Neutral Citation Number: [2022] EWHC 728 (QB)

Claim No: QB-2013-006737

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2022

**Before** :

**MR JUSTICE FOXTON**

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**Between :**

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| **LOMBARD NORTH CENTRAL PLC** | **Claimant** |
| **- and -** | |
| **EUROPEAN SKYJETS LIMITED (IN LIQUIDATION)** | **Defendant** |
| **- and -** | |
| **(1) EUROPEAN SKYJETS LIMITED (IN LIQUIDATION)** | **Part 20 Claimants** |
| **(2) EUROPEAN SKYTIME LIMITED (IN LIQUIDATION)** | |
| **- and -** | |
| **LOMBARD NORTH CENTRAL PLC** | **Part 20 Defendant** |

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**NICHOLAS CRAIG QC and CHARLOTTE EBORALL** (instructed by **Addleshaw Goddard LLP**) for the **Claimant/Part 20 Defendant**
**PHILIP COPPEL QC and NATASHA PETER** (instructed by **Ballinger Law Ltd**) for the **Defendant/Part 20 Claimants**

Hearing dates: 1 to 4, 7 to 8 and 10 March 2022
Further written submissions: 11 and 17 March 2022
Draft sent to parties: 18 March 2022

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# Approved Judgment

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

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THE HONOURABLE MR JUSTICE FOXTON

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30 March 2022 at 10:30 am."

**Mr Justice Foxton :**

## A INTRODUCTION

1. This action arises out of a secured loan made by the Claimant (**Lombard**) to the Defendant (**Skyjets**) in respect of a Bombardier Learjet aircraft (**the Aircraft**). In brief summary:

    i) Lombard says it validly terminated the loan (**the Loan Agreement**) on 8 November 2012, and thereafter has validly enforced its security over the Aircraft (**the Mortgage**) by selling it for $3.1m (all $ figures in this judgment being US$). It claims what it says is the outstanding balance of some $5.78m.

    ii) Skyjets and the other Part 20 Claimant (**Skytime** and together with Skyjets, **the Sky Parties**) say that Lombard had no entitlement to terminate the Loan Agreement or sell the Aircraft, that in any event Lombard breached its duties as mortgagee when selling the Aircraft, and they counterclaim for damages in the sum of £26m for breach of contract and/or conversion.

2. It will be apparent from that brief summary that the first issue which arises is whether Lombard validly terminated the Loan Agreement so as to be able to take possession of the Aircraft under the Mortgage. If that issue is decided in Lombard's favour, it is then necessary to consider whether Lombard breached its duties as mortgagee when selling the Aircraft. If the termination issue is resolved in Skyjets' favour, then it is necessary to consider Skyjets' and Skytime's claims for damages.

3. The Sky Parties raised a significant number of issues in the course of their 120-page opening, many of which were not developed in oral opening or closing submissions, given the time constraints. I have focussed on the real issues between the parties, having regard to every point raised.

## B THE WITNESSES

4. Lombard called two witnesses.

5. Mr Simon Hallows took over responsibility for Skyjets' account with Lombard in August/September 2012. I found Mr Hallows to be an honest witness. His memory of the detail of events of nearly 10 years ago was understandably limited, as he was willing to accept. He had no personal knowledge of events before he took over the file, his understanding of those events being derived from the documents, a hand-over discussion with Mr Kit Holding who had had responsibility for the file up to that point, and what might be termed the "institutional memory". It is right to record that Skyjets came to Mr Hallows as a "problem" account, and he approached it throughout in those terms, viewing default and re-possession as realistic outcomes from the outset. That perception was honestly held and given Skyjets' repeated inability to pay instalments on time over many years, a view which it was reasonably open to him to take. However, it meant that some of his communications with Skyjets had a rather hard-nosed character, and that Skyjets did not get the benefit of any doubt.

6. As he acknowledged, and I as explain below, Mr Hallows made a significant error in the calculation of the amount required for Skyjets to comply with the asset coverage

percentage (**ACP**) requirement in an email of 8 October 2012. While Mr Hallows was right to state that this was not "the standard of work I would expect from myself or my colleagues", I am satisfied the error was made in good faith and not dishonestly (as Mr Coppel QC suggested in closing). On the other key issues on which Mr Hallows' honesty was attacked, for reasons I explain below:

i) I am satisfied that Mr Hallows did honestly believe that Lombard was entitled to charge late payment fees as a condition of not exercising its right to terminate.

ii) I reject the suggestion that Mr Hallows wanted to influence the content of the independent accountant's report into the Sky Parties in October 2012 so as to produce an unfairly negative assessment.

iii) I reject the suggestion that Mr Hallows made a dishonest statement about the history of the ACP issue at the meeting of 8 November.

7. Lombard also called Mr Ian Cox of Lombard Asset Management (**LAM**) who was involved in the subsequent sale of the Aircraft. Mr Cox was an honest witness who understandably sought to defend the process Lombard had followed. He joined LAM in December 2012, by which point the decision to appoint a sales agent to handle the sale, and the identity of the agent, had effectively already been taken. The issues which arise on this aspect of the case are essentially objective ones, and I deal with the evidence of Mr Cox (to the limited extent relevant) when addressing the complaints made about the sales process and outcome below.

8. The Sky Parties called Mr Westlake, the founder and principal mover behind the business. In some respects, I found Mr Westlake a sympathetic figure. He had clearly made a substantial financial and emotional investment in the Sky Parties' business, strongly believed in it, and found himself in an increasingly desperate position as the financial position of the Sky Parties worsened during 2011 and 2012. Under the pressures to which that financial deterioration gave rise, Mr Westlake sometimes resorted to disingenuous communications with the Sky Parties' creditors or stakeholders, or ignored communications, in an effort to keep the show on the road or to buy time. He remained optimistic throughout that if the Sky Parties' business could only survive, it would eventually prosper, an optimism which it became increasing difficult to reconcile with the harsh reality of the prevailing business environment. Under the pressures of cross-examination, there were also occasions when Mr Westlake resorted to dissembling rather than openly acknowledging unhelpful facts or events, and the ungrounded optimism which he had maintained throughout 2011 and 2012 was similarly apparent in his evidence as to the position the business would have been in had the Loan Agreement not been terminated.

9. For these reasons, I have approached Mr Westlake's evidence with a degree of caution. For all the witnesses, I regard the contemporary documents and the inherent probabilities as the most reliable guide.

## C WAS LOMBARD ENTITLED TO TERMINATE THE LOAN AGREEMENT ON 8 NOVEMBER 2012?

### C1 The factual background

### *C1(1) Delays in payment*

10. Mr Westlake decided to establish a business which offered private jet charter services, and he incorporated Skytime for this purpose on 20 December 1999. On 30 April 2007, Mr Westlake incorporated Skyjets for the purpose of acquiring aircraft to be used in that business, and Skyjets set about raising funding. In August 2008, Lombard was approached to finance the greater part of the acquisition cost of the Aircraft, which Skyjets intended to acquire from Learjet Inc for $11.690m. That funding was provided through the Loan Agreement and the Mortgage, which were completed on 28 October 2008, and involved a secured loan to Skyjets of $8.771m to be repaid in 120 monthly instalments, with Lombard acquiring a first priority legal charge over the Aircraft. On 22 December 2008, the Loan Agreement was varied to provide for payment by Skyjets of 119 monthly instalments of $82,804.63, to be paid on the 28th day of every month. These obligations were guaranteed by Mr Westlake.

11. Skyjets acquired a second Learjet at a cost of $9,240,000, with the benefit of secured financing from Clydesdale Bank Plc ("the Clydesdale Aircraft"), although this had a lower passenger carrying capacity and range than the Aircraft.

12. The Civil Aviation Authority, the UK regulator, requires every aircraft operating commercially to have an Operator who holds an Air Operator Certificate. In the case of the Aircraft, a company called TAG was initially the Operator, but Manhattan Jet Charter Limited (**Manhattan**) replaced TAG in early 2009. Skyjets was initially party to an engine reserve programme with the engine manufacturer Honeywell Inc (**Honeywell**) under which regular payments were to be made into a fund which would be used to pay for any required work on the engine – **the MSP Service Plan**. Skyjets stopped making payments under the MSP Service Plan, which was terminated on 24 February 2010 with effect from 30 November 2009.

13. Skyjets failed to make the payment due under the Loan Agreement on 28 October 2009, and Mr Westlake sought unsuccessfully to negotiate a variation to the payment terms. There were further defaults in making timely and full payments for every month from January to October 2010, which led to the Skyjets' account being identified, and managed, within Lombard as an account of concern. By the end of October 2010, arrears under the Loan Agreement had reached over $421,000. There were exchanges between Lombard and Mr Westlake regarding proposals to pay off the arrears, and while these were ongoing, Skyjets made four payments totalling $285,000, and further payments on 29 November and 2 December 2010, which cleared the arrears.

14. However, a failure to pay the 28 December 2010 instalment when due brought the account into arrears again (as well as meaning that all 2010 instalments had been paid late), and there were further failures to make payments when due for each month from January to July 2011. Those arrears were cleared by August 2011, but Skyjets failed to pay the October 2011 instalment when due. These continuing failures on Skyjets' part to perform its obligations engendered a considerable amount of frustration within Lombard, particularly on the part of Mr Kit Holding, the "relationship manager" for the account. On becoming aware of the latest default, on 3 November 2011, Mr Holding said he would arrange for default interest to be applied on the account (clause 5.1.1 of the Loan Agreement entitling Lombard to charge default interest on the amount of any sum due but unpaid at 5% above the applicable interest rate). However, Mr Holding

wanted to go further telling Mr Griffiths of the Royal Bank of Scotland's Global Restructuring Group (**GRG)**:

> "I think we now need to formalise a default fee to prevent these late payments from happening if we are not to foreclose and to also encourage them to ensure repayments are met on time because as it stands there is no recompense/incentive if they make a late payment – Any objections to charge to the agreement our standard formal default fee of 15% of the arrears?"

15. Mr Griffiths replied that "if that is a normal procedure then I don't see why I would have a problem with your proposal". Mr Holding replied:

> "There is nothing that mentions a specific amount in the customers mortgage documentations for a 'default fee' only the 'default interest'. We do not have a set fee structure for mortgages but the 15% amount is a standard in all our HP finance agreements so I was going to apply this as the fee to the mortgage default but if I document this in a one off letter that this has been charged and will continue to be charged in the event of a late payment as the mortgage is then in default, this then confirms to them that this will now happen".

16. Mr Holding then emailed Ms Anna Freeland, a Senior Operations Consultant at Lombard, and Ms Nichola Bowron who worked with Mr Holding, giving them instructions to charge default interest and a late payment fee, saying of the latter:

> "This is based on a default late payment fee of 15% of the arrears. I am writing a letter today to notify [Skyjets] this has been incurred. We need to get a fee structure advised to them that helps to help focus to ensure they make repayments on time, now that cashflow issues have eased we are in a position to now do this and we are going to charge this in the event of any future late payments and again I will cover this off in the letter".

17. I did not hear evidence from Mr Holding, although a witness statement had been served from him, and there was no suggestion that there was some explanation for his absence other than that his evidence would not have been helpful in certain respects to Lombard's case. I have drawn adverse inferences from his absence where appropriate, but not where the contemporary documents or the inherent probabilities make the position sufficiently clear.

18. Drawing such an inference, and having regard to the terms of his emails and the clear terms of the Loan Agreement, I am satisfied that Mr Holding must have known that there was no contractual right under the Loan Agreement to charge a late payment fee of 15% of the amount paid late. However, if a failure to pay Lombard on time gave Lombard the right to terminate, it was, of course, open to Lombard to take the position that it would exercise that right unless a late payment charge was paid (which is in effect what was said in Mr Holding's first email).

19. On 3 November 2011, Mr Holding wrote to Skyjets referring to the arrears and the default and stating:

> "You will be aware that Lombard are entitled to undertake certain actions pursuant to the Mortgage should the company where there is a breach of the Mortgage and/or the Agreement [sic]
>
> There has been a late payment charge (the Charge) applied to the mortgage. The terms of the mortgage requires the punctual payment of the specified instalments. This charge will also apply to any future late payments on the mortgage and will be calculated based on an amount equivalent to 15% of the arrears".

20. While the first quoted paragraph – referring to Lombard's right to take actions following a default – was correct if referring to the rights which arose under clause 9.2, this was not spelled out. There was no right to charge a late payment penalty. In the absence of evidence from Mr Holding offering any alternative explanation, it seems to me likely that the terms of the letter were deliberately ambiguous as to the basis on which Lombard was purporting to charge the fee, and that this was done to avoid having to accept in open correspondence that the Loan Agreement itself did not give such a right (although reading the Loan Agreement would immediately have confirmed that was the case).

21. There was no immediate response by Skyjets to the letter, perhaps because it recognised the weakness of its position given that it was not in a position to pay the 28 October 2011 instalment until credits due from customers came in (as Mr Westlake noted in an email to Mr Griffiths of 7 November 2011). When the 28 November 2011 instalment was missed (the 28 October 2011 instalment having been paid late), Mr Holding once again instructed that default interest and a late payment fee be applied to the account, and an allegedly outstanding balance reflecting these charges was communicated by Mr Holding to Mr Westlake on 30 November 2011 in similar terms to the 3 November letter. In response, Mr Westlake queried the amount of the arrears, and in return Mr Holding explained the calculation of the payment but not the alleged legal basis for it beyond referring back to his letter of 3 November. Mr Humphrey (the Finance Director at Skytime) also queried how the default interest (rather than late payment charge) had been calculated, saying it seemed "excessive". On receipt of that query, Mr Holding forwarded it to Ms Nicola Packman of Lombard asking for "Help Please!!!!", to which Ms Packman replied "??"

