender/lessor group come to a deferral agreement as soon as possible.
Please do not hesitate to let us know if you have any queries and we would greatly appreciate your prompt feedback.
Thanks in advance.
Regards,
Ryan"

(2) Second, an email from Natixis of 29 September 2021:

"Hi Danny,

> Thanks for this.
> As discussed separately, I am afraid our position shared with the VietJet team previously is the lender / lessor group's final position. Would be grateful if you could advise whether this is acceptable so that we can agree to your deferral request ASAP as we are really running out of time.
> Thanks in advance.
> Regards,
> Ryan "

(3) Third, an email from VietJet of 7 October 2021:

> "Dear Ryan and Natixis team,
> Thank you very much for your time for the e-meeting with us yesterday.
> Vietjet has reevaluated all the aspects with full consideration of all the efforts of Natixis team and lenders has supported to Vietjet sofa. Therefore, we are pleased to confirm that we have finally agree with your below proposal.
> We expect to receive your counter agreement soon so we can close the deal and move forward.
> Thank you again for your understanding and patience.
> Kind regards
> Danny"

44. Also relevant are the next exchanges in the chain:

(1) A follow-up email form VietJet of 11 October 2021:

> "Hello Ryan and Natixis team,
> We hope to receive your counter agreement on our below email so we can document it for execution soon.
> Kind regards
> Danny"

(2) The response from Natixis of 13 October 2021:

> "Dear Danny,
> From facility agent side, we have not received any official reply from the Lenders on the deferral proposal even though we had previously updated the Lenders and followed up with a reminder."

(3) An email from VietJet of 13 October 2021:

> "Dear Mark, Ryan, and Natixis team,
> We have been received the information that Natixisi and lenders are approaching with potential buyers to sell their facility. Natixis as the lead arrangers, lender, and facility agent of this JOLCO structure, we will urgently request your support to work with other lenders to maintain the deal. In addition, Vietjet are willing to discuss directly with the lenders if you can arrange. In

> any case, Vietjet need to understand what is the further impact to our current operational structure, and other impacts as well.
> Thank you for your understanding and support.
> Kind regards
> Danny"

(4) The response from Natixis of 20 October 2021 (which post-dated the Termination Notices from Natixis):

> "Hi Madam Phuong and Danny,
> To follow up from the call today, we are arranging a call amongst the VJ team, a new lender of the VJ JOLCO facilities and Natixis – the available slots are as follows and would be grateful if you could advise which one works best for you and your team, once agreed, I will circulate a team invite to all:
> □ Friday: 8:30-10AM BST (3:30-5PM Singapore / 2:30-4PM HCM)
> □ Next Mon: 9-11AM BST (4-6PM Singapore / 3-5PM HCM)
> Also, we have received a green light to share a new lender's name FitzWalter Capital (FWC) – Andrew Gray a partner (copied) at FWC will be the primary point of contact there. I'm sure this will be all covered on the call.
> Look forward to hearing back from you.
> Regards,
> Ryan"

45. In relation to the Alleged VietJet-BNP Agreement, the critical emails were as follows:

(1) First, an email from BNP of 14 September 2021:

> "**Without Prejudice**
> Dear Danny,
> Following-up on your email below and our subsequent VietJet/BNPP's call, we have arranged a discussion with the JOLCO lenders on the revised terms of VietJet's deferral request.
> You will then find, as follows, the revised <u>indicative</u> counter-proposal that Lenders would be agreeable to consider (changes vs earlier counter-proposal in **bold**):
> > June 2021, September 2021 and **December 2021** principal payment deferral. Payment of principal to resume from **March 2022**;
> > deferred principal amount to be repaid in **4** equal quarterly payments in March 2022, June 2022, **September 2022 and December 2022**;
> > VietJet to pay interests with additional default interest of 2.0% p.a. to apply on deferred principal amount.
> Interests in relation to the overdue June 2021 payments to be paid as soon as possible and by **30th September 2022 at the latest**;
> > most favored nation treatment to apply to the terms of our deferral vs other JOLCO financings (ie terms for deferral in

relation to MSN 8577/8592/8605/9011/9059 not to be worse off than any similar arrangements for other JOLCO financings);
> **no dividend payment permitted as long as the deferred principal amount has not been repaid in full**;
> **VietJet reimbursement of International Registry costs owed to the lessors must be settled immediately**;
> **VietJet to cover legal costs related to documentation for the rent deferral arrangements**;
> VietJet to provide the aircraft's technical records and allow for aircraft inspections.
We provided the Lenders with all the information that you sent to us to date and we shared the comments VietJet made on the call last week regarding the (non-) availability of monthly projections. **Lenders are still insisting for the need for monthly cash-flow projections** as well as additional details on VietJet's plans/initiatives to weather their current difficulties.
Finally, you confirmed VietJet's availability for a VietJet/BNPP **call on September 15 at 11.00am VN time**. We are sending you shortly a calendar invite with a MS Teams dial-in.
Best regards,
Fabien"

(2) Second, an email from BNP of 21 September 2021:

"**Without Prejudice**
Dear Danny,
Following-up on the VietJet/BNPP call on 15 September, we reached out to the JOLCO lenders to share VietJet's feedback on the Lenders' counterproposal as per the 14 September email below.
You will then find below, Lenders' revised position, contemplating additional flexibility to the airline (changes in red vs earlier counter-proposal):
> June 2021, September 2021, December 2021 **and March 2022** principal payment deferral. Payment of principal to resume from **June** 2022;
> deferred principal amount to be repaid in 4 equal quarterly payments in June 2022, September 2022, December 2022 **and March 2023**;
> VietJet to pay interests with additional default interest of 2% p.a. to apply on deferred principal amount. Interests in relation to the overdue June 2021 payments to be paid as soon as possible and by 30th September 202**1** [correction of typo] at the latest;
> most favored nation treatment to apply to the terms of our deferral vs other JOLCO financings (ie terms for deferral in relation to MSN 8577/8592/8605/9011/9059 not to be worse off than any similar arrangements for other JOLCO financings);
> no dividend payment permitted as long as the deferred principal amount has not been repaid in full;

> VietJet reimbursement of International Registry costs owed to the lessors must be settled immediately;
> VietJet to cover legal costs related to documentation for the rent deferral arrangements;
> VietJet to provide the aircraft's technical records and allow for aircraft inspections.
In addition, we would like to request/follow-up on earlier request for information: > monthly cash-flows projections;
> status of the COA for each aircraft;
> **timing for payment of overdue Jun-21 interests**;
We then propose to have a VietJet/BNPPcall to discuss further - would the VietJet's team be available for **call on 23 September at 2.00pm VN time** ?
Best regards,
Fabien"