22. On further investigation within Lombard, it became apparent that the interest calculation was wrong because the system only allowed for the default interest rate to be applied to the full outstanding balance under the Loan Agreement rather than just the amount of arrears, something which Mr Holding admitted to Mr Humphrey on 1 December. On receiving that email, Mr Humphrey sought information as to whether default interest had been charged in the past, to be told that this has not been done, but that payments needed to be made in time to avoid default interest and "additional fees … as per the notification" (i.e., the late payment charges). That revelation led Mr Humphrey to identify two interest charges, on 7 and 27 July 2011, which "seem[ed] very high". These also proved to be errors, which Mr Holding acknowledged on 12 December 2011.

23. It will be apparent from these communications that Skyjets (through Mr Westlake and principally Mr Humphrey) critically examined the charges which Lombard claimed it was entitled to levy. In particular, I am satisfied that Mr Westlake, when receiving the 3 November 2011 letter and the demand for late payment fees in respect of the 28

October and 28 November instalments, was alive to the issue of whether the Loan Agreement itself permitted Lombard to make such a demand. On 1 December 2011, Mr Westlake informed Mr Holding that "we need to discuss these late payment charges as they are completely unreasonable and not helping either party involved in this agreement".

24. At the end of November 2011, Mr Griffiths and Mr Westlake agreed to meet. That meeting took place on 16 December. It is clear that at the meeting, Skyjets informed Lombard that in current operating conditions, payments were likely to be made "eventually" rather than "on-time". This is recorded in a draft letter prepared by Lombard following the meeting, which I infer is likely to have been sent, as a letter of 6 January 2012 which Lombard did send to Skyjets refers to an earlier letter from the Bank of 5 January 2012 which is not available. Even if it was not sent, it remains reliable evidence of what was said at the December meeting. That 6 January 2012 letter also recorded that Skyjets had said that it would not be able to make payments due to Lombard "as and when they fell due in the immediate future … due to insufficient working capital requirements due to the lumpiness of payments from debtors". The 6 January 2012 letter also records that Mr Westlake had queried the late payment charges:

> "In relation to your question around the level of the late payment charge, as per the conditions of the agreement, we are permitted to levy additional charges arising at any time in connection with the facility, payable on demand by the borrower. As a result of the non-payment of the specified instalments and subsequent breach of the agreement being an event of default, this charge becomes payable as has been previously advised to you in writing and the level of fee is at our discretion. You can avoid paying any additional amounts by meeting your obligations on time".

This passage repeated the calculated obscurity of the 3 November 2011 letter, and was disingenuous in so far as it sought to suggest that the Loan Agreement provided a contractual right to levy such charges (when I am satisfied that Mr Holding knew that there was no such right). However, the passage which followed placed the attempt to claim such charges on a more realistic basis:

> "In order for us to continue supporting the business and not enforcing our rights to terminate the facility and reposes [sic] the aircraft, we will only be prepared to do this on the following basis:
>
> > Noting there is an unsecured element on the mortgage and that you are not able to inject cash into the mortgage to rectify the LTV breach, we will require additional security … If you can let us have details of the shareholders/directors assets & liabilities statements we can discuss with you what level of additional security is appropriate.
> >
> > Subject to acceptable security being provided we will allow late payment to continue on the agreement subject to …
> >
> > - We cannot accept late payment of more than one consecutive instalment – As soon as the agreement enters two consecutive payments in arrears, this will revoke any revised agreement in place and will lead to immediate termination of the facility and repossession of the aircraft.

- A late payment charge (based on 10% of the arrears – e.g., Arrears of $82,804.63 will incur a charge of $8,280.46) will be payable on any instalments not met by the specified time & date as outlined in your original mortgage terms and the amount will be repayable by the next instalment on the agreement".

25. It was at one stage Lombard's case that an offer on these lines had been accepted at the 16 December 2011 meeting, and I accept that the outline terms of such an offer are likely to have been discussed, and sufficient positive noises made, for Lombard to have come away with the view that the proposal was or was likely to be acceptable to Skyjets. For example, a facilities document which appears to have been prepared by RBS on 10 January 2012 refers to the meeting of 16 December taking place to discuss the "way forward" and states:

> "Lombard RM has agreed the following with credit
>
> Monthly payments will be allowed up to one month late/
>
> A charge will be made for late payments"

and it was noted that the customer was "now aware that paying on time is key" and Lombard was "now more comfortable allowing payments to slip a little".

26. There are other documents to a similar effect.

27. However, Mr Holding was alive to the need to nail the agreement down. On 10 January 2012, Mr Holding arranged to meet Skyjets stating "I would like to ensure that we have a confirmed agreement as to the way forward … What I don't want to do is to commit to something at this stage if you are not happy with the conditions set by RBS/Lombard as ultimately if you do not wish to confirm the proposals we will have to re-think the way forward". A PDF of the 6 January letter was sent to Skyjets on that date.

28. On receipt of the letter, Mr Humphrey asked for "a copy of the document or … specific parts of the loan agreement and/or mortgage agreement" which "permit you to levy these charges please. We would just like piece [sic] of mind that these charges are in accordance with the loan documentation we have". In an internal email, Mr Westlake told Mr Humphrey "just go into broken record mode for the time being", the implication being that he should continue to repeat points already made, by way of a holding position. Later communications from Skyjets in relation to the alleged 10% agreement have a similar character.

29. Mr Holding's reply reflected the obscurity he had adopted on this issue throughout, beginning:

> "Within the loan documentation, section 19 allows for charges to be made in connection to the facility and maintenance therein of it…"

I interpose that clause 19 (the usual indemnity against the lender's costs and expenses) could not conceivably have justified the late payment charges, and I find that Mr Holding is likely to have been aware of that. However, he continued:

> "I would point out that we have reserved our rights under the mortgage since the original breach last year that wasn't satisfied under the conditions set. The late payment charge is a condition of Lombard not enforcing future breaches/default, as detailed in our letter of 06.01.12".

That analysis was legally correct, and I am satisfied that Mr Holding believed that Lombard was entitled to charge the late payment fees on that basis if the later payments continued as a condition of not terminating, both because that was the position taken by him in a number of contemporary documents and because it is legally correct.

30. In internal correspondence, Mr Westlake recognised that what Lombard was seeking to do was leverage its termination rights by extracting an additional fee in return for not exercising them. On 13 January 2012, he emailed Mr Michael Bradfield (whose company Aerofleet LLP had provided funding for the acquisition of the Aircraft) stating:

> "On another matter we are having a bit of a run in with Lombard due to them applying extra charges to our loan repayments. They are using the loan to value covenant as the aircraft has depreciated according to the blue book under the 30% LtoV to threaten proceedings and then apply crippling charges".

31. Thereafter, Lombard corresponded with Skyjets on the basis that the arrangements set out in the letter of 6 January 2012 had come into force (for example that if two consecutive payments were outstanding, a clause 9.2 notice could be served). Thus, on 5 March 2012, Ms Bowron wrote to Mr Humphrey stating:

> "We now find ourselves in breach of the agreement we provided that there is to be no more than 1 payment in arrears at any point in time"

(which is a clear reference to the content of the 6 January 2012 letter). Mr Humphrey did not suggest that no such agreement had been reached. However, the ambiguous status of the January 2012 proposals was clear from Lombard's letter (signed by Mr Holding) of 27 March 2012 which referred to Lombard's "commitment to support the business by way of our proposals outlined in the letter issued to you dated 6th January 2012" and the fact that the assets and liabilities statements referred to in that letter had not been provided. It continued:

> "The agreement is in arrears and any condition of us allowing arrears was that additional security was to be taken.
>
> The agreement also went two payments into arrears which (a) were not pre-advised of (b) the terms of our offer of support would not allow for this.
>
> I consider these two fundamental issues which has effectively breached the agreement we reached".

32. It will be apparent that this letter described the terms of the 6 January 2012 letter variously as a proposal, an offer and an agreement. There was no response from Skyjets challenging the latter characterisation, indeed no formal response at all. An internal email from Mr Holding to Mr Griffiths of 27 April 2012 stated that "nothing agreed at the meeting (that we ratified to them as per the joint letter issued dated 6th January) has

been complied with", one of a number of internal Lombard communications reflecting a belief within Lombard including on the part of Mr Holding, that an agreement had been reached. I can see no good reason why Mr Holding would have given a false *internal* account of his belief as to the existence of such an agreement, and allowed a false view to be propagated more generally in Lombard and RBS, and every reason why he should not have done so. I do not regard Mr Holding's unexplained absence as a sufficient reason for reaching the contrary view.

33. Lombard continued to levy fees based on the terms of the 6 January 2012 letter in the statements of account. On 2 May 2012, Mr Holding wrote to Mr Westlake referring to arrears that needed to be paid, and the lack of a formal response to the issues raised in Lombard's letters. Mr Westlake replied saying "I assume these refer to extra charges you intend to impose, and I know Ed has some questions regarding these". Mr Holding replied stating that the letters "confirm what was required and what was undertaken" for Lombard to continue to support the business "as discussed at the meeting in January" (which appears to have been a reference to the December 2011 meeting).

34. On 30 July 2012, after being notified of a level of arrears (including late payment charges) which Mr Westlake said was higher than anticipated, Mr Humphrey asked Lombard for "a breakdown of the balance due on the account in terms of "monthly payments due, charges for late payments, interest etc". Mr Holding temporised by telling Mr Humphrey (I infer falsely) that he had the statement in front of him but problems with his scanner, while he instructed a member of staff to carry out the required calculation (which had to be done manually because of the issue with the system referred to at [22] above). A statement of account was sent to Mr Humphrey on 31 July, and Lombard stated that a further statement reflecting the position at the end of the month would follow, which in due course happened on 1 August 2012. Both statements clearly showed a number of late payment and additional interest charges. Mr Humphrey reviewed them carefully and sent a query through on 2 August in which he identified a payment made which had not reduced the arrears (which led to Lombard providing a revised statement of account). The following day, Mr Westlake told Lombard that a further payment was on its way, but there would be no further payments "pending a clear and acceptable account balance history", given the history of calculation errors. Mr Holding's position, in response, was that the statement which had been recently provided was "accurate and can be relied upon".

35. What is noticeable about this correspondence, against the background of the events of December 2011 and January 2012, was the absence of any clear statement by Skyjets that the proposal which Lombard had made during that period for late payment charges had never been accepted.

### *C1(2) The MSP Service Plan*

36. As I have stated, in February 2010, and in the face of strong contrary advice from Harrods Aviation Ltd (**Harrods**) who would have performed work under the Plan, Mr Westlake cancelled the MSP Service Plan with effect from November 2009. Before doing so, Mr Westlake asked Clydesdale if it had any objection so far as the Clydesdale Aircraft was concerned (on 18 November 2009). Mr Montgomery of Clydesdale asked, "Any feedback from Lombard?", which I am satisfied was a request for information about Lombard's reaction to the proposal to cancel the MSP Service Plan. Mr Westlake

replied that "Lombard are happy". In fact, no notice was given of this cancellation to Lombard until May 2012, and Mr Westlake's statement was misleading.

37. In late 2011 and early 2012, Lombard became concerned as to the status of the engine overhaul contract relating to the Aircraft. Lombard telephoned Air Claims asking about the package in place for the Aircraft, and on 21 December Mr Cook of Air Claims told Mr Bach of Manhattan that he had told Lombard that an MSP Gold package was in place. When the issue reached Mr Westlake's attention, Mr Westlake replied "let's discuss when I get in. Don't let [John Back] say anything just yet". There was no attempt to correct Air Claims' misapprehension or the false information conveyed to Lombard.

38. On 10 February 2012, Mr Gary Crichlow of LAM sent an email to Mr Holding and others referring to a report produced following a recent physical inspection of the Aircraft, and stating:

> "The operator had an engine overhaul contract with Harrods and it was reported that this was the MSP gold package … We need to understand exactly what the overhaul contract support for the engines is in place with the aircraft in order to determine whether it is in fact fully equivalent to an MSP Gold package … General market value assumes enrolment on MSP Gold.".

39. An email seeking confirmation of the position so far as the MSP Service Plan was concerned was sent by Ms Bowron of Lombard to Mr Humphrey on 15 February and again on 5 March 2012. On 6 March 2012, Mr Westlake prepared a draft email to go to Lombard stating that the plan had been cancelled 18 months ago. However, I have seen no evidence that the email was sent, and the subsequent communications suggest that it was not.

40. On 3 May 2012, Mr Holding asked Mr Westlake to confirm "the current nature of the engine support and how many hours remain before the next engine overhaul is due". Mr Westlake's response identified some upcoming work, and the fact that "the fund for this work sits with Honeywell", but he did not reveal that the Honeywell MSP Service Plan had been terminated more than two years before. Mr Crichlow of LAM noted in an internal communication that the letter implied that the MSP Service Plan was in place (and I am satisfied that that is the impression Mr Westlake was hoping to give, without expressly saying so), but identified various follow-up questions, including a request for specific confirmation that the Aircraft remained enrolled in the MSP Service Plan. Mr Holding passed that request back to Mr Westlake on 3 May 2012, and Mr Westlake informed him by reply that day that "we are not enrolled on MSP gold anymore as the whole MSP programme was completely wrong for our business. We do have a fund in place for about $260k which is estimated to cover the work coming up in June 2013".

41. In fact, the figure of $260k was too high. In April 2010, Honeywell had identified credits for the Aircraft of $144,884.93, and for the Clydesdale Aircraft of $149,731.15, and these amounts would need to cover work on both Aircraft. Further, by May 2012 those figures are likely to have been reduced by work done in the intervening period.

42. While there was internal recognition within Lombard that the loss of the MSP Service Plan might have implications for the Aircraft's value, there does not appear to have been any outwards reaction. Another internal email of 19 July 2012 noted:

> "Maintenance on the plane is fully up to date and LAM are satisfied that the company have sufficient monies lodged with the maintenance provider to meet the ongoing costs and the next maintenance schedule. The next airframe checks are due next month and LAM's opinion is that we do not now repossess until the maintenance has been carried out as it will make the plane far more saleable and improve the value and (a) it will avoid us incurring the costs (if we chose to do so) given that as mentioned above the money is already lodged for this maintenance ...".

43. I am satisfied that May 2012 was the first occasion when Mr Westlake told Lombard about the cancellation of the MSP Service Plan. As the correspondence makes clear, he had dissembled on this issue up to the point, and he never responded to the enquiries by saying "I have already told you that I cancelled the MSP Service Plan".

44. However, not everyone within Lombard appears to have been aware of, or at least absorbed, this news. On 24 July 212 Mr Paul Tunstall of LAM sent an internal email stating that they needed "to know …the exact details of the support package and whether it is transferrable with the aircraft". In 2013, clarification was still being sought from Honeywell as to whether or not the Aircraft was on MSP Gold.

### *C1(3) The sale of a 50% stake in the Skytime and its business*

45. At the meeting on 16 December 2011, Lombard had expressed the view that the Sky Parties' business needed to be recapitalised, and Mr Westlake had been asked to come back with proposals to this end. In a facilities proposal of 10 January 2012, Mr Westlake informed Lombard of moves in that direction, under which the Danesmoor Group (**Danesmoor**), a business associated with Mr Mark Stephenson which owned Manhattan together with Skytime, and was a customer of the business, would take a stake in Skytime. On 26 March 2012, Mr Westlake told Mr Griffiths that there had been an agreement to sell a 50% stake in Skytime to Danesmoor for £2.25m. He said the amount of cash which would go into the business as a result of the deal would be known when the deal structure was finalised. Mr Westlake gave Lombard an update on 17 April 2012, stating that the business was expecting an injection of cash of £1m in two instalments over the next 6 months, with the remaining £1.25m being split as to £250,000 to existing shareholders and £1m to convert the aircraft loan to equity. On 27 April 2012, Mr Westlake told Lombard that "a minimum of £1m cash will be injected into the business" and on 2 May 2012, he said that the account would be brought up to date when the cash injection was made. Similar statements about the injection of £1m cash into the business were made to Mr Stuart Lorraine of Clydesdale on 23 April 2012.

46. By 3 May 2012, Mr Westlake was referring to the new investor injecting £650,000 cash, of which £400,000 would remain in the business and £250,000 leave it. However, an email from KPMG (who advised Danesmoor) to Mr Cowen of Danesmoor of 17 June 2012 explained that, at least by that point, all of the £650,000 would go out of the business, to buy out the shares of existing minority shareholders (Mr Wakefield's ex-wife and sister-in-law) or to meet tax liabilities resulting from the sale. However, this change does not appear to have been communicated to Lombard or Clydesdale. On 19

July 2012, Mr Holding sent an internal email referring to his intention to contact the vendor's solicitors in the transaction to ensure that the arrears were paid from the cash injection was concerned by obtaining an undertaking from the solicitors that the cash would be paid directly to Lombard on receipt. Email exchanges between Mr Westlake and Mr Lorraine of Clydesdale referred to funds which were to be received, and to Skytime having "our money by" 19 July.

47. The share sale completed on 20 July 2012. On 26 July, an internal Lombard document noted that Mr Westlake had "ignored and/or fobbed off all subsequent chasers for solicitors' details and is not now responding" (which was a fair summary of the position). On 27 July 2012, Mr Westlake told Lombard that the deal had completed, but "due to a bank account screw up we have been unable to access the funds deposited", and that it would be sorted by close of play that day. A little later that day, Mr Westlake said Skyjets still did not have access to their money but had managed to get one of the outstanding payments out to Lombard. Mr Westlake sent a third email that day to similar effect. Ms Bowron of Lombard sent a chaser on 30 July 2012, to be met with further temporising from Mr Westlake with references to not having "full access to our investment funds yet". Lombard delivered an ultimatum for the solicitor's undertaking on 3 August. An internal email from Mr Humphrey stated:

> "We can't give them this as £650,000 was mainly for Carol/Kelly – also Guy can't provide any undertaking as none of the funds have passed through his account".

This reflected to the extent to which Mr Westlake had allowed Lombard and Clydesdale to labour under a misunderstanding, and actively encourage that misunderstanding in his choice of language.

48. In response, Mr Westlake confirmed to Lombard by reply that the £650,000 had been paid "of which the majority has gone to our two minor shareholders". However, exchanges with Clydesdale continued to refer to "delay getting access to the full investment funding" (on 15 August 2012).

### *C1(4) Mr Hallows arrives on the scene*

49. In August 2012, Mr Hallows replaced Mr Holding as the person responsible for Skyjets' account at Lombard. It was his evidence that there was a handover meeting with Mr Holding, at which he was briefed on various issues, which included Mr Holding telling him that there had been agreement that allowed Lombard to charge a 10% payment charge. I accept that evidence:

    i) I found Mr Hallows to be a generally honest witness: see [5].

    ii) As I have noted at [25] and [31] to [33] above, internal and some external Lombard documents proceeded on the basis that there had been such an agreement.

    iii) When read with the 6 January 2012 letter which was on the file, Lombard's failure to take steps to terminate the loan in the face of persistent late or non-payment was entirely consistent with there being such an agreement, as was the absence of any clear challenge by Skyjets to the issue of whether such a charge could in principle be imposed.

50. On 28 August, Mr Hallows was sent a draft email which another employee, Ms Karen Edwards, had prepared to send to Mr Humphrey. The email referred to a decision having been taken to "charge for late payment in accordance with our rights under the agreement" (as I have noted, if this was a reference to the Loan Agreement, there was no such right), and also to a meeting of 16 December, which led to the letter of 6 January 2012 setting out Lombard's requirements at that time.

51. Mr Hallows approved the charging of a further late payment fee when the 28 August instalment was missed. He sent an updated statement of account to Skyjets on 17 September 2012, saying "you will note from the attached statement that the arrears are subject to a default charge for late payment. You have not maintained regular payments of the correct amount since January 2010 … This is clearly unacceptable and outside the terms of the Agreement". He said that if the arrears as claimed were not cleared, solicitors would be instructed to repossess the Aircraft. Mr Westlake said he would discuss the statements with Mr Humphrey. He sent Mr Humphrey an email saying, "can you have a good look at their statement … as I am sure we can find something wrong with it!" Mr Humphrey told Mr Westlake on 18 September:

> "Have been through the statement and unfortunately I can't find anything wrong with it. Apparently Barclays are near a resolution to the overdraft situation so we need to try and buy some time from this Simon character".

52. The following day Mr Humphrey responded to Mr Hallows stating:

> "I have now had a chance to review this and am now happy with the arrears position stated …"

That is an important email, which can only have served to reconfirm Mr Hallows' understanding that there had been agreement to the late payment charges and is at least suggestive that Mr Westlake may have held a similar understanding, or at least decided not to confront Lombard on this issue at a time when Skyjets was so obviously in default. On the same date, Lombard's solicitors, Addleshaw Goddard LLP (**AG**), sent Skyjets a letter setting out what Lombard said was the arrears position, including the late payment charges.

53. On 21 September 2012, Mr Westlake sent Lombard an email setting out his description of the current state of the business, with reference to a number of funding options which it was said were close to realisation. In response, Lombard set out various conditions for giving Skyjets more time to pay, including allowing Lombard to engage a firm of independent accountants to assess the viability of the Sky Parties' business (at the Sky Parties' expense). Mr Westlake accepted those terms on 24 September. Duff & Phelps Ltd **(Duff & Phelps**) were approached by Lombard to act as the independent accountants, and they made contact with Mr Humphrey and Mr Westlake seeking information.

54. At this point, it is convenient to address allegations put to Mr Hallows in cross-examination that he had deliberately set out to poison Duff & Phelps in their assessment of the Sky Parties' viability:

    i) First, reference was made to an email of 24 September 2012 in which, for the purposes of the cashflow forecast which would have to be prepared, Mr Hallows

told Duff & Phelps that by 30 September 2012 the outstanding amount under the Loan Agreement would be $576,000. The origins of the figure are unclear. To the extent that it assumes that the late payment charges to date were due (the late payment charge for the delayed payment on 28 August 2012 falling due, on Lombard's then-position, on 28 September 2012) then it was clearly overstated on Lombard's current case.

ii) I am satisfied, however, that Mr Hallows honestly believed this would be the approximate level of arrears if the 28 September instalment was missed (as he expected it would be), and that he did not (as Mr Coppel QC suggested) knowingly put forward a false figure for the purpose of creating an unfavourable impression on the part of Duff & Phelps. Not only am I satisfied that Mr Hallows was an honest witness generally, but I note that on 24 September 2012, in an internal email, Mr Griffiths referred to an outstanding balance to Lombard of "c.$500k" which, adding amounts falling due on 28 September 2012, would easily take the balance to Mr Hallows' figure. In another internal email of 4 October 2012, Mr Hallows referred to Skyjets being $600k in arrears, which suggests that this was the internal understanding at this time.

iii) Second, Mr Hallows' response to Duff & Phelps of 2 October 2012 stating that "the stakeholder management of this customer is very poor" and might drive Lombard to exit the relationship. Mr Hallows accepted that the email was unwise and an "overshare", but it was a reaction to Duff & Phelps' email to him referring to continuing difficulties in getting information from Mr Westlake and Mr Humphrey and what was said to be their disappointing engagement. This was not an attempt to colour Duff & Phelps' view, but an (unwise) acknowledgement of mutual frustration.

iv) Third, the fact that an email sent *internally* referring to $600k of arrears (see ii) above) was part of an email chain later sent to Duff & Phelps for the purpose of informing them that a decision to re-possess had been taken. Any suggestion that the figure of $600k circulated internally was believed to be false, and generated for the purpose of conveying a false impression to Duff & Phelps by sending Duff & Phelps an email chain which included it, would be entirely unrealistic.

v) Fourth, the failure to tell Duff & Phelps that Skyjets had (unintentionally) made two payments to Lombard – an event which would have no material impact on Skyjets' cashflow because the reduction in the Lombard debt would be off-set by an increase in the Barclays Bank Plc (**Barclays**) overdraft. In any event, Duff & Phelps were copied into an email which referred to the double payment the following day.

vi) Finally, the fact that on 5 November 2012, Mr Hallows informed Duff & Phelps that it was apparent from the cashflow forecasts that the Sky Parties' business was not viable. However, as I explain below, that was simply parroting back to Duff & Phelps the conclusion that Duff & Phelps had just communicated to Mr Hallows.

55. I accept that Mr Hallows viewed the Skytime business as unviable, and fully expected Duff & Phelps so to report. However, I do not accept that he set about engineering this outcome.

56. On 24 September 2012, Mr Westlake sent an email to Mr Griffiths saying, "did you know that $190,000 of the arrears for Lombard are penalty charges from December 2011 to August 2012?" Mr Hallows sent a further updated statement of account on 5 October which now included 10 late payment fees. Mr Humphrey emailed Mr Hallows in response stating that $248,413.89 was on its way and that this was "all I have been authorised to release by the shareholders pending discussion of penalties and fees on the account". Mr Westlake sent a further email that day which also referred to the need to meet and discuss "your penalty charges and the current mortgage payment due".

57. Once again, Mr Humphrey had clearly studied the updated statement of account with care because he sent an email that afternoon stating:

> "Just to clarify the arrears charges stated as 10% in your email below. Charges against the account on 4/11/2011 and 28/11/2011 appear to have been calculated at 15%. Could you please look into this for me please".

58. This was a reference to the figure unilaterally imposed by Mr Holding in late 2011, although it is once again noticeable that no direct challenge was mounted to the entitlement to levy charges at all. Mr Hallows accepted that the point raised by Mr Humphrey was a good one but he spotted that it would have been possible to levy a further 10% charge (on Lombard's then-case) on 31 December 2011, which negated the amount of any credit.

59. On 26 September 2012, Mr Humphrey sent Duff & Phelps a Short-Term Cash Flow Forecast (**the First STCFF**) and a Long-Term Cash Flow-Forecast (**the First LTCFF**),

60. There were exchanges about fixing a meeting, but on 8 October 2012 Mr Hallows said he could see no merit in meeting, given the level of arrears and the lack of co-operation on Skytime's part with Duff & Phelps. The letter also responded to the issues raised about the penalty charges by saying:

> "I would refer you to the terms of the Loan Agreement and Aircraft Mortgage. The late payment charges are added to your account when you are late in paying".

That was an unhelpful response, and, as I have noted, the Loan Agreement did not give a right to charge such fees. Mr Westlake replied:

> "We are unable to pay your penalty charges in this timescale. I am aware you are asking for some $250,00 in late payment fees for a period of 10 months …. Please can you provide a detailed breakdown as to how these charges have been calculated."

Once again it is noteworthy that Mr Westlake did not mount any direct challenge to Lombard's entitlement to charge such a fee, but only as to the calculation of the fee and the time for payment. Mr Hallows said he regarded this query, and a similar one relating to the amount of Duff & Phelps' fees, as delaying tactics. He sent a rather curt (but accurate) response stating that "the calculation of the late payment charge is apparent

from the statement of account". A slightly longer response – addressing the issue of how many weeks in arrears the account was – followed later that day, which was soon followed by a revised statement of account.