(3) Third, an email from BNP of 29 September 2021:

"Dear Danny,
We shared and discussed the below with the Lenders. Lenders' position and the terms for deferral that they might be able to consider then remain as per the indicative counter-proposal shared with VietJet's team in our email dated 21st September 2021. In particular, timing for the start of the repayment of the deferred amounts –from the June 2022 payment date- appears to be a key point.
As per our earlier requests, Lenders critically need additional elements for their considerations including, most importantly, comprehensive monthly cash-flows projections (ideally covering a period until the last repayment of deferred amounts) and visibility on the timing for payments of the overdue Jun-21 interests and Sep-21 interest for MSN9011.
If we look forward receiving additional information, we are available for further discussion.
Best regards,
Fabien"

(4) Fourth, VietJet's email of 29 September 2021:

"Dear Fabien,
Thank you for your email.
We also fully understand your difficulty in term of extension of the repayment period. Therefore, after consider all aspects together with the recently positive improvement in the covid management of VN Government, we are pleased to accept your proposal in term of repayment period in 12 months (4 payments) from June 2022 as per your proposal. However, we also request your willingness to give VJC the option for further extension for another extension of 12 months if the covid wave happen again at the time of repayment. Of course, that is definitely not of our expectation to see another wave of covid coming.

> In addition, as you may be advised, we still request you to reduce the additional interest from 2% to 1% as other lender have offered to us.
> You also find attachment the updated cash-flow which is reflected closely the latest development in our funding initiatives. It is in yearly basis, and we will provide you another quarterly basis no later than this Friday. Since your facility is paid on a quarterly basis, so we believed that the quarterly report should be satisfied the lenders.
> Thank you again for your support and I do hope to close the deal with you soon.
> Best regards
> Danny"

46. Also relevant are the following subsequent exchanges:

(1) BNP's response to VietJet's email of 29 September 2021, by BNP's email of 7 October 2021:

> "**without prejudice**
> Dear Danny,
> Lenders have discussed the revised terms of VietJet's deferral request as per your email below.
> Lenders main feedback is, for the time being:
> > not in position to accommodate a conditional extension of a deferral period; and
> > additional default interest, to apply on deferred amounts, to remain at 2% p.a..
>
> In addition, to support their review of the request, Lenders continue to require, in particular:
> > detailed financial projections (monthly, with detailed underlying assumptions on operations/financing, etc); and
> > any new element providing visibility on the convertible bond issuance.
>
> Best regards,
> Fabien"

(2) VietJet's email of 8 October 2021:

> "Dear Pierre and Fabien,
> Thank you for your time for the call meeting with us today.
> Please find the attachment with the related quarterly cash flow projection.
> Regarding your question on the CB, as updated by Mdm Phuong during our call, we also summarize some key updates for your reference.
> -The process of CB is going on as the schedule . It is expected in October and November, 2021 subject to market
> condition .
> -The CB project is approved from SBV by today and it is still in the process to submit by SSC during next week.

-The approved Plan by SBV , the amount of CB is 80% for CAPEX, 20% for OPEX .
We hope to receive your positive feedback soon.
Kind regards
Danny"

(3) BNP's email of 8 October 2021:

"Dear Danny,
Thank you for this. would you also please share all the relevant operational assumptions behind the cash flow projections?
Also, as discussed we will bring to the lender the counterproposal of 18 months for the catch up period, and 1.5% additional rate to apply on delayed amounts, and confirm the other JOLCO group would be requested the same conditions.
Regards,
Pierre Briens"

(4) VietJet's email of 8 October 2021:

"Dear Pierre,
Thanks for your prompt response.
The conditions of other group JOLCO lenders are not totally exact the same as you. Some condition are better than BNPP such as we are offered with total deferral of both principle + interest, with 1% additional interest.
Since BNPP is offering the deferral for just principle (not included interest) and with higher additional top-up interest, that is why VJC is asking you to consider the longer repayment period of 18 months, and 1.5% top-up interest for the deferred amount.
Vietjet is transparent and we just want to make fairly to important partners like BNPP.
As said, even without pax revenue, Vietjet is still trying our best to pay BNPP all June interests this week with a very short of notice.
We then do hope to have your understanding and support the discussion with the lender again.
Best Regards
Danny"

(5) VietJet's email of 8 October 2021:

"Hi Pierre,
We have not received the updates from you regarding our final request.
However, we have received different messages from equity underwriters on your sales of facility that is definitely impacted to Vietjet but we have not received any true and honest information from you.

> We hope you will honor our relationship and give us your the straight forward communication your final position yes, or no TODAY.
> Thank you.
> Danny"

(6) BNP's email of 21 October 2021:

> "Dear Danny,
> It was agreed with the lenders we would wait to see if Vietjet would settle September interest as was promised by Vietjet, before reverting on the deferral request. That was expected last Monday, but has not happened yet. we are talking with them again today to assess the situation.
> Meanwhile, regarding your question of the loan sale, this was asked from us before and we reverted that we continue to evaluate all our options to mitigate our risk on this defaulting loan.
> Best Regards,
> Pierre Briens"

47. VietJet's response of the same date:

> "Dear Pierre,
> Thanks for your response.
> As I exchanged to your team and equity underwrites, the payment is planning to make this week that is supposed to be tomorrow.
> We will advise you the payment proof when it is available.
> Regards
> Danny"

The Procedural History in Vietnam

48. I have noted that the Vietnamese Bank Proceedings were filed on 2 February 2023. This was followed by the filing of the second and then the third versions of the VJSOC (the latter on 29 December 2023). VietJet paid the court fee on 1 February 2024 and the PCH issued a Notice of Accepting Jurisdiction of the Case ("the NOA") on 2 February 2024.

49. All the procedural steps summarised so far involved VietJet alone. VietJet's attempts to serve BNP and Natixis did not commence until 23 February 2024, when it purported to effect service of the NOA on BPCE IOM, a company in the same group as Natixis which had an office in Hanoi. That company responded that it was not a representative office of Natixis.

50. On 6 March 2024, VietJet claims that on 6 March 2024 it sent copies of the VJSOC to BPCE IOM in France, to Natixis in Singapore and to BNP in Tokyo. Whether Natixis or BNP received those documents is disputed.

51. On 12 March 2024, BNP received a letter dated 4 March 2024 containing a copy of the VJSOC. On 27 March 2024, VietJet sent a copy of the VJSOC to Natixis by email. Hard copies followed on 8 April 2024.

52. In the meantime, FWA had seen a press report referring to the Vietnamese Bank Proceedings. It asked to be provided with documents but did not ultimately receive them until 23 May 2024.