61. On 8 October 2012, Duff & Phelps sent Mr Hallows an update based on what they described as "the limited information we have been provided with to date" saying that they were unable to provide any comfort as to the group's short-term viability. They described the First LTCFF produced by Skytime as "significantly overstated".

62. A further payment of $165,599.36 was made on 9 October 2012 (Skyjets having intended to pay a single instalment of $82,500, but two instalments having been paid due to an error at Barclays). Mr Hallows acknowledged the payment on 10 October 2012, and in response Mr Humphrey asked for confirmation of the sum received because "this does not tally with the payments I have raised at this end" (a reference to the fact that Mr Humphrey had only authorised one instalment to go out). The net effect of this unintended overpayment was that Skyjets' account was, at this point, in credit by $82,624.64.

63. On 10 October 2012, Mr Hallows wrote to Mr Westlake and Mr Humphrey referring to the additional payment just received but stating (on Lombard's case at this trial, wrongly) that there were still arrears of $154,701.36, with late payment on 28 September 2012 triggering a further late payment fee which would fall due on 28 October 2012. It stated:

> "It really is essential to bring your account up to date and to do this you will need to pay the balance of the arrears this months scheduled payments on time a combined total of $294,376.91".

The letter also referred to "concerns over the asset cover ratio" which Mr Westlake had promised to take up with Mr Stephenson. The letter asked Mr Westlake to "consider and prepare proposals" for new investors in the business which it was said would address the ACP issue.

64. In response to this letter, Mr Westlake did challenge the 10% charge more directly, stating:

> "In order for us to consider your requests I would appreciate some understanding as to how you justify the 10% late payment fees applied to our account over the past year or so.
>
> I understand that late payments create extra interest charges and administration costs. We know that Lombard are very transparent regarding their fee structure and costs associated. Please can you give me some idea of what the late payment charges of $250,000 relate to in order for us to understand what we are paying for".

To legal eyes, at least, the communication appears to have been written with a possible eye to a penalty argument. Mr Hallows replied stating that he had read back through the file to answer the question, and he attached a copy of the 6 January 2012 letter, describing the charges as a variation to the standard terms of the facility, and saying it had been agreed between Mr Westlake and Mr Holding at a meeting and then documented in the letter. He then made the fair point that:

> "Had you indicated at an earlier time that you did not agree the Late Payment Fee then perhaps we would not have allowed forbearance in terms of working outside of the Agreement accepting late payments".

Mr Westlake did not challenge the email, but thanked Mr Hallows for his explanation. Mr Hallows sent a copy of his email to Mr Paul Tunstall in Lombard, who appears to have questioned the attempt to charge late payments, saying:

> "You said you do not agree with our late payment fee. See below and it should put it into context for you".

It is, in my view, significant that Mr Hallows was offering this justification for the charges both internally and externally. It is clearly what he believed the position to be.

65. Over the following days, there were issues as to Duff & Phelps' fees (eventually resolved when it was agreed that they would be capped at £15,000) and complaints by Duff & Phelps about Skyjets' failure to sign an engagement letter and provide information. On 17 October 2012, Mr Wiles of Duff & Phelps sent Mr Hallows a rather flippant email referring to the Aircraft's identification designation (G-SNZY), saying "I think that it may be time to collect snzy from the enchanted forest!" Mr Coppel QC's suggestion that the email took this form because "he knows what conclusions you want him to reach and he's saying 'yes, we're going to do it'" was an unrealistic forensic overreach, however misplaced the email's tone.

66. On 28 October 2010, Mr Westlake sent an email to Wei Zhang of GRG and Ms Bowron of Lombard saying Lombard would receive a further $50,000 by the end of the week "plus the remaining USD 275k by 20th November latest". This appears to state that a payment would be made which would include the late penalty charges.

67. A meeting between Lombard and Skyjets was arranged for the week of 8 November 2012. On 5 November 2012, Duff & Phelps gave Lombard an interim update, including their comments on the further short-term cash flow forecast (**the Second STCFF**) and long-term cash flow forecast (**the Second LTCFF**) which Mr Humphrey had prepared and provided to Duff & Phelps on 30 October. Duff & Phelps advised Lombard that Skyjets was "not in a position to repay its debts as and when they fall due and is insolvent on a cash flow basis". Mr Hallows responded stating that "it is apparent that the short and long term forecasts demonstrate that the customer is not viable now and will in the future be unable to service its Lombard facilities". Mr Hallows stated that it was his intention to terminate the Loan Agreement and re-possess the Aircraft. That strategy was approved by Mr Chris Townsend of Lombard, "unless customer pulls a rabbit out of the hat". I am satisfied that Mr Hallows went to the 8 November meeting with the strong expectation of terminating the Loan Agreement there and then, unless something unanticipated and significant occurred, albeit this was not revealed to Skyjets.

68. On 8 November 2012, Mr Hallows, Ms Bowron and Mr Welling of Lombard met Mr Westlake and Mr Humphrey of Skyjets and Mr Cowen of Danesmoor. The following day (Friday) Mr Hallows prepared a typed-up note of that meeting. The notes were circulated to the other Lombard attendees (Mr Welling and Ms Bowron) for their corrections on Monday 12 November. They were not provided to Skyjets for their agreement (any more than any notes taken on the Skyjets' side were provided to

Lombard) but given that the meeting had moved the parties' relationship into a more contentious phase, I do not find this particularly surprising.

69. There are details in the note which are not accurate, and I accept Mr Hallows' evidence that the meeting took place without him having access to the files to check finer points of detail. Subject to that limitation, I am satisfied that the note is a broadly accurate account of what would have been a dynamic meeting, albeit it would not have possible to capture the full to and fro. I am satisfied that at the meeting:

i) Mr Hallows expressed disappointment at the failure to clear what Lombard said were the arrears of $294,000, at lack of co-operation by the Sky Parties with Duff & Phelps and that he expressed the view that the business was not viable.

ii) Mr Cowen produced Danesmoor's strong financial statements and referred to plans to recapitalise the business.

iii) When shown the statement of arrears, Mr Cowen queried the late payment charges, and Mr Hallows said that these had been agreed at a meeting in January 2012 (sc. December 2011) and referred to in a letter of January 2012, by way of a variation to the standard terms. Mr Westlake stated that the late payment fee had not been agreed and that Skyjets wanted to dispute it, to which Mr Hallows responded that he had not previously been aware of such a dispute.

iv) Mr Hallows was challenged in cross-examination about that statement, it being suggested that "Mr Humphrey and Mr Westlake had been questioning more than once Lombard's imposition of a late payment charge". As I have explained, on most occasions, Mr Humphrey and Mr Westlake had queried the *calculation* of these fees, sometimes the time for payment, and on other occasions had confirmed that there were no issues with the statement of account which included such figures (or at least without identifying that the penalty charges were an issue). There were also occasions when they had come closer to a direct challenge, but when Mr Hallows had set out Lombard's account of the history, they had backed off. Mr Hallows' position at the meeting was, therefore, something of a shorthand, and for that reason not completely accurate (as he accepted). However, I am satisfied that he believed that there had been no real or sustained attempt by Skyjets to challenge Lombard's right to impose late penalty charges, and that that was a reasonable interpretation of what had happened.

v) It was also suggested that Mr Hallows' statement at the meeting that the ACP issue had been raised throughout 2012 was dishonest. However, an ACP breach had been raised in the letters of 6 January and 27 March 2012, and there were references in later correspondence to Skyjets' failure to engage with those letters (e.g., on 2 May 2012). A note in May 2012 refers to Mr Westlake having told Mr Holding that when the restructuring of Skytime had been completed, the LTV breach would be covered by the expected cash injection. As I explain below, at a meeting on 3 October 2012 Mr Westlake told Mr Stephenson of Danesmoor that Lombard was alleging a breach of the ACP requirement. Given that Mr Hallows did not have access to his own files when making the statement at the meeting of 8 November, I am satisfied this statement was substantially accurate and honestly made.

vi) The note records Mr Hallows as stating:

> "We are here to terminate the facility and the only thing that would stop that happening is if all arrears are cleared. Also noting the other defaults in respect of the facility, change of control, asset cover ratio and material adverse conditions which would justify termination in their own right irrespective of the $294k arrears and missing the 28 October 2012 scheduled payment".

Fairly read and in context, I accept Mr Hallows' evidence that this did not state that the only issue was the arrears. There were other matters which had to be addressed (as vii) confirms).

vii) When Mr Westlake asked about rescheduling the arrears, Mr Hallows stated that the poor payment history, the ACP and negative reports from Duff & Phelps made this impossible. Mr Cowen was told that even if the arrears were cleared immediately, Lombard would want funds from Danesmoor paid into a secured account by way of a guarantee of future payments, which Mr Cowen said he could not agree to.

viii) The meeting then broke up temporarily, so Mr Hallows and the Lombard team could go outside and speak to Mr Townsend about what form of offer from Danesmoor might be acceptable. When they returned to the room, Mr Cowen said he was seeking legal advice about the late payment fee. There was also discussion about the ACP shortfall, Mr Cowen indicating agreement to Lombard's calculation as put forward at the meeting of a shortfall of about $1 million. He said that Danesmoor was not willing to put forward proposals at the meeting because of the late payment fee.

ix) Mr Humphrey was asked about other trade creditors, and said their trade creditors in the sum of £250,000, an HMRC debt in an unknown amount, and two instalments outstanding to Clydesdale on the Clydesdale Aircraft. I accept that Mr Cowen manifested surprise at these figures, as is clear from Danesmoor's later communications with Skyjets which I set out below.

x) Mr Hallows handed Mr Westlake the termination notice dated 8 November 2012 (**the Notice**).

xi) After receiving the Notice, Mr Westlake handed over the keys, logs and records for the Aircraft.

70. The Notice provided as follows:

> "As you were made aware from [the letter dated 19 September 2012 from AG] you are currently in arrears in respect of the Agreement. Whilst I recognise the attempts that you have made to reduce the arrears, including the part payments of US $248,408.49 on 5 October 2012 and a further US $165,599.36 on 9 October 2012, there are still arrears totalling £294,376.92 outstanding.
>
> Under clause 9.1 of the Agreement the failure to make any payment due under the Agreement is an Event of Default. Clause 9.2 of the Agreement therefore applies.

> In accordance with clause 9.2 we hereby give you notice that the loan facility contained in the Agreement is cancelled and you are therefore required to immediately pay the full amount due under the loan facility. The sum due from you is currently $5,879,361.06.
>
> As you are aware, in support of the Agreement, you entered into an Aircraft Mortgage (the Mortgage). In accordance with clause 8.1 of the Mortgage we hereby give you notice that the Aircraft, as the security under the Mortgage, has become enforceable and we are exercising our powers and remedies as mortgagee of the Aircraft. These powers and remedies include the obtaining of possession of the Aircraft and appointing an agent to sell the Aircraft."

71. On 9 November 2012, Danesmoor lent Skytime £150,000 while their investigations continued into the company's affairs. On 30 November 2012, Mr Stephenson and Mr Cowen of Danesmoor made contact with an insolvency practitioner, who was engaged on 5 December 2012. Danesmoor advanced a further £100,000 to Skytime on 7 December 2012. On 17 December 2012, Skytime went into administration.

72. I am going to deal with the subsequent steps taken by Lombard to sell the Aircraft below.

## C2 Was Lombard entitled to terminate the Loan Agreement under clause 9.1(a) for a default in the payment of principal, interest or any other sum payable under the Transaction Documents?

### *C2(1) The contract terms*

73. Clause 9.1(a) of the Loan Agreement provides:

> "**9. EVENTS OF DEFAULT**
>
> **9.1 Defaults**
>
> There shall be default if:
>
> (a) the Borrower…defaults in the payment of principal or interest or any other sum payable under any Transaction Document …".

74. Clause 4.1.1 of the Loan Agreement (under the heading "Repayment Terms") provides:

> "The Borrower shall repay the Loan and shall pay interest on the Loan to the Lender in instalments in the amounts and on the Payment Dates specified in the Loan Details until the Loan has been repaid in full."

75. By clause 14.1 of the Loan Agreement, all payments were required to be made in cleared funds by 10am on the due date. Clause 4.3 of the Loan Agreement provided:

> "Time shall be of the essence for all payments due from the Borrower hereunder."

76. Clause 22 also provided that "Time shall be of the essence as regards the times and dates referred to in this Agreement…".

77. Clause 9.2 provided:

> "At any time after the occurrence of an Event of Default the Lender may by notice to the Borrower: (a) cancel the Facility and require the Borrower immediately to repay the loan together with accrued interest and all other sums payable under this Agreement…"

***C2(2) Must any default be continuing as at the date of purported termination under clause 9.2?***

78. As I have set out above, there can be no doubt that Skyjets had repeatedly failed to pay the monthly instalments when due. The issue which arises is whether it can rely on those failures for the purposes of justifying its termination on the basis of clause 9.1(a), or whether, for that provision to be invoked, there has to be an amount outstanding at the date of termination.

79. As a matter of construction, I am satisfied that clause 9.2 does not require the default to be continuing at the date the notice of cancellation is served. There is clearly a breach of clause 9.1(a) whenever an amount due is not paid when it is due to be paid, and clause 9.2 is not expressed to require an Event of Default to be continuing, but on the contrary provides that the right may be exercised "at any time" after the Event of Default. There are other provisions of the Loan Agreement which are conditional upon the continuation of an Event of Default (clause 2.2(b) as to Lombard's obligation to advance the loan sum and clause 8(k) in which the exercise by Lombard of a right of inspection arises "following the occurrence of an Event of Default which is continuing").

80. That conclusion derives support from the decision of the House of Lords in Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia (The Laconia) [1977] AC 850, in which the charterer failed to pay a hire instalment by the required time, but had made the payment, which had been received by the owner's bank, before the notice of withdrawal took effect. In that case the right of withdrawal arose "failing the punctual and regular payment of hire". Lord Wilberforce observed (at p.868):

> "It must mean that once a punctual payment of any instalment has not been made, a right of withdrawal accrues to the owners. Conversely, it is incapable of meaning that a charterer who has failed to make a punctual payment, can (unless the owners have waived the default) avoid the consequences of his failure by later tendering an unpunctual payment. He would still have failed to make a punctual payment, and it is on this failure and by reason of it that the owners get the right to withdraw."

It is noteworthy than, when considering the decision of the Court of Appeal in Empresa Cubana de Fletes v Lagonisi Shipping Co Ltd (The Georgios C) [1971] 1 QB 488 that the provision in the Baltime charterparty providing "in default of payment the owners to have the right of withdrawing the vessel from the service of the charterers" should be interpreted as meaning "in continuing default", Lord Wilberforce observed at p.868:

> "I regret that I cannot agree with this interpretation … The words 'in default of payment' must relate to the obligation to pay monthly in advance which this clause imposes. It is this failure to pay - in advance - which constitutes the default, and this cannot be cured by late payment. The Court of Appeal have in effect construed

> the words 'in default of payment' not as meaning 'in default of payment in advance,' but as meaning 'in default of payment whether in advance or later, so long as the vessel has not been withdrawn. This is a reconstruction not a construction of the clause."

81. For these reasons, I do not think that a term can be implied into the Loan Agreement that "insofar as a notice or demand invoked an event of default under clause 9.1(a), Skyjets remained in default of that clause as at the date of the notice or demand". That is also true of clause 8.1 of the Mortgage, which permits a notice to be served "at any time after" the occurrence of an Event of Default.

82. The apparent severity of that approach – and the risk that a creditor might sit on the right of termination arising from a late paid instalment, only to exercise its right of termination much later – is modified by the doctrine of waiver, under which the conduct of the creditor in the period after receipt of the late payment may be held to have waived any right to terminate on account of that late payment (or by the doctrine of estoppel). Lord Wilberforce also addressed this issue in The Laconia, noting at p.871:

> "The charterers had failed to make a punctual payment, but it was open to the owners to accept a late payment as if it were punctual, with the consequence that they could not thereafter rely on the default as entitling them to withdraw. All that is needed to establish waiver, in this sense, of the committed breach of contract, is evidence, clear and unequivocal, that such acceptance has taken place, or, after the late payment has been tendered, such a delay in refusing it as might reasonably cause the charterers to believe that it has been accepted."

83. In this case, there is no dispute that Skyjets was in arrears at 5 October 2012. The account moved into credit on that date due to the unintended (but late) overpayment on 10 October 2012, and Lombard does not contend that the account went into arrears again until 28 October 2012 (which is disputed, but which, if correct, would involve a continuing default in payment as at 8 November 2012, and which I consider in this context).

84. Did Lombard accept the payment on 10 October 2012 "as if it were punctual" or had there been such a delay in refusing it "as might reasonably cause the charterers to believe that it has been accepted" as a punctual payment? Significant in this respect is Lombard's email of 10 October 2012 which provided:

> "I am pleased that since our correspondence and discussions on Monday you have made further payments totalling £165,599.36. Please see attached an up-to-date Statement of Account.
>
> You will note that your mortgage account remains $154,701.36 in arrears and we remain uncomfortable with your payment history and your short term cash flow. Despite this and as a gesture of goodwill we will allow more time to bring the balance of the arrears up to date. You will note that the next scheduled payment is due on 28 October and also last months Late Payment Fee in the sum of $56,870.92 also falls due on 28 October 2012. It really is essential to bring your account up to date and to do this you will need to pay the balance of arrears [and] this month's scheduled payments on time …".

85. Fairly read, this communication clearly involved an offer of additional time to clear whatever was outstanding, and thereby render it "punctual", and made it clear that it was the position following 28 October 2012 which would be determinative. I am satisfied that it is implicit in this communication that Lombard was waiving any right to treat payments made to date, but late, as Events of Default so as to give it the right to terminate on 28 October 2012 whatever happened. Further, Lombard had purported to charge Skyjets for previous late payments, added those charges to the total said to be due, and charged interest on the late payments. That decision to assert contractual entitlements arising from the late payments was, in my view, consistent only with Lombard deciding to keep the contract in being notwithstanding the late payments prior to 10 October. To the extent, therefore, that Lombard seeks to justify its termination on 8 November 2012 by reference to sums paid, but paid late, prior to 10 October 2012, it is not entitled to do so.

86. Lombard seeks to rely in response on clause 12 of the Loan Agreement, and what it describes as the "No Waiver Statement" which appears in Lombard's correspondence. Clause 12 provides:

> "No failure and no delay in exercising on the part of the Lender …. of any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege preclude the further exercise of such one or any other right, power or privilege whether hereunder or otherwise".

87. However, the waiver I have found does not result solely from a failure to exercise or delay in exercising a right, but on the positive statements made in the 10 October 2012 letter and the positive assertion of contractual entitlements said to arise from the late payments. While a contractual "no waiver" provision of this kind may be of great significance in making clear that what are often the inherently equivocal events of a delay or omission to act should not be understood as a waiver, that is not the position here.

88. The "No Waiver Statement" which appears in Mr Hallows' email of 10 October 2012 and elsewhere provides:

> "This correspondence is without prejudice and Lombard fully reserves its rights in respect of the identified breaches being arrears on the Loan Agreement and an insufficient Asset Cover ratio".

89. I do not accept, however, that the ritual incantation of this language can prevent anything said or done in the preceding letter from having its objective effect. I considered a similar issue in SK Shipping Europe Plc v Capital VLCC 3 Corp [2020] EWHC 3448 (Comm), [207]-[211], and concluded that it was not invariably the case that acting under a reservation of rights would prevent an affirmatory act (and I am satisfied that this is also the case for waiver, which is also a species of election). I understand the Court of Appeal ([2022] EWCA Civ 231) to have agreed with that summary of the law (at [73]-[75]), Males LJ holding at [75]:

> "I do not accept Mr Rainey's submission, based on what is said in *Wilken, The Law of Waiver, Variation & Estoppel* 2nd Ed (2012), para 4.14, that the only way in which a relevant reservation of rights cannot preserve a party's position is if the reservation is a sham. While a reservation of rights will often have the effect of

> preventing subsequent conduct constituting an election, this is not an invariable rule. The court must have regard to all the circumstances, including the nature and terms of any reservation of rights which has been communicated and the nature and consequences of any demand for future performance. The judge was careful to say that an unconditional demand for future performance 'may' be incompatible with a reservation of rights, not that it necessarily will be".

The decision in Tele2 International Care Company SA v Post Office Ltd [2009] EWCA Civ 9, [55]-[56] is to similar effect.

90. In this case, I have concluded that the clear effect of the 10 October 2012 email was to give Skyjets until 28 October 2012 to regularise the position so far as payment was concerned, and that it was implicit in that offer that, if this was done, Lombard was not reserving the right to serve a clause 9.2 notice for past delays in payment. While the "No Waiver Statement" is likely to have prevented this communication having any wider effect should Skyjets not take the opportunity to regularise the position by 28 October 2012, I am satisfied that it does not prevent the 10 October 2012 email from having that limited effect.

### *C2(3) Was there a further clause 9.1(a) breach after 10 October 2012?*

91. Lombard contends that, in any event, it is "not in issue" that as at 28 October and 8 November 2012, the sum of $179.99 was outstanding under the Loan Agreement (this being the amount outstanding, on Lombard's case, once the late payment charges to which it now accepts it was not entitled are taken out of account).

92. In support of its contention that these amounts are "not in issue", Lombard points to passages in Skyjets' statements of case which plead the amounts which Skyjets paid, which amounts are those which Lombard says it received (and which give rise to the apparent $179.99 shortfall). While there are certainly passages in Skyjets' pleading which suggest that the figures which would produce the $179.99 shortfall are asserted as part of the Sky Parties' own case, the position on the statements of case is more nuanced than that, particularly given the prior history of the litigation:

i) Skyjets' Defence and Part 20 Claim denied breach of the Loan Agreement and denied there was *any* outstanding balance.

ii) Its pleaded case as to the arrears as at 5 October 2012 is consistent with an alleged $179.99 deficit as at 28 October 2012, and as to adopting Lombard's pleaded case as to the amount of payments made. However, the relevant paragraph (paragraph 74) continues:

> "Skyjets reserves the right to adjust down the arrears figures (including so that the figures become a credit in Skyjets' favour) upon the Claimant giving full disclosure of payments received from Skyjets and of their application by the Claimant to amounts due under the Loan Agreement".

I would note that Skyjets' expectation of disclosure on this issue would not be consistent with there being no issue in the case as to the amount of the payments and the balance at any one time.

iii) Paragraph 79 was in similar terms. It also describes the figure of $179.99 as "all that Skyjets was, *according to the Claimant's account*, actually due to pay".

iv) Paragraph 83 pleaded a case as to the position "*if in fact* Skyjets was not in default as at 28 October 2012 (*which Skyjets will only be able to determine definitively upon the Claimant giving it the disclosure set out in paragraph 79(9) above*)".

v) Paragraphs 84 and 86 pleaded payments made by Skyjets as at 8 November 2012 in amounts which were consistent with the $179.99 deficit. Paragraph 87 once again reserves a right to amend the figures once Lombard had given disclosure.

vi) Paragraph 91 pleaded "*if* Skyjets were in arrears in respect of the Loan Agreement, those arears were *at most* $179.99 (as has now been admitted by the Claimant and which the Claimant is now estopped from alleging or seeking to prove that they were more)".

93. It is fair to say that the Defence and Part 20 Claims does not speak with an entirely consistent voice on this issue. Looking at its overall effect, however, I am satisfied that Lombard must have understood that Skyjets was not in a position to advance any positive case as to the figure (and I would note that both Master Dagnall and I rejected a very late attempt by Skyjets to do so), but that the figure was one which it was for Lombard to establish, if it was necessary to do so. In effect, the figure of $179.99 was not admitted. That conclusion is supported by other documents which, given the ambiguous nature of the statements of case, I am entitled to have regard to:

i) The hearing before Mr Justice Freedman in early 2020 which referred to the fact that it was possible that it might be found at trial that the sum of $179.99 was not due.

ii) Mr Westlake's witness statement exchanged on 10 September 2021 which referred to the shortfall of $179.99 as arising from "disputed payments".

94. I have no doubt, therefore, that Lombard knew that the question of whether there had been a $179.99 default was a matter which would be decided at the trial. In circumstances in which Lombard bears the burden of proving that it was entitled to terminate the Loan Agreement under clause 9.1(a) as at 8 November 2012, I am satisfied that it is for Lombard to establish that there was an outstanding balance as at that date.

95. The Loan Agreement provides as follows:

i) Clause 4.2.6: "The Borrower shall ensure that the Lender receives all instalments and other sums due to the Lender in full notwithstanding any bank or other charges that may be deducted from any payment that the Borrower makes."

ii) Clause 14.1: "All payments to be made to the Lender pursuant to this Agreement or any other Transaction Document shall be made to the account specified in the Loan Details (or to such other account as the Lender may notify to the Borrower

in writing) in cleared US Dollar funds by 10.00 a.m. London time on the due date." The Loan Details referred to an account 42007194 ("the Loan Account").

iii) Clause 14.2 provided "All payments by the Borrower under this Agreement or any other Transaction Document are to be made in immediately available funds free and clear of and without any withholding or deduction for any and all present or future taxes, duties, levies, fees or other charges and without any set-off or counter-claim whatsoever."

96. I am satisfied that the effect of these provisions was as follows:

i) Payment had to be made into the Loan Account and was not made until and to the extent that there had been an unconditional crediting of the amount due to that account (The Brimnes [1975] QB 929, 948).

ii) Charges deducted from a payment initiated by Skyjets which led to a lesser sum being credited to the Loan Account are for Skyjets' account (clause 4.2.6).

97. Lombard must, therefore, establish on the balance of probabilities that the amounts credited to the Loan Account in respect of the following instalments were the roman figures below (I explain the italicised figures in [98(iii)]:

i) 28 March 2012: $82,772.06 rather than $82,804.63 (*$82,760.66)*.

ii) 30 April and 4 May 2012: $49,995.09 (*$49,943.45*) and $32,760.02 *($32,748.45)*($82,755.11) (*$82.691.90*) rather than $82,804.63.

iii) 3 August 2012: $82,761.63 rather than $82,804.63 *($82,750.48*).

iv) 5 October 2012: $248,408.89 rather than $248,413.89 *($248,397.91)*.

v) 9 October 2012: $165,599.36 rather than $165,609.26 (*$82,788.21 and $82,788.23*).

98. Lombard has produced the following documents:

i) Statements of Account which appear to be drawn from the computer system in ii) and manual calculations on spreadsheets.

ii) Entries from a computer system entitled:

"D00051 European Skyjets Ltd"

which shows payments received in the amounts for which Lombard contends (that of 9 October in the form of two payments of $82,799.68 reflecting the double payment accidentally made by Barclays). It is clearly a system into which manual inputs can be made. There is no dispute as to the entries in this document for the other payments made by Skyjets. All of the receipts have the notation "TTCA CR" next to them.

iii) Extracts from what Ms Katie Willis, Managing Legal Counsel at NatWest Group Plc, described as "historic ledger information" identified by the "C&CC

> Customer Service team". The extracts from that document describe it as "Lombard Marine US Dollar Account", "Current UK United States Dollars 140/00/42007194" (i.e., the Loan Account) which Ms Willis says was closed on 30 September 2016. It records a series of different (and lower) figures for receipts (which I have included in italics at [97] above). No explanation has been offered for the difference.