53. On 25 June 2024, VietJet asked the PCH for permission to serve the claim documents on BNP and Natixis out of the jurisdiction.

54. The PCH granted permission to serve out of the jurisdiction in late July 2024. VietJet asserts that the claim documents were delivered to Natixis and BNP by a courier on 23 August 2024, although BNP disputes receipt.

55. The PCH issued a Notice of Procedural Order on 6 August 2024 ("the PCH Procedural Order"). It set out steps to trial as follows:

    (1) On 15 January 2025, there is to be a meeting to review the handover, approaching, publicization of evidence and conciliation.

    (2) On 22 January 2025 there is to be a second such meeting.

    (3) There will be a trial hearing on 19 February 2025.

    (4) There will be a further trial hearing on 26 February 2025.

56. BNP served a Statement of Opinion, objecting to the jurisdiction of the PCH, dated 8 November 2024.

57. Natixis served a Statement of Opinion, objecting to the jurisdiction of the PCH, dated 10 December 2024, which was provided to the PCH on 18 December 2024.

The EJCs relied on

58. In its application, FWA relies only on the EJCs in the Sub-Leases. This is apparent from paragraph 1 of the draft Order attached to its application notice. The submissions advanced by Mr Lööf, on behalf of FWA, also focussed only on the EJCs in the Sub-Leases.

59. In its Claim Form, BNP asserts that VietJet is in breach of the EJCs in the Loan Agreements and/or the EJCs in the Sub-Leases. The submissions advanced by Mr Patton KC also proceeded on this basis.

60. In its Claim Form, Natixis asserts that VietJet is in breach of the EJCs in the Loan Agreements and/or the EJCs in the Head Leases and/or the EJCs in the Sub-Leases. The submissions advanced by Mr McLaren KC also proceeded on this basis.

61. On the face of things, VietJet is party to the Sub-Leases, including their EJCs. However, it is not party to the Loan Agreements or the Head Leases and cannot be bound by any of their provisions.

62. BNP and Natixis argued that the case being advanced by VietJet in the Vietnamese Bank Proceedings was, necessarily and/or in substance, that the effect of the Alleged VietJet-Natixis/BNP Agreements was that VietJet became party to the Loan Agreements (and, Natixis said, the Head Leases). I understood this to be the sole basis on which it was said that VietJet was bound by the EJCs in those agreements.

63. Mr Sprange KC, on behalf of VietJet, said that it was no part of VietJet's case that it became party to the Loan Agreements or the Head Leases.

64. Understanding the VJSOC and identifying the true substance of the case being advanced is not straightforward for an English lawyer, as I have already noted. However, a case that VietJet became party to the Loan Agreements or the Head Leases would, as a matter of English law (being the system of law that expressly governs those agreements), have required a true novation, in relation to each agreement. This would have involved not merely a bipartite arrangement in each case between (i) VietJet and (ii) BNP/Natixis as Security Agent/Security Trustee. It would also have required the involvement of the SPV as Borrower under each Loan Agreement, and of the Lessee under each Head Lease.

65. This is not alleged to have happened and I have seen nothing to suggest that it happened. More broadly, none of the materials provided suggests that any of the parties involved in the exchanges relied on in relation to the Alleged VietJet-Natixis/BNP Agreements intended this result. If that had been their intention, given the formality and care with which the JOLCO structure had been created, this intention would have had to have been clearly expressed, and I regard it as practically inconceivable that lawyers would not have been involved.

66. It follows that the only EJCs that bind VietJet are those in the Sub-Leases.

Are the FWA Proceedings within the scope of the EJCs in the Sub-Leases?

67. As already noted, the EJCs in the Sub-Leases are materially identical. The critical part of the text is as follows;

> "…the courts of England are to have jurisdiction to settle any disputes that may arise in connection with the legal relationships established by this Agreement (including, without limitation, claims for set-off or counterclaim) and any other Operative Document or otherwise arising in connection with this Agreement and any other Operative Document…"

68. "Operative Document" is defined so as to include a large number of documents that are used under the JOLCO structure, including the Loan Agreement and the Head Lease.

69. Much of the debate before me focussed on the meaning and application of "in connection with".

70. In *Campbell v Conoco* (*UK*) *Ltd* [2002] EWCA Civ 704, Rix LJ (with whom Tuckey LJ agreed) said at [19]:

> "I agree that the words of the indemnity, and in particular the connecting links contained in the relevant part of the clause, cover the facts of this case. The words throughout the clause are very wide and the connecting links expressed are themselves of increasing width, ending with the words "in connection with" which are widely regarded as being as wide a connecting link as one can commonly come across. In themselves they do not express the need for a causal connection, although of course they do express a need for a connection of some kind. That is the essence of the words "in connection with"."

71. In *Celestial Aviation Services Limited v Unicredit Bank GmbH* [2024] EWCA Civ 628, the Court of Appeal was not concerned with a contractual indemnity (as had been the case in *Campbell v Conoco (UK) Ltd*) but with the construction of a UK sanctions regulation. Falk LJ (with whom Snowden and Males LJJ agreed) adopted what Rix LJ had said, at [55]:

> "**[55]** The words 'in connection with' are broad. As Rix LJ said in *Campbell v Conoco* (*UK*) *Ltd* [2002] EWCA Civ 704, [2003] 1 All ER (Comm) 35 at [19] 'the words "in connection with" … are widely regarded as being as wide a connecting link as one can commonly come across'. Their use in conjunction with 'in pursuance of ' indicates a clear intention to cast the net more broadly than financial services or funds provided under or in accordance with the terms of the relevant arrangements (which would be covered by the natural sense of 'in pursuance of '). I would also agree with UniCredit that the words 'in connection with' do not require any form of legal dependence, for example by reference to principles of causation. Rather, the question is one of factual connection."

72. I accept, as submitted by Mr Patton KC, that this indicates that the observation that the words "in connection" are broad is of general application. I also accept that no legal dependence or causative relationship is required – only a factual connection.

73. In these EJCs, the words "in connection with" appear twice, in two separate limbs:

(1) First, in relation to "any disputes that may arise in connection with the legal relationships established by this Agreement… and any other Operative Document".

(2) Second, in relation to "any disputes… otherwise arising in connection with this Agreement and any other Operative Document."

74. This indicates that the dispute does not need to be connected with the legal relationship arising from the Sub-Lease or other Operative Document. It therefore underscores that a practical connection is all that is required.

75. Mr Sprange KC argued for VietJet that the Vietnamese Bank Proceedings are not connected with the Sub-Leases, nor with any other Operative Document. He said that they are concerned with the Alleged VietJet-Natixis/BNP Agreements, either as concluded agreements of which Natixis and BNP are in breach, or as providing the

context for the claims in deception. He sought to explain that the Alleged VietJet-Natixis/BNP Agreements were bipartite arrangements, arising only between VietJet and Natixis/BNP (respectively), and were independent of the Loan Agreements, the Head Leases and the Sub-Leases, none of which was an agreement between VietJet and Natixis/BNP. He emphasized that, while Natixis and BNP each had (at the relevant time) its role as Security Agent/Trustee, and therefore was assignee of the Security Rights under various Operative Documents including the Sub-Leases, it was not strictly a party thereto.

76. Mr Sprange KC found it difficult to spell out the details of this case. I am sure that the fault here lies with the case, not with Mr Sprange KC. The VJSOC undoubtedly alleges that the effect (or putative effect) of the Alleged VietJet-Natixis/BNP Agreements was to defer payments of principal under the Loan Agreements and payments of rent under the Sub-Leases, with the result that it was not open to Natixis or BNP to terminate the Sub-Leases. Mr Sprange KC said that this was not because the Alleged VietJet-Natixis/BNP Agreements varied the terms of the Loan Agreements or the Sub-Leases. Rather, each of them was an agreement between VietJet and Natixis/BNP that, as between them, any failure to make timely payment would not be treated as a default; and it would be a breach of contract, as between those parties, if this were to be treated as a default or (therefore) to be relied on as entitling Natixis/BNP to terminate the Sub-Leases.

77. Even if this were a fair characterisation of the VJSOC, it would not help VietJet. The Alleged VietJet-Natixis/BNP Agreements would still be very closely connected with the Loan Agreements and the Sub-Leases. On Mr Sprange KC's approach, those alleged agreements would not, strictly, affect or alter the legal relationships established by the Loan Agreements and the Sub-Leases. However, they were unquestionably connected with them. Indeed, their central subject-matter was the Loan Agreements and the Sub-Leases, the payment obligations under them and the related rights and obligations such as termination. A contract between A and B, whereby A undertakes to B not to exercise his rights under a separate contract between A and C, is in my judgment inextricably connected with the contract between A and C. Accordingly, even if I were to accept entirely Mr Sprange KC's characterisation of the VJSOC and the case advanced by it, I would still regard that case as having a very close connection with both the Loan Agreements and with the Sub-Leases.

78. Beyond that, I have gone to the trouble of summarising the VJSOC in some detail, and then setting out in full the critical emails that are relied on as comprising the Alleged VietJet-Natixis/BNP Agreements, in order to show that both the VJSOC and those emails are replete with references to the payment of principal under the Loan Agreements and the payment of rental under the Sub-Leases, as well as to the intention that those payment obligations be deferred or extended. These references are not merely incidental. It is objectively obvious that, in the email exchanges, VietJet was seeking to negotiate an extension or deferral of those payments; and in the VJSOC, it is positively alleged, in clear terms, both (i) that this was what VietJet wanted (e.g. in paragraph 21) and (ii) that this was what the Alleged VietJet-Natixis/BNP Agreements achieved (e.g. in paragraph 25, 27 29, 36).

79. I therefore do not accept Mr Sprange KC's characterisation. What was being discussed, and what the VJSOC says was achieved (alternatively, indicated), was not merely a collateral contract, but an arrangement including the formal variation of the terms of

the Loan Agreements, Head Leases and Sub-Leases, so as to alter the payment schedules for all of them. This is obvious from any fair reading of the totality of the material.

80. I therefore find that the Vietnamese Bank Proceedings are within the scope of the EJCs in the Sub-Leases. This leads me to consider whether FWA, Natixis and BNP are entitled to invoke and rely on the EJCs, in all the circumstances.

The position between FWA and VietJet

81. It having been decided by Picken J that FWA is the assignee of Security Rights under the Sub-Leases, FWA is undoubtedly entitled in principle to rely on the terms of the Sub-Leases, including the EJCs. Prior to the hearing, there was an issue as to whether the FWA Proceedings could be said to have given rise to a "dispute" within the meaning of the EJCs, so far as FWA is concerned, in circumstances where FWA is not a defendant to the Vietnamese Bank Proceedings.

82. My understanding was that FWA's concerns about the Vietnamese Bank Proceedings arose from the possibility that the PCH might make findings inconsistent with those made (or to be made) by Picken J in the FWA Proceedings; and also from the possibility that those proceedings might be relied on to resist enforcement of judgment in FWA's favour. FWA's Vietnamese counsel, Mr Minh, said in his Fourth Witness Statement that the PCH might make findings that the Loan Agreements were extended, that VietJet did not breach the Loan Agreements, Head Leases or Sub-Leases and/or that Natixis and BNP acted in breach of the Loan Agreements (or other Operative Documents) when they terminated the Loan Agreements. Mr Lööf said that this was sufficient to constitute a "dispute".

83. Given Mr Sprange KC's assurances that VietJet's case in the Vietnamese Bank Proceedings as to the Alleged VietJet-Natixis/BNP Agreements is that they are independent of the Loan Agreements, Head Leases and Sub-Leases, I asked him whether VietJet would be willing to undertake to this Court not to act in the manner that FWA appeared to be concerned about. I asked this on the basis that, as I understood his explanation of VietJet's case in the Vietnamese Bank Proceedings, giving such an undertaking should not cause VietJet any difficulty.

84. Having taken instructions overnight, VietJet duly offered undertakings along these lines. They are reproduced in Annex 2 to this judgment.

85. Mr Lööf suggested that these undertakings would not give adequate protection to FWA. He said that it was, in principle, disadvantageous to FWA to be protected by undertakings given by VietJet to the court, rather than by an ASI in its favour.

86. I understood him to make three main points. The first was that the Vietnamese Bank Proceedings should be stopped altogether. However, FWA only has an interest in achieving this result if the continuation of the Vietnamese Bank Proceedings might affect it adversely – in particular, if the Vietnamese Bank Proceedings might vex or oppress FWA. If the terms of the undertakings should prevent this, then this objection falls away.

87. Mr Lööf's second point was that, if the Vietnamese Bank Proceedings continue, and result in a substantial money judgment against either Natixis or BNP, the Banks might seek an indemnity from FWA, under the indemnity provision in the Loan Agreements.

(1) It is right that the Loan Agreements contain an indemnity clause, which provides in some circumstances for Natixis/BNP, as Facility Agent, to be indemnified by the Lender or Borrower.

(2) Mr Lööf said that it was at least arguable that FWA stepped into the role of Lender and assumed obligations as Lender, including (potentially) the obligation to indemnify Natixis or BNP.