99. I remind myself that, on the Sky Parties' case, a great deal turns on what, on any view, is a trifling amount, that the burden of proving its entitlement to accelerate the Loan Agreement lies on Lombard, that only Lombard can know what amounts were credited to the Loan Account and why different figures appear in different Lombard documents and that Lombard ought to have the resources to pull together the relevant evidence, if necessary by calling a witness from Lombard Marine who maintained the Loan Account. Against this background, I am not able to find that Lombard has discharged its burden. Accordingly, Lombard has not established an entitlement to serve the Notice on the basis that there was a $179.99 default as at 28 October (or 8 November) 2012.

***C2(4) Was any breach de minimis or did it render it inequitable to realise the security?***

100. If I had decided the previous issue in Lombard's favour, I would have rejected Skyjets' argument that the failure was de minimis. Certainly at the level of dollars rather than cents, I do not accept that there is scope for a de minimis obligation so far as the failure to pay instalments under a loan is concerned (Bank of New York Mellon v GV Films [2009] EWHC 3315 (Comm)). When the parties have made a breach of a particular obligation a condition (giving the right to terminate), that right is available "without regard to the magnitude of the breach" (Mustill LJ in Lombard North Central v Butterworth [1987] QB 527, 535).

101. If the payments made were not sufficient to discharge the outstanding debt, then there was a default and an entitlement on Lombard's part to serve a clause 9.2 notice. I do not accept that it would be appropriate for equity to seek to intervene to prevent the operation of a right of acceleration under a commercial loan agreement (Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd (Nos 3 to 5) [2016] AC 923, [74]). I deal with the issue of whether clause 9.2 is a penalty below.

102. I am satisfied that it cannot credibly be argued here that Lombard took possession for any reason other than a desire to secure repayment of outstanding loan. I accept that there would be jurisdiction, in appropriate circumstances, to relieve against forfeiture so far as enforcement of the aircraft mortgage is concerned (Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd (Nos 3 to 5)), albeit the commercial nature of the transaction might militate against such relief. In this case, however, it is far too late for any such relief to be sought (Keshwala v Bhalsod [2021] EWCA Civ 492).

**C3 Can Lombard rely upon another Event of Default for the purposes of the Termination Notice?**

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.

108. Notice of cancellation under clause 9.2(a) permits Lombard to require Skyjets immediately to repay all sums due. It does not, however, require Lombard accurately to specify the amount of the same. I accept that the Notice here did not accurately state the sum due (because it included claims for accrued late payment charges which it is now accepted were not due) but that does not prevent the demand for repayment being effective (Bank of Baroda v Panessar [1987] 1 WLR 33, 346-47), still less render the clause 9.2 notice invalid. While Panessar was a case in which the notice contained no

statement of the arrears at all, Walton J cited with approval the decision of the High Court of Australia in Bunbury Foods Pty Ltd v National Bank of Australasia (1984) 51 ALR 609 that an error in a notice as to the amount due does not vitiate the notice, and reasoned from that premise to arrive at the conclusion that a failure to specify any amount did not have such an effect (at p.347). That conclusion has been followed in other cases (e.g., County Leasing Limited v East [2007] EWHC 2907 (QB), [121]-[124] and Tridos Bank v Dobbs [2004] EWHC 845 (Ch), [234]).

109. For the same reasons, provided that there had been an Event of Default at the date of the Notice, I am satisfied that the Notice was effective under both clause 9.2 of the Loan Agreement and clause 8.1 of the Mortgage.

110. Mr Coppel QC submitted of Lombard's case that it could rely on other Events of Default beyond that identified in the Notice:

> "If that is what a major UK bank thinks, the Court should not encourage such thoughts. It is another deeply unattractive proposition from Lombard, in which the Court is being urged to bend the language of Lombard's drafting so as to excuse what it now thinks were omissions in its 8 November 2012 letter. It does so regardless of basic precepts of contractual interpretation, regardless of practicality of implementation, and regardless of basic commercial decency. The Court should not countenance such a one-sided reading".

111. The conclusion I have reached, however, reflects hornbook principles of contract law, and the clear effect of the Loan Agreement applying conventional principles of interpretation.

**C4 Was there an Event of Default under clause 9.1(o)?**

112. Clause 9.1(o) of the Loan Agreement provides:

> "There shall be default if:
>
> (o) any representation, warranty or statement made to the Lender by any Group Company…in or in connection with any Transaction Document proves to have been incorrect in any material respect when made (or deemed made) or if repeated at any time by reference to the facts or circumstances subsisting at that time would no longer be true and correct in all material respects."

113. By clause 7.1(l), Skyjets represented and warranted that:

> "each Maintenance Agreement constitutes the entire agreement between the Borrower and the relevant Maintenance Performer relating to the maintenance of the Aircraft (or the relevant engine or parts) and is in full force and effect and neither the Borrower nor the Maintenance Performer is in breach of any of its obligations thereunder."

114. Clause 7.2 provided that this representation and warranty were deemed to be "repeated on each day until the Loan is repaid in full, *with reference to the facts and circumstances subsisting at that time"*. Mr Coppel QC argues that this only repeats a representation

made as to the position at the date of the Loan Agreement and not thereafter, but that ignores the italicised words, and also the terms of cause 9.1(o) ("if repeated at any time by reference to the facts or circumstances subsisting at that time would no longer be true and correct in all material respects.")

115. By clause 8(g), Skyjets undertook not to terminate any Maintenance Agreement.

116. There is an issue as to whether there was any Maintenance Agreement for the purposes of the Loan Agreement:

i) "Maintenance Agreement" is defined as "in cases where the Buyer will subcontract to a third party all or part of the maintenance of the Aircraft, the engine or any other major component … each agreement between the Borrower and the relevant Maintenance Performer providing for the maintenance of the Aircraft … by the relevant Maintenance Performer, each in such form as may be acceptable to the Lender".

ii) The words "in cases where the Buyer will subcontract to a third party all or part of the maintenance of the Aircraft, the engine or any other major component" are intended to distinguish between cases in which the borrower will contract for others to perform maintenance work, and cases in which the borrower will do that work itself. It is not disputed that Skyjets was a borrower who intended to sub-contract that work.

iii) The MSP Service Plan did "provide for" the maintenance of the Aircraft by Honeywell. On the best evidence as to its terms, Honeywell was described as delivering "parts and labor" for periodic inspections, unscheduled maintenance, alert service bulletins and replacement units during unscheduled maintenance. The fact that these services would be provided in whole or in part by Honeywell through approved sub-contractors does not change the position.

iv) The principal issue here arises from the fact that the Maintenance Provider section of the Loan Details was left blank. Skyjets argues that there can be no agreement between Skyjets and "the relevant Maintenance Performer" if no Performer is identified.

v) However, there is nothing in the definition of "Maintenance Agreement" which makes that clause contingent on the Maintenance Performer(s) being identified in the "Loan Details". That is equally true when the expression "Maintenance Agreement" appeared in clauses 7.1(1) and 8(g). Rather the clauses will apply to agreements of the relevant kind in place when the Loan Agreement is concluded, with the entity who contracts to perform the maintenance under the agreement. That conclusion is reinforced by the fact that the reference to Maintenance Performer in the Loan Details appears in a section dealing with "Aircraft Details", which suggests that its role is to provide information (rather than, as the Sky Parties contend, being an entry which must be completed to bring a number of the provisions of the Loan Agreement into operation).

vi) It is also reinforced by the fact that clause 8(g) contemplates that there may be a replacement Maintenance Agreement with a replacement Maintenance Performer, who will not, by definition, be identified in the Loan Details.

vii) I am satisfied on the material before me that the MSP Service Plan was already in place at the time Skyjets acquired the Aircraft and was (initially) maintained by it following the purchase. Emails exchanged between Skyjets and Honeywell in December 2009 refer to the MSP Service Plan being in place "from the date of the aircraft purchase" and an email from Honeywell of 4 March 2010 identified the effective date of the contract as 15 July 2008 and refers to payments being made from then to November 2009.

117. As I have explained, Mr Westlake cancelled the MSP Service Plan in February 2010 (with effect from November 2009); and no notice was given of this cancellation to Lombard until May 2012.

118. I am satisfied that the cancelation of the MSP Service Plan placed Skyjets in breach of the (continuing) representation and warranty made by clauses 7.1.1 and 7.2, and that this constituted an Event of Default. For what it is worth, it was a continuing Event of Default. Skyjets has not alleged that any such breach had been waived, and in any event Mr Westlake's incomplete and inaccurate account of the consequences of cancellation (see [40]-[41] above) would have made a waiver argument particularly challenging.

## C5 Was there an Event of Default under clause 9.1(p)?

119. Clause 9.1(p) of the Loan Agreement provides:

> "**9. EVENTS OF DEFAULT**
>
> **9.1 Defaults**
>
> There shall be default if:
>
> (p) in the opinion of the Lender, a material adverse change occurs in the business, assets, condition, operations or prospects of any Group Company or any Credit Support Provider."

120. Skyjets contends that it is not open to Lombard to rely on this argument because it is not pleaded in the Particulars of Claim, albeit it is squarely pleaded in Lombard's reply as an alternative basis on which termination under clause 9.2 was effective. I do not accept that the point is not open to Lombard. This allegation did not introduce a new cause of action, but an alternative legal justification for the termination. For what it is worth, it is a point which Skyjets was able to reply to without permission, because it served a further pleading after Lombard's Reply (Skyjets' Reply to Defence to Counterclaim). This pleading point apart, Skyjets advanced no submissions on this issue.

121. I accept Lombard's submission that, for the purposes of such a clause it is necessary for the court to be satisfied that the Lender formed the requisite opinion at the time (and that the opinion was honest and rational) but unnecessary objectively for the event of circumstance relied upon to have had an adverse effect (see Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd [2016] AC 923, [55]). I also accept that if Lombard wishes to rely on this ground to justify the Notice, it must establish that there was the contemporary perception at the time of serving the Notice which the Event

of Default requires (Plantation Holdings (FZ) LLC v Dubai Islamic Bank PJSC [2017] EWHC 520 (Comm), [229]-[232]).

122. Lombard says that it honestly and rationally formed the view that there had been a material and adverse change in the position both of Skyjets itself and of Mr Westlake (its guarantor, and hence a "Credit Support Provider"):

i) I accept that, prior to the conclusion of the Loan Agreement, Mr Westlake had told Lombard that his business plan for the Aircraft required revenue of €2.2m to break even and to meet the loan repayments over 10 years.

ii) A profit and loss forecast prepared on 25 June 2008 for the year ending April 2009 and provided to Lombard for the purposes of determining whether to enter into the Loan Agreement, stated that Skytime's net profit was forecast to be £1.537m.

iii) An internal Lombard memo from Mr Ambler to Mr Morris establishes that Lombard was provided with the financial statements for Skytime and Business Air Centre Limited (a subsidiary of Skytime) for the financial years ending April 2005, 2006, 2007 and 2008. Those for the year ended April 2008 showed that Skytime had made profit before tax of £402,500.

iv) Lombard was told by Mr Westlake that he had net assets of £1.585m.

123. It is clear that the financial position of each of Skytime and Skyjets worsened during the life of the Loan Agreement, culminating in the conclusions which Duff & Phelps reported to Mr Hallows on 5 November 2012 and which I have set out above.

124. Standing back:

i) I am satisfied that Mr Hallows of Lombard, as the relevant account manager, had formed the view that the position of Skyjets and Skytime had materially worsened. Mr Hallows had raised the need for an investigation to assess the viability of the ongoing business on 21 September 2012. On 8 October 2012, Mr Hallows informed Mr Westlake that Duff & Phelps had concluded that the Barclays overdraft of £1.5m could not meet the business's cashflow requirements.

ii) On 8 October, Duff & Phelps advised that the companies' management accounts showed trading losses for the 4 months to August 2012 of £87,000 and £67,000, which Duff & Phelps themselves contrasted with the budget for FY 2013. Duff & Phelps also referred to "the Group's far below budget performance" in those 4 months.

iii) On 5 November, Duff & Phelps provided Mr Hallows with their assessment of the Second STCFF Mr Humphrey had provided on 30 October 2012. As I have stated, Duff & Phelps concluded that the business was insolvent on a cash flow basis.

iv) An email from Mr Hallows immediately following receipt by him of the Duff & Phelps assessment stated that "it is apparent that the short- and long-term

forecasts demonstrate that the customer is not viable now and will in the future be unable to service its Lombard facilities", making it clear he had endorsed that assessment.

v) It is clear, therefore, both that Lombard (through Mr Hallows) honestly believed that there had been a material adverse change in the position of Skyjets and Skytime, and that this was, objectively, an entirely reasonable opinion.

125. Accordingly, I find that this Event of Default had occurred and (for whatever significance it may have, was continuing) as at 8 November 2012.

## C6 Was there an Event of Default under clause 9.1(a): "any other sum"?

126. Clause 6.5.1 of the Loan Agreement provides:

> "If in the Lender's opinion the Asset Cover Percentage falls below 133% the Lender may call upon the Borrower (a) to increase the amount of the instalments for so long as the Lender shall consider appropriate…(b) to prepay such of the outstanding balance of the Loan (plus accrued interest) such that the Asset Cover Percentage is restored to a percentage of not greater than 133%…(c) place an amount on deposit with a bank…".