(3) However, it was FWC, not FWA, that bought up the outstanding loans from the original Lenders, and took assignments of the Loan Agreements, as found by Picken J in his judgment at [51] and [52]. Accordingly, if any party is (arguably) exposed to the risk of having to indemnify Natixis and BNP, having assumed obligations as assignee, it is FWC – not FWA. FWC might have an interest in preventing the Vietnamese Bank Proceedings from continuing even with the benefit of the undertakings offered by VietJet, but it is not the party applying for an ASI and it would not obviously have standing to do so. It was not argued that FWA has any such interest.

(4) It was not suggested by Mr Lööf that FWA might be liable to FWC. If (between them) FWC and FWA have entered into an arrangement that has created the commercial risk that FWC might be liable to Natixis and BNP, in circumstances where FWC has no right to rein in VietJet, they must bear the consequences of having exposed themselves to such risk. If, on the other hand, FWC does have that right (which I think it may do as a Relevant Person under clause 26.3, which I discuss below) then it is FWC that should have been making the application.

(5) Furthermore, Mr Lööf did not seek to demonstrate to me that, even if it had been FWA that took assignments of the Loan Agreements, it assumed the obligations of the Lenders under the indemnity clause, rather than merely taking the assignment of the benefit of the Lenders' rights. My own tentative view of the documents provided to me in relation to the CEO aircraft is that it is possible that rights were assigned, but not obligations under the indemnity provision. It has been suggested that the documents in the agreed hearing bundles may not be complete, on this point. In any event, it is possible that the position was different in relation to the NEO aircraft, and especially one of them (aircraft 8906). Given that this aspect of the case was not argued before me, I think I probably should not decide these points.

88. Mr Lööf's third main point was that an ASI, in the form of an order made by this court, carries more weight than an undertaking. This was pure assertion, or possibly an expression of pure opinion. I disagree. My own experience suggests precisely the opposite. The consequences are of course the same in both cases (i.e., proceedings for contempt of court). However, any party is likely to strive with better grace, and harder, to comply with an undertaking that it has given voluntarily than with an order forced upon it against its will. Furthermore, a foreign court will not regard an undertaking given voluntarily to this court as an act of interference by this court, or otherwise as inimical to comity.

89. In my experience, the more or less universal practice, where an undertaking in satisfactory terms is offered, is for the court to accept the undertaking in lieu of an order, rather than to refuse it and make an order. This is what I will do in this instance.

90. VietJet's undertakings mean that it is not necessary for me to decide whether I would otherwise have granted FWA an ASI, and I decline to do so.

The position between Natixis and BNP and VietJet

91. It is accepted that a contractual nexus arose under the Sub-Leases between (on the one hand) Natixis and BNP as Security Agent/Trustee, and thus as assignees of Security Rights, and (on the other hand) VietJet as Sub-Lessor.

92. Mr Sprange KC argued for VietJet that, while this had been the position when the Alleged VietJet-Natixis/BNP Agreements were negotiated/concluded (i.e., prior to termination), it ceased to be the position when FWC and then FWA took assignments of the Security Rights under the Sub-Leases. He said that Natixis and BNP had divested themselves of their rights under the Sub-Leases and so could not invoke the EJC.

93. On this, there are technical arguments arising from some specific features of the Sub-Lease Agreements that would be sufficient to dispose of this argument. However, I think it important first to address the issue on the basis of general principles.

94. Let it be supposed that A, a party to a contract with B that contains an EJC, assigns away his contractual rights to C. A is then sued in a foreign jurisdiction by B – either (i) directly under the contract for a breach, or (ii) on some non-contractual basis that is nevertheless sufficiently closely related to the contract to be within the scope of the EJC. The foreign claim relates to events that preceded the assignment. Mr Sprange KC's argument is that A cannot rely on the EJC.

95. The right to rely on an EJC is now often expressed (per the language used by Lord Mance in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, at [48]), as derived from a negative promise not to bring proceedings in breach of the EJC. Seen in this light, the EJC confers a contractual benefit on the promisee – in my example, a contractual benefit conferred on A, by B. It is axiomatic that assignments generally transfer benefits, although not burdens. The nub of Mr Sprange KC's argument is that A cannot purport to assign away his contractual benefits to C, and yet insist that he has nevertheless retained a right to enjoy some of those benefits, if and when it suits him.

96. The familiar distinction between contractual benefits and burdens – one category readily assignable, the other not – is readily workable in relation to the substantive provisions of the contract. Furthermore, these substantive provisions create rights and obligations which, in general, can and should only be owed to, and enforceable by, one person or class of persons at any one time. The Sub-Leases provide a ready example. The right to rental payments is clearly a benefit and is clearly assignable. It is important that, if A assigns this benefit, A should no longer be able to assert any right to it. Otherwise, B might face conflicting payment demands.

97. Choice of law and (especially) choice of jurisdiction provisions, and provisions relating to arbitration, are entirely different. Although they can be analysed in terms of promises

made and received (per Lord Mance's characterisation), they are not a zero-sum game under which one party assumes a burden and another receives a matching benefit. They apply equally, to everyone, and there is no difficulty in them applying to A, B and C simultaneously – assignor, counterparty and assignee. On the contrary, it is positively desirable that they should apply to all these parties alike.

98. The fact that choice of jurisdiction and arbitration provisions are in a special category has long been recognised. It is acknowledged by the fact that, even though they generally take the form of numbered contractual clauses that sit alongside other numbered contractual clauses, such clauses are frequently referred to as a "jurisdiction agreement" or "arbitration agreement" – in effect, a contract within a contract. This gives rise to the doctrine of separability, which means (amongst other things) that such provisions survive the termination of the contract – unlike other primary contractual rights/obligations.

99. Mr Patton KC (in particular) relied on this and drew my attention to *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm). This was a case where the original insurer under a contract of insurance (QBE UK) was replaced by a transferee (QBE Europe) – not under an assignment, but by way of a statutory transfer in accordance with Part VII of the Financial Services and Markets Act 2000. The issues in the case did not really relate to this transfer, but to whether the two QBE parties acting together (with no point being taken as to the distinction between them) were entitled to an ASI against a Spanish liability insurer which was not a party to the insurance policy but claimed to be entitled to assert rights under it by reason of a Spanish statute. Foxton J had to decide whether an ASI was available against the Spanish insurer. He did not have to consider whether either or both of the QBE parties could rely on the arbitration clause in insurance policy. However, he made this passing comment, at [18]:

> "QBE contended that it was entitled to an injunction, however QBE UK fell to be treated, and Generali did not seek to draw a distinction in this respect between the test to be applied to QBE UK's application, and that to be applied to QBE Europe's application. In circumstances in which QBE UK was the original party to the Policy, and given the principle of separability of arbitration agreements under English law which allows for the possibility that even if QBE UK had ceased to be party to the Policy, it had not ceased to be party to the London arbitration agreement in respect of disputes arising from the fact that it had originally been a party to the Policy, I can well understand why this was not seen as a significant issue in this case."

100. Not only was this an obiter comment in respect of a point not argued, but Foxton J characterised the relevance of the principle of separability as no more than a "possibility". Nevertheless, I too can see why the point was not seen as a significant issue in that case: it was a point that counsel for Generali considered so unattractive that she decided not to argue it. Foxton J thought that she was right, and so do I.

101. In QBE, the fact that the transfer from QBE UK to QBE Europe occurred on a statutory basis puts it on a different footing from the assignment in this case. A statutory transfer has the effects prescribed by the statute – whatever they may be. By contrast, an

assignment is itself a contract, which falls to be construed together with the substantive contract that is its subject-matter. Both contracts, like all contracts, must be construed on the basis of the words used and in the light of the surrounding factual matrix. The object of the exercise of construction is to identify the objective intention of the parties.

102. I do not find the relevant exercise of construction in this case even slightly difficult. If the question is asked, did the parties here intend to preclude Natixis and BNP from relying on the EJC, if VietJet were to sue them in connection with the Sub-Leases, the answer must be "No".

103. The reason for my confidence that there can only be one answer to that question is the 'rational businesspersons' approach, endorsed in a number of different contexts. I was referred to *LLC Eurochem North-West-2 v Tecnimont SPA* [2023] EWCA Civ 688, per Carr LJ at [46]:

> "It is generally to be assumed that parties to a single agreement, as rational businesspersons, do not intend that disputes under the same agreement be determined by different tribunals (see *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951 at [13]; *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998; [2011] 2 All ER (Comm) 245 at [39])."

104. Accordingly, I would if necessary reject Mr Sprange KC's argument as a matter of general principle. However, it happens that there are additional reasons for doing so, on the terms of the Sub-Leases.

105. First, the final limb of the clause that contains the EJC – in the case of the CEO aircraft, clause 26.3 – extends the right to rely on the Sub-Leases to certain specified third parties in some circumstances. These include any "Financing Party" – which it is accepted includes Natixis and BNP. As a Financing Party, even if not as the former Security Agent/Trustee and assignee and entirely irrespective of having previously been the Security Agent/Trustee and assignee, each of them can:

> "… enforce such terms of this Agreement as provided for the obligations of the Sub-Lessee to such Financing Party…, subject to the provisions of Clauses 26.1 (*Law*) and 26.2 (*Jurisdiction*) and the Contracts (Rights of Third Parties) Act 1999 (the "**Third Parties Act**")."

106. The obligations of the Sub-Lessee (i.e., VietJet) include the obligation not to bring foreign proceedings in breach of the EJC. Thus, even if Natixis and BNP had never had the Security Rights under the Sub-Leases assigned to them, they would still have been entitled to enforce the EJC against VietJet, as long as its conditions were satisfied (notably, the "in connection with" test).

107. Second, BNP and Natixis had a particular interest in being able to rely on the EJC in the Sub-Leases, via clause 26.3, because both under the Facility Agreements and (more relevantly) under clause 23 of the Sub-Leases, they had a right to be indemnified, as a Financing Party. The indemnity under the Sub-Leases is a further obligation owed by VietJet and enforceable by Natixis and BNP, as a Third Party within clause 26.3.

108. Third, it is clear from the Resignation and Appointment Agreements, by which the assignment of Security Rights from Natixis/BNP to FWC was effected (and following which they were then assigned yet again, by FWC to FWA), that FWC's appointment was intended (as between FWC and Natixis/BNP) to take effect from the date of appointment in each case. In so far as Natixis and BNP were to remain responsible for things done by them before their resignation as Security Agent/Trustee, it would be especially anomalous if their liability for those things could be decided, as against VietJet, in a different jurisdiction.

109. For all these reasons, I find that Natixis and BNP are entitled, in principle, to rely on the EJCs in the Sub-Leases, as against VietJet.

Delay

110. VietJet said that all the Claimants had delayed in issuing their claims/applications and/or in bringing them before the court. They relied on this as a factor militating against the grant of ASIs. Because of the undertakings, this point does not arise in relation to FWA, although my view would have been the same.

111. It was common ground between the parties that the law on delay in the context of ASIs is as set out in *Ecobank Transnational Incorporated v Tanoh* [2015] EWCA Civ 1309, in the judgment of Christopher Clarke LJ.

112. It is clear that Natixis was aware of the Vietnamese Bank Proceedings from March late February 2024, and BNP from March 2024. It is not clear whether, or when, they were properly served, this being disputed.

113. Both the date of knowledge of the foreign proceedings and the date of service are relevant. There can be no delay before the applicant had knowledge. Once the applicant is aware of the foreign proceedings, it is incumbent on him to act "with appropriate speed", see *Ecobank* per Christopher Clarke LJ at [123]. However, before he has been served, it may well be the case that the foreign proceedings are not progressing materially. After he has been served with the foreign proceedings, they are likely to progress more rapidly. In other words, the "appropriate speed" will be affected by the overall circumstances – including, but certainly not limited to, service.

114. Here, nothing material happened in the Vietnamese Bank Proceedings from March 2024 until the PCH Procedural Order 6 August 2024. Service (if it was carried out effectively as a matter of Vietnamese law) does not appear to have made any real difference until the PCH Procedural Order. Moreover, even when it was made, the PCH Procedural Order did set out any specific dates for further steps to be taken prior to 15 January 2024. Thus, "appropriate speed" meant (if nothing else) acting so that a decision would be rendered by this court reasonably before that deadline.

115. The Claimants' applications were all issued on 8 August 2024. It was accepted by the Claimants that this was not a coincidence and that their efforts were co-ordinated. It was also accepted, at least by FWA, that it was not a coincidence that this was very shortly after Picken J's judgment (31 July 2024).

116. I repeat that the issues before Picken J included whether the Termination Notices had been effective, and whether the appointment of FWC and the assignments in favour of

FWA had been effective. The answers to these questions were crucial not only to the Claimants' attitude to the case being advanced in the Vietnamese Bank Proceedings (viz., VietJet's allegations that the Termination Notices were wrongful) but also to the Claimants' ability to rely on the EJCs – especially for FWA.