127. The "Asset Cover Percentage" is (under clause 1.1.1) "the value of the Aircraft divided by the balance of the Loan expressed as a percentage from time to time."

128. I accept that on the proper construction of clause 6.5.1:

i) Lombard must form the view (which must be a view which could reasonably be formed) that the value of the Aircraft was less than 133% of the outstanding balance of the loan.

ii) If so, it has the option of, inter alia, calling upon Skyjets to prepay such part of the outstanding balance of the loan necessary to restore the ACP.

iii) If Lombard does call upon Skyjets to make such payment, this sum would constitute "some other sum payable" under the Loan Agreement for the purposes of clause 9.1(a); and therefore a failure to make a payment in accordance with a call under clause 6.5.1 would constitute an Event of Default.

129. On 8 October 2012, Mr Hallows received an internal valuation assessment of the Aircraft by email from Mr Paul Tunstall of LAM which valued the Aircraft at about $6.1m, with a six-month sale period. A note of a meeting involving Mr Hallows, Mr Tunstall and others on that date noted that Mr Tunstall believed that $6.5m was a fair market value, with $6.1m being achievable if the Aircraft was sold by a business which was a going concern.

130. Skyjets has argued that:

i) it was an implied term that "for the purposes of clause 6.5, Lombard's opinion as to the Asset Cover Percentage had to be reasonable having first taken all reasonable steps to ascertain the open market value of the Aircraft and

uninfluenced by anything other than the value of the Aircraft as so ascertained"; and

ii) it was an implied term of the Loan Agreement that any statement of value used by Lombard must be "accurate".

131. While I am satisfied that Lombard has to act reasonably (in the contractual discretion or Wednesbury sense) in arriving at a valuation for the purpose of clause 6.5, I am not persuaded that any other implication is appropriate:

i) An implied term of accuracy is inappropriate for something as inherently judgmental as the valuation of an aircraft and would cut across the terms of clause 6.5.1, which refer to the lender's opinion.

ii) The purpose of the ACP is to ensure Lombard has a sufficient margin of security in respect of what is meant to be a secured debt, which security will very frequently have to be realised in circumstances other than an open market sale. In those circumstances, it would be very surprising if the terms of clause 6.5.1 impliedly precluded reliance by Lombard on the value achievable by a distressed sale.

iii) Lenders very frequently have access to their own internal valuation expertise, and loan agreements frequently permit the lender to carry out its own (rational) value of security held or realised. Clause 6.5.1 is qualified only by the words "if in the Lender's opinion", and I can see no basis for qualifying those words to any greater extent than is the case for any contractual discretion.

iv) This does not involve, as the Sky Parties contended, Lombard taking "a remarkable position for a major UK financial institution to be taking" that it can "exercise [a] power having formed the opinion unreasonably", but that, in an exercise of judgment where the contract provides that it is Lombard's opinion which matters, it is enough that it reaches a view reasonably open to it.

132. On 8 October 2012, Mr Hallows sent an email to Skyjets valuing the Aircraft at $6.3m (which is the mid-point of the $6.5m and $6.1m given by Mr Tunstall, although there is no evidence that it was calculated in this way), and that the current loan exposure was $6.006m. The email continued:

> "The asset cover requirement is 1.33% of $6.006m or $7.988m. Therefore you are immediately required to make a lump sum capital payment of $1.982m. Are you or Mr Westlake able to make any viable proposals to clear up the asset cover shortfall?"

133. Mr Westlake asked for a copy of the valuation report. What he was sent in response was a quote from Mr Turnbull's email which had set out his conclusions on the Aircraft's value, with the last sentence ("I would hazard a best guess therefore that we should get back about $6.1 + Million within hopefully 6 months") omitted.

134. Mr Coppel QC made three attacks on Mr Hallows' ACP calculation of 8 October.

135. First, the figure for the outstanding amount under the Loan Agreement was too high, because it reflected the late payment charges and interest charged on those amounts.

    i) I accept that criticism. The outstanding balance under the Loan Agreement, if the penalties and default interest were removed, was $5.760m.

    ii) In closing, Mr Coppel QC went further and suggested that "Mr Hallows deliberately exaggerated the amount of the outstanding balance", because a note of a meeting held at 15.00 on 8 October recorded "outstanding balance now below $6m", 90 minutes before Mr Hallows' reference to $6.06m.

    iii) That suggestion was not put to Mr Hallows in cross-examination. The note of the meeting at 15.00 was referring to the effect of two payments of $82,000 having been made that day. The email of 16.32 expressly stated that "we are yet to receive the $83k payment apparently sent today", which on its face appears to explain the difference in approach. Had Mr Hallows been given the opportunity to respond to the allegation, this issue could have been explored further. However, I am not persuaded that the point was open to Mr Coppel QC in closing, nor was it made out on the evidence.

136. Second, that the figure of $6.3m used in the calculation was not one which it was rationally open to Lombard to use:

    i) At the outset, it should be noted that Mr Tunstall of LAM, who sent the email with the figures of $6.5m and $6.1m, was a senior asset manager whose role included the valuation of assets. It is clear from his email that he had looked at the most recent Ascend valuation, the Blue Book figures and the Vref data in arriving at his figures.

    ii) On the basis of those figures, he concluded Lombard was looking at a figure of "about $6m" without any local add-ons. He then reviewed the data for actual sales and came to the conclusion that, compared with those, the Aircraft would be a bargain at $6 to $6.4m from which costs of sales of $100,000-$150,0000 would then have to be deducted. His "best guess" was recovery of $6.1m+ (i.e., $6.2m+ before costs of sale) allowing a 6-month period for the sale. Against that background, the figure of $6.3m used in the valuation was a fair one.

    iii) Skyjets suggest that Lombard acted irrationally in not using the "Base value" which is "the underlying economic value of the aircraft in an open, unrestricted, stable market environment with a reasonable balance of supply and demand" and "assumes full consideration of its 'highest and best use'". The ISTAT Handbook notes that "Base Value pertains to a somewhat idealised aircraft and market combination" and "may not necessarily reflect the actual value of the aircraft in question".

    iv) Given that the relevance of asset values in an ACP/LTV calculation is to assess the extent of security, it was reasonably open to Lombard to conclude that what mattered was a realistic figure for what the Aircraft could be sold for in prevailing market conditions when repossessed. Even on the evidence of Skyjets' own expert, Mr Seymour, the base value was appropriate for an owner to use when the owner intended to continue to use the aircraft and could show a

plan for profitable operation. Those were not the circumstances in which Lombard would be realising any security (nor was the Aircraft being operated profitably by the Sky Parties: see [191] below).

v) Lombard was also criticised for not increasing the value for "add ons". I accept that the Aircraft was acquired with certain options including Steep Approach Capability, Satcom and Airshow. Mr Seymour suggested that those would have added $300-$400,000 to the value. Even on the basis of that evidence, the valuation used of $6,300,000 was a rational one. However, I am not persuaded that any significant adjustment for this factor was appropriate when valuing the Aircraft. Mr Seymour (the Sky Parties' expert) accepted that these would only be enhancements if required by "the specific buyer", and that Steep Approach Capability would not have much use in the U.S.A. where the majority of Learjets were operated. He described these features as "potential value", but in my view it was rational for Lombard to value the Aircraft on a basis which was not increased by reference to what was only a potential value to a specific type of purchaser. Further, I accept Mr Butler's evidence (the expert for Lombard) that 45XR Learjets would, in practice, usually be equipped with these features at the original point of sale.

vi) However, even ignoring i), the calculation performed was mathematically inaccurate, as Mr Hallows accepted. In particular, even taking the figures used at face value, the amount required to bring the Aircraft back within the ACP was $1.269m. If the outstanding balance under the Loan Agreement is reduced to $5.760m, then the amount which could be called for was of the order of $1.023m.

vii) The end result is that there was an ACP breach, Lombard was entitled to make a call, but not in the amount sought.

137. What happens in these circumstances? In Albermarle Supply Company Limited v Hind and Company [1928] 1 KB 307, 318, Scrutton LJ addressed the position where a lien had been asserted over goods for too great a sum, and analysed the position as follows:

> "It was next said that the lien for repairs was lost inasmuch as it was originally claimed for a larger amount and a different cause than the right one. I have considered the numerous authorities cited, and in my view the law stands as follows: A person claiming a lien must either claim it for a definite amount, or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then in the absence of express agreement tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (1.) if he has no knowledge or means of knowledge of the right amount; (2.) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, and that claim is wrongful. The fact that the claim is made for more than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed".

138. The parallel is not exact because Scrutton LJ was addressing an essentially bilateral interaction (A holds B's goods; B has to pay money to obtain possession; A demands

too much), in which correct tender by B of an amount which A regards as insufficient may not cause A to hand over possession. The issue here is whether or not there is a default in paying a debt, in which tender of the right amount will provide a defence to the debt, even if more is demanded. However, the issue of whether the recipient of a wrongly calculated demand is able to calculate the correct amount itself is a highly relevant consideration in both contexts. I am satisfied that it would have been possible for Skyjets to exclude the late payment and interest charges from the amount demanded and perform an ACP calculation on the basis of the valuation provided.

139. That gives rise to two further, linked, questions.

140. First clause 13 of the Loan Agreement provides:

> "DEMAND OR NOTICE
>
> Any demand or notice on the Borrower under this Agreement or any other Transaction Document shall be made in writing signed by an officer of the Lender and served either by personal delivery on any officer of the Borrower at any place or by post or by hand delivery to its registered address or its address for communications specified in the Loan Details … or by facsimile using the relevant number last known to the Lender".

The Loan Agreement recognised elsewhere (in the "Keeping You Informed" box) the possibility of communication by email but, significantly, not in this clause.

141. Skyjets had pleaded that the clause 6.5.1 call, having only been sent by email, did not satisfy clause 13. Lombard did not contend that clause 13 had been varied but contended that the clause was limited to communications expressly described as demands or notices in the Loan Agreement. To address this argument, it is necessary to undertake a close reading of the Loan Agreement:

i) There is no contractual definition of a demand or notice, which are not capitalised terms (cf clause 1.1.2).

ii) Clause 4.2.5 refers to Lombard making a demand for repayment following an event of default in the first year and addresses the calculation of interest in that scenario.

iii) Clause 6.2.2 allows Lombard to require repayment of the Loan in the event of a change of control, by serving a "written notice".

iv) Clause 6.2.3 provides for repayment in the event of illegality, following a demand from Lombard.

v) Clause 6.5.1, dealing with the ACP, refers to Lombard being entitled to "call upon" Skyjets to make a payment, without using the words "demand" or "notice".

vi) Clause 9.1(a) provides for an Event of Default in terms which are capable of covering both a clause 6.5.1 "call", and sums "demanded" or sought by "notice".

vii) Clause 9.2 provides for the service of a notice to terminate the Loan Agreement, or make it repayable on demand.

viii) Clause 11 gives a right of cancellation by notice.

ix) Clause 12.1 provides for Lombard to "notify" a state of affairs, which would thereafter allow it to "demand" certain payments.

x) Clause 19.2 provides that costs must be indemnified "on demand".

142. Finally, clause 13 of the Loan Agreement is expressed to apply to the Mortgage (which is a Transaction Document). Clause 13 of the Mortgage provides:

> "Unless otherwise expressly provided herein, all notices, requests, demands or other communications to or upon the respective parties hereto shall be given in accordance with clause 13 of the Loan Agreement".

143. Reading these provisions together, as they are clearly intended to be read, I am not persuaded that a call for a payment under clause 6.5.1 does not fall within clause 13. Functionally, it is a demand (a requirement that Skyjets immediately make a payment) and the failure to make the payment carries the same potentially significant consequences as sums payable following a "demand". The terms of clause 13 of the Mortgage also tell against such a literal interpretation of clause 13 of the Loan Agreement. I do not find it surprising that the Loan Agreement should have required a degree of formality in relation to a communication of this type and with these potential consequences.

144. This latter concern leads directly to the second point. I am not satisfied on the evidence that Lombard maintained the position that an ACP was immediately due and payable under the Loan Agreement. While the email had demanded immediate payment, it also stated "are you or Mr Westlake able to make any viable proposals to … makeup the asset cover shortfall?" Mr Westlake said that he would discuss the position with Danesmoor. On 10 October 2012, Mr Hallows informed Mr Westlake and Mr Humphrey:

> "We have also advised of concerns over the asset cover ratio and you have promised to take this up with your investor"

and said he wanted to meet Danesmoor. He asked for Mr Westlake's confirmation that he would "consider and prepare proposals around the asset cover issue". In the event, that meeting with Danesmoor did not take place until 8 November.

145. Mr Craig QC accepted that these emails gave Skyjets additional time to comply with any call, and I am not satisfied on the evidence that that period had run its course before 8 November when the clause 9.2 notice was served. This is one of the difficulties with the use of fluid and informal communications for this purpose.

146. Had a valid clause 6.5.1(b) call been made, I would have rejected Skyjets' arguments:

i) that this would not have constituted a sum payable under a Transaction Document, as it would have been a sum payable under the Loan Agreement;

ii) that Skyjets would have been under no obligation to make the payment; if Lombard had exercised its right to vary the Loan payments by requiring Skyjets to prepay a certain amount, this would have created a payment obligation on Skyjets' part; and

iii) that the call was invalid because the email had been sent to a Skytime and not Skyjets' email address (all or most email communications relating to the Loan Agreement going to and from such addresses) and was addressed to "Ed".

## C7 Is clause 9.2 an unenforceable penalty?

147. Skyjets argue that clause 9.2 of the Loan Agreement is void as a penalty, because it entitles Lombard to render the full amount of the outstanding balance immediately payable following an Event of Default which may, of itself, have little or no significant consequences.