117. If there had been any significant progress in the Vietnamese Bank Proceedings prior to the end of July 2024, I would not have expected the Claimants to wait. However, in the circumstances, I do not find it surprising that they chose to do so. In fact, my impression is that both sides were waiting to see what the outcome was before Picken J. In other words: it is not a coincidence that the applications before me were issued shortly after his judgment had been handed down. It likewise is not a coincidence that VietJet obtained the PCH Procedural Order at about the same time.

118. When Picken J's judgment became available, they both sides responded swiftly – the Claimants in this jurisdiction and VietJet in Vietnam. Having issued their applications, the Claimants sought expedition. VietJet initially resisted this, but ultimately the hearing took place on an expedited basis, at the Claimants' request, as I have noted. The timetable set in place has made it possible for me to render my decision before the next relevant date in Vietnam – 15 January 2024.

119. In all the circumstances, I do not consider that Natixis or BNP have delayed materially; and certainly not to the extent that they should be disqualified from being granted the ASI that they are entitled to seek, in the light of their right to rely on EJCs.

Other factors raised by VietJet

120. VietJet said that the court should also consider (i) comity, (ii) whether this court has sufficient interest in the Vietnamese Bank Proceedings to grant ASIs, (iii) forum conveniens and (iv) the balance of injustice. These are (or may be) relevant factors in principle where an ASI is under consideration. However, none of them is of any real significance once the court has concluded that the foreign proceedings are being pursued in breach of an EJC. This has been clear for a long time – at least since *Angeliki Charis Compania Maritime SA v Pagnan SpA (The "Angelic Grace")* [1995] 1 Lloyd's Rep 87.

Jurisdiction and Service

121. It follows from my conclusion that Natixis and BNP are entitled to rely on the EJCs that they were entitled to commence proceedings in this jurisdiction and to rely on the service provisions in clause 26.2.

Conclusion

122. I will not grant an ASI in favour of FWA, but will accept the undertakings offered by VietJet, as set out in Annex 2.

123. I will grant ASIs in favour of Natixis and BNP, to the effect that VietJet should not pursue the Vietnamese Bank Proceedings.

124. I would add that the fact that I am in any event granting ASIs which order VietJet not to pursue the Vietnamese Bank Proceedings should provide further comfort to FWA.

In effect, FWA has the best of both worlds. It has the benefit of the undertakings that I have decided to accept, and which I regard as its best protection against the mischief with which it is concerned. In case I may be wrong in that assessment, it also has the benefit of the ASIs that I am granting in favour of Natixis and BNP – two parties that it knows have every incentive to monitor rigorously VietJet's compliance with the ASIs.

125. Finally, I am extremely grateful for the efficiency with which the hearing proceeded. This meant that it finished well within the estimate, and has allowed me to produce my decision before Christmas (albeit during vacation). I extend this gratitude not only to those who had speaking roles, but to everyone concerned in the preparation for the case. I know that the efforts of those in the background are not always acknowledged, but we on the bench are well aware of them and are thankful.

Annex 1 to Judgment
Relevant provisions in the Sub-Lease for the 8577 CEO Aircraft

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, except where the context otherwise requires or unless otherwise defined herein, terms and expressions defined in the Lease shall have the same meanings where used in this Agreement and the following words and expressions shall have the respective meanings shown opposite them:

…

"**Operative Documents**" means (i) this Agreement, the Lease, the Manufacturer Bill of Sale, the Purchase Agreement Assignment, the Commitment and Purchase Price Agreement, the Lessor Support Letters (Lenders), the Lessor Support Letters (Lessee), the Loan Agreement, the Loan Supplement, the Utilisation Request, the BFE Bill of Sale, any Transfer Certificate, the Acceptance Certificate, the Acceptance Certificate (Sub-Lease), the Funding Indemnity Letter (Lessor), the Hedging Agreement, the Funding Indemnity Letter (Financing Parties), any Irrevocable Instruction to Pay, any Subordination Agreement, the Delayed Delivery Letter Agreement, the Security Documents, any Permitted Sub-Sublease, any Fee Letter(s) and all notices, acknowledgements, consents, certificates, confirmations and other documents from time to time issued or entered into pursuant to or in connection with any Operative Document and (ii) any other document, instrument or agreement which is agreed in writing by the Lessor, the Sub-Lessor, the Sub-Lessee and the Security Trustee to be an Operative Document and "**Operative Document**" means any of them.

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23. INDEMNITIES

General Indemnity

Subject to Clause 23.2 (*Exceptions to General Indemnity*), the Sub-Lessee hereby agrees at all times to indemnify and hold the Sub-Lessor, , and each Relevant Person, each Kumiai-in and each Financing Party and their respective and any subsequent respective successors, affiliates, officers, directors, servants, agents, employees, attorneys and managers (collectively "**Indemnitees**" and each an "**Indemnitee**") harmless from and against all and any Losses of whatsoever kind and nature and regardless of when the same shall arise (whether prior to, during, or after termination of, the Lease Period) which may from time to time or at any time be imposed on, suffered or incurred by or asserted against any Indemnitee (whether or not any such Losses are also indemnified or insured against by any other person) relating to, arising out of or resulting from (whether directly or indirectly):

(a) the purchase (save for the Lessor Cost), ownership (but solely to the extent it relates to the transaction contemplated by the Operative Documents), title, registration, delivery, non-delivery, redelivery, performance, acceptance, non-acceptance, rejection, import, export, re-registration, de-registration, financing, certification, insurance, mortgaging, hypothecating, supply, lease, hire, charter, sub-lease, "wet lease", possession, presence, location, stationing, use, operation, accident, damage, loss, transportation, management, assignment, control, manufacture, design, condition, maintenance, alteration, modification, improvement, refurbishment, repair, service, overhaul, testing, removal, replacement, repossession, foreclosure, substitution, pooling, interchange, storage, sale, remarketing, return, redelivery, exchange or disposition of the Aircraft, the Airframe, any Engine or any Part or any interest therein or any title thereto or the Technical Records or destruction of or damage to any property,

or death or injury of, or other Loss of whatsoever nature suffered by, any person caused by, relating to or arising from or out of any of the foregoing matters (either in the air or on the ground) whether or not such Losses may be attributable to any defect (including, without limitation, latent or other defects whether or not discoverable) in the Aircraft, the Airframe, any Engine or any Part or any interest therein or any title thereto or the Technical Records or attributable to the design, testing or use thereof or from any maintenance, service, repair, overhaul, or to any other reason whatsoever (whether similar to any of the foregoing or not);

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26. **LAW AND JURISDICTION**

26.1 Law

This Agreement (including the arbitration agreement contained in it) and any non-contractual obligations arising from, out of or in connection with this Agreement are governed by and shall be construed in accordance with, English law.