148. This argument is hopeless. Skyjets was obliged to repay the amount it had borrowed, on the terms of the Loan Agreement. Those terms provided for monthly instalments as the starting point, but entitled Lombard to require repayment of the full outstanding balance following events which, objectively, raised the risk of default. As Neill LJ observed in The Angelic Star [1988] 1 Lloyd's Rep 122, 126:

> "…I know of no rule that prevents a lender from stipulating that in the event of a failure to make an instalment payment on the due date the whole loan becomes due and repayable forthwith…"

149. The decision of Lionel Persey QC, sitting as a Deputy High Court Judge, in; ZCCM Investments Holdings Plc v Konkola Copper Mines Plc [2017] EWHC 3288 (Comm), [33] to [34] is to similar effect.

150. Nor is the analysis changed by considering the other consequences which follow from default:

i) The rate of interest payable following default is the higher of 1% or 1 month RBS USD Libor (the "Applicable Interest Rate") plus 5%. Mr Coppel QC submitted that this "quintupled the minimum base rate that becomes due". However, absent a default, the interest rate payable was not a minimum of 1%, but a minimum of 3% (2% over the Applicable Interest Rate). The existence of a default heightens the credit risk presented by the borrower (*a fortiori* when a Material Adverse Change Event of Default occurs). I do not think a 3% increase in the interest rate payable in these circumstances renders the rate penal. Further, this rate is payable whether or not there is acceleration, on sums where there is default, and is only payable on any sum becoming due solely as a result of clause 9.2 if there is a subsequent default in payment. I do not accept, therefore, that this provision can simply be added to the acceleration provision in search of a penalty argument.

ii) Default interest is compounded with monthly rests. There is nothing inherently penal about compound interest, which is frequently awarded in commercial disputes (see s.49(3) of the Arbitration Act 1996). Nor is the selection of monthly rests unusual in commercial or banking transactions. I accept that this

is a change from the pre-default interest regime (albeit it should be noted that unpaid interest is to be added to the Loan Amount and therefore carries interest thereafter). However, it is not surprising that there is a difference in interest regimes between that applicable to a long-term loan, and that payable on an outstanding debt where the payor is in default.

iii) It is said that an Event of Default triggered Lombard's right to take possession of the Aircraft. However, there is nothing inherently penal in the mortgagee being able to enforce its security when there is a default under a secured loan.

iv) It is said that various charges become payable. However, under clauses 19.2 and 19.3 of the Loan Agreement these are in the nature of an indemnity.

## C8 Has Lombard waived or is it estopped from exercising any right of termination?

151. At para. 13(5) of the Reply to Defence to Counterclaim, Skyjets contend that as at 10 October 2012 Skyjets had brought the balance of arrears up to date and that Lombard is estopped from relying upon Events of Default pre-dating 10 October 2012 or has waived its right to rely on such Events of Default. Mr Coppel QC accepted that this waiver plea was limited to Events of Default arising from non-or late payment of the Instalments. However, I have not founded my conclusions on any arrears in payment.

## C9 Is Lombard precluded from terminating by a contractual duty of good faith?

152. When the occurrence of an Event of Default gives Lombard a right of termination, I do not accept that Lombard's decision whether or not to exercise that right is in the nature of a contractual discretion to which the Braganza duties apply. Rather Lombard's decision is what is sometimes described as an "absolute contractual right" for it to exercise for its own purposes, as it sees fit. The issue of whether rights to terminate and analogous rights could be subject to Braganza-duties was the subject of careful consideration by His Honour Judge Pelling QC in TAQA Bratani Limited v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm), [44]-[53], who rejected the argument that rights of termination were to be analysed as contractual discretions. That reasoning is compelling, and I gratefully adopt it.

## C10 The position at this point summarised

153. If (as I have held) Lombard is entitled to justify its termination of the Loan Agreement by relying on clauses 9.1(o) and/or (p), notwithstanding the failure to identify these grounds in the Notice, and entitled to take possession of the Aircraft under the Mortgage, then the only remaining issues in the case are those raised by Skyjets as to the sale process and price, which are addressed in Section H below.

154. If Lombard had been entitled, and *only* entitled, to terminate the Loan Agreement by reason of the failure to pay $179.99 on 28 October 2012, then further issues would arise:

i) as to whether this was a consequence of a breach of contract or duty by Lombard in failing to exercise reasonable skill and care in preparing the statements of arrears provided to Skyjets before the 8 November 2012 meeting; and

ii) if so, what loss this has caused Skyjets (and in particular, what would have happened if Skyjets had been informed that arrears were $179.99)?

155. If I had found that Lombard was not entitled to terminate the Loan Agreement at all, a similar issue to that in [154(ii)] would have arisen.

## D WAS SKYJETS' FAILURE TO PAY $179.99 ON 28 OCTOBER 2012 THE RESULT OF LOMBARD'S BREACH OF CONTRACT AND/OR DUTY?

### D1 The issue in context

156. The Sky Parties argue that Lombard owed:

i) Skyjets a contractual obligation that statements made in any notice or demand given by Lombard as to the existence and amount of any arrears and the value of the Aircraft would be accurate and prepared with reasonable skill and care;

ii) both Sky Parties a duty of care in tort to like effect.

157. The essence of this aspect of the Sky Parties' argument is that the late payment charges were "bogus", their imposition an act of "impropriety" on Lombard's part, and that Lombard's case that it was entitled to levy such charges involved "peddling the late payment charges fiction". The Sky Parties went so far as to submit that the "so-called '10% Agreement' … was a fiction, manufactured by Lombard and its solicitors to befog the reality". However, as will be apparent from my factual findings above, the dispute about Lombard's entitlement to levy such charges was essentially a dispute about whether or not an agreement had been reached to that effect, either on 16 December 2011 or by a combination of correspondence and conduct thereafter. That was an issue on which there was something to be said for both sides. As I have said, I am satisfied that Mr Hallows honestly believed that there was such an agreement, and that this was the "institutional" view within Lombard. I am also satisfied that Mr Westlake realised that this was Lombard's view, and that there was an arguable basis for it, but that there were also grounds for denying that a binding agreement had been reached.

158. In these circumstances, the issues as to what representations are made or obligations owed by a financial institution when providing statements of account so far as they concerned matters within the special (or at least superior) knowledge or expertise of the financial institution do not arise, and I do not propose to consider them.

159. Against the particular factual background of this case including the various communications in which Lombard had told Skyjets that it understood the late payment charges regime had been agreed by Skyjets, the only representation which Lombard might arguably have been making by its claim to the penalty charges was a representation as to its belief that there had been an agreement allowing it to make such charges, and I shall assume (without determining the issue) that such a representation was made to Skyjets and also to Skytime.

160. In circumstances in which Skyjets and Skytime were as well-placed as Lombard to reach a view on the issue of whether such an agreement had been concluded, I do not accept that Lombard made any implied representation that it had reasonable grounds for such a belief, or owed a duty of care when making statements about its

understanding beyond (at best, and again, without deciding the issue) a duty to state what its understanding actually was.

**D2 Would any such representation have been untrue?**

161. I have already found that Mr Hallows did genuinely believe that there had been such an agreement, and that this was the institutional view within Lombard in October 2012. If it matters, I am satisfied that this was a reasonable view for it to hold in the circumstances in [49], [52] and [64] above. Had the issue of whether matters had reached the stage of a binding agreement remained live at this trial, the question of who was right would have been a fairly fine point, although Lombard would have faced the forensic difficulty that it had never sought to formalise any such arrangement in a context in which formality might be expected, and in which Mr Westlake had taken an ambiguous line in his communications on this issue.

**D3 Did Skyjets rely on any misrepresentation which may have been made?**

162. This leads to one of the curiosities of the Sky Parties' case. The Sky Parties argue that "it is entirely foreseeable that if a bank misstates amounts in a loan statement, the borrower will believe what is in that statement and repay in accordance with what the borrower reads in the statement". However, the Sky Parties do not contend that they were induced by statements made by Lombard to believe that they owed Lombard the arrears claimed of $294,376.91. Indeed they positively assert (and Mr Westlake asserted at the 8 November 2012 meeting) that they did not believe they owed these arrears.

163. In closing, the Sky Parties' case was that Lombard's statements led them to believe that "Lombard believed and had reason for believing that it was owed $294,000" such that, unless they paid that sum to Lombard, Lombard would take the position that Skyjets was in default.

164. If that was what Mr Westlake was led to believe, it was true – Lombard did believe that there were arrears in that amount, and had reasons for that belief.

165. It is, in any event, clear from the contemporaneous documents that Skyjets and Danesmoor believed that Skyjets' were on strong ground so far as the late payment charges were concerned. That was the position taken by Mr Cowen in the 8 November meeting, and by Mr Westlake immediately afterwards. On 8 November, he emailed Mr Jeremy Talbot of TAG Farnborough referring to the penalty charge issue and saying:

> "For your information all payments to Lombard were up to date and this action was as a result of an argument over unlawful and excessive penalty charges. *We won the argument and then they decided for LTV covenant which at their valuation took us into breach*".

He said the same thing in his email to the staff of the same date:

> "Over the past 4 years we have occasionally had a late payment or two and these charges were bordering on financial rape! *We won the argument for this but unfortunately lost the argument on LTV.* This is a clause in the finance agreement that says the value of the aircraft must always be 133% higher than the outstanding

loan. *Our loan payments are up to date but because the value of the aircraft has dropped extraordinarily due to the financial downturn we are breaching this clause and the difference is around 20%. Because of this they have decided to repossess the aircraft*".

Against these clear contemporary statements, it is clear that it was not Lombard's demand for late payment charges which determined the Sky Parties' response.

**D4 What would have happened if Lombard had stated between 28 October and 8 November 2012 that the amount of arrears was $179.99?**

166. If $179.99 had been all that was due and all that was demanded, I am sure that Skyjets would have paid this sum, and there was no dispute about this. However, I am also satisfied that this would not have addressed all of Lombard's concerns as to the Loan Agreement or taken the issue of termination "off the table":

i) It is clear that, by this stage, Lombard had concluded that the Sky Parties' business was not viable: see [124] above.

ii) Lombard was entitled to, and had, concluded that the Aircraft was not in compliance with the ACP. At that stage, the amount required to bring the ACP into compliance would have been of the order of $892,000 to $1.043m (depending on whether the valuation of $6.5m or $6.3m was used). While there may have been room for some flexibility as to the figure, the amount Lombard would have been entitled (and willing) to call for certainly exceeded $850,000.

iii) It is clear from the events at the meeting on 8 November 2012, and Mr Westlake's reaction after that meeting as recorded in the emails at [165] above, that Lombard would have enforced its clause 6.5.1 rights under the Loan Agreement in full unless a deal had been done which improved the security package by guarantees or deposits from Danesmoor.

iv) In particular, it is clear from the minutes of the 8 November 2012 meeting that Lombard was not interested in a temporary solution, in which Skyjets would limp on so far as the Loan Agreement was concerned to the next instalment, but only in an arrangement which involved substantial guarantees from Danesmoor of future payments, which Danesmoor was not willing to give.

v) In summary, I accept Mr Hallows' evidence that it was the "overwhelming picture here that [Lombard] had significant concerns and probably would have terminated" absent some significant development.

167. On the basis of the material available (and in particular the discussion between Mr Hallows, Mr Welling and Mr Townsend during the "break out" from the meeting of 8 November 2012), I am satisfied that Lombard would have required:

i) a payment of (or guarantee by Danesmoor of) the ACP of something approaching $800,000; and

ii) some form of guarantee or security from Danesmoor for future payments (Mr Welling having suggested "at least" £300,000);

(and hence a total guarantee or security commitment from Danesmoor of something of the order of £750,000) if it was not to exercise any right of termination it had, or not to serve a clause 6.5.1 call.

168. The issue of how Danesmoor would have responded is considered in Section F3 below.

## D5 THE SKY PARTIES' ALTERNATIVE ARGUMENT

169. The Sky Parties also argue that Lombard owed Skyjets a duty to calculate the balances properly, and that if it had performed that duty, Lombard would not have served the Notice. This argument seeks to avoid the requirement for establishing reliance by the Sky Parties on the truth of any representation made by Lombard. However, it effectively asserts that Lombard owed Skyjets a contractual duty of care in relation to Lombard's decision to serve the Notice, rather than in relation to the contents of the Notice.

170. I am satisfied that no such duty is owed. If a notice of termination is served under a loan agreement when there is no right to do so, the notice will be a nullity, but the service of the invalid notice will not ordinarily be a breach of contract (see Jafari-Fini v Skillglass Ltd [2007] EWCA Civ 261, [113]-[118] and Concord Trust v Law Debenture Trust Corpn [2005] 1 WLR 1591, [36]-[37]]). If the notice served *is* legally effective (as I have found the Notice is), I can see no basis for a claim of breach of contract premised on the assertion that Lombard would not have done what (ex hypothesi) it was legally entitled to do if it had exercised care in its internal decision-making. Nor is there any basis for a common law duty of care to that effect.

171. In any event, this argument fails on the facts for the reasons set out at [166].

## E SKYTIME'S CLAIMS

172. I have already addressed Skytime's claim to the extent that it was based on Lombard owing it a duty of care in and about the preparation of statements of account and rejected it on the law and on the facts.

173. Skytime also claims damages for the tort of conversion, on the basis that it had a right to possession of the Aircraft at the time that Lombard took possession of and sold it, and has thereby suffered consequential loss

174. The issue of whether Skytime had possession or an immediate right to possession of the Aircraft so to be able to sue for the tort of conversion was not explored at trial. Lombard did not advance a positive