26.2 Jurisdiction

(a) Both parties agree that the courts of England are to have jurisdiction to settle any disputes that may arise in connection with the legal relationships established by this Agreement (including, without limitation, claims for set-off or counterclaim) and any other Operative Document or otherwise arising in connection with this Agreement and any other Operative Document (including for purposes of Article 42 of the Convention). Both parties hereby expressly waive any applicable jurisdiction that may be applicable by virtue of the domicile of any of the parties or otherwise, and irrevocably and unconditionally submit to the jurisdiction of the courts of England.

(b) Nothing in this Clause 26.2 shall be construed as preventing the Sub-Lessor from seeking enforcement proceedings in any court of competent jurisdiction or as preventing the Sub-Lessor from seeking conservatory or similar interim relief in any court of competent jurisdiction. Without prejudice to the generality of the foregoing, the Sub-Lessor shall be entitled to seek such conservatory or similar interim relief regarding:

(i) the preservation and safe-keeping of the Aircraft or any part thereof including, without limitation, any application for an order to ground the Aircraft, an order relating to the custody and insurance of the Aircraft or any part thereof or an injunction preventing or restricting the Sub- Lessee, any Permitted Sub-Sublessee, the Lessee Parent or any third party, including any of their respective subsidiaries, parents, group companies, employees, officers, agents or servants, from taking possession of, operating, leasing or agreeing to lease, selling or agreeing to sell, encumbering or otherwise dealing with the Aircraft or any part thereof or from prejudicing the interest of the Sub-Lessor, the Lessor or any Financing Party in the Aircraft or in any part thereof; and

(ii) the delivery or recovery of the Aircraft or any part thereof, wheresoever located, and its transfer to an acceptable location, in the opinion of the Sub-Lessor, which may involve a transfer to another jurisdiction and its de-registration and export from the State of Registration, as necessary.

(c) Sub-Lessor hereby irrevocably designates, appoints and empowers CC Process Agents Limited, First Floor, Buckhurst House, 42-44 Buckhurst Avenue, Sevenoaks, Kent, TN13 1LZ, United Kingdom, to receive and acknowledge for it and on its behalf any writ, summons, order, judgment or other notice of legal process issued out of the courts of England in any legal action or proceeding arising out of or in connection with this Agreement and any other Operative Document and in the event of the termination of such appointment Sub-Lessor undertakes promptly to appoint another agent for service of process satisfactory to Sub-Lessee and, failing such appointment by Sub-Lessor within fourteen

(14) days, Sub-Lessee shall be entitled (and is hereby authorised) to appoint an agent on behalf of Sub-Lessor.
(d) Sub-Lessee hereby irrevocably designates, appoints and empowers CC Process Agents Limited, First Floor, Buckhurst House, 42-44 Buckhurst Avenue, Sevenoaks, Kent, TN13 1LZ, United Kingdom, to receive and acknowledge for it and on its behalf any writ, summons, order, judgment or other notice of legal process issued out of the courts of England in any legal action or proceeding arising out of or in connection with this Agreement and any other Operative Document and in the event of the termination of such appointment Sub-Lessee undertakes promptly to appoint another agent for service of process satisfactory to Sub-Lessor and, failing such appointment by Sub-Lessee within fourteen
(14) days, Sub-Lessor shall be entitled (and is hereby authorised) to appoint an agent on behalf of Sub-Lessee.
(e) Sub-Lessor and Sub-Lessee irrevocably waive any objections to the courts of England on the ground of venue or *forum non conveniens* or any similar grounds.
(f) Sub-Lessor and Sub-Lessee irrevocably consent to service of process in any manner permitted by the relevant law.
(g) Sub-Lessee hereby waives, and agrees not to assert, by way of motion, as a defence, or otherwise, in any such suit, action or proceeding, the defence of sovereign immunity, any claim that it is not personally subject to the jurisdiction of the above-named courts by reason of sovereign immunity or otherwise or that it is immune from any legal process (whether through service of notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise) with respect to itself of its property, or any objection on the grounds of venue or *forum non conveniens* or any similar grounds. Each of Sub-Lessee and Sub-Lessor agrees that in any proceedings in England this waiver shall have the fullest scope permitted by the English State Immunity Act 1978 and that this waiver is intended to be irrevocable for the purposes of such Act.

26.3 Third Parties

Any person which is a Lessee Party, a Relevant Person, a Financing Party, an Indemnitee, a Tax Indemnitee or an Additional Insured from time to time and is not a party to this Agreement shall be entitled to enforce such terms of this Agreement as provided for the obligations of the Sub-Lessee to such Financing Party, Indemnitee, Tax Indemnitee or Additional Insured, as the case may be, in each case, subject to the provisions of Clauses 26.1 (*Law*) and 26.2 (*Jurisdiction*) and the Contracts (Rights of Third Parties) Act 1999 (the "**Third Parties Act**"). The Third Parties Act applies to this Agreement as set out in this Clause 26.3 (*Third Parties*). Save as provided above, a person who is not a party to this Agreement has no right to use the Third Parties Act to enforce any term of this Agreement and, subject to the other provisions of the other Operative Documents, the parties to this Agreement do not require the consent of any third party (including, without limitation, any Indemnitee, Tax Indemnitee or Additional Insured who is not a party to this Agreement) to amend or rescind this Agreement at any time.

Annex 2 to Judgment
Undertakings given by VietJet to the Court

(1) VietJet will not rely on any decision, ruling of judgment of the PCH in the Vietnamese Bank Claims or on the existence of the Vietnamese Bank Claims:

a. in the FWA Claim (including in the appeal against the Picken Judgment); or

b. for the purposes of resisting enforcement of any final judgment of the English Court in the FWA Claim, whether that enforcement be against VietJet in England and Wales, Vietnam or in any other jurisdiction.

(2) Subject only to the outcome of the appeal against the Picken Judgment, VietJet will not advance any position in the Vietnamese Bank Claim that the termination of the Head Leases and the Sub-Lease Agreements was ineffective or invalid. VietJet will not seek relief from the PCH, nor make arguments in the Vietnamese Bank Claims, in the terms set out at paragraphs 21-24 of the Fourth Witness Statement of N Ngoc Minh dated 9 August 2024 ("**Minh 4**"), served in the FWA Claim, except that, in relation to paragraph 22.4 of Minh 4, VietJet will be free to seek disclosure from third parties for the purposes of the Vietnamese Bank Claims as parties with related rights and obligations in the sense envisaged by Article 68 of the Vietnam Civil Procedure Code 2015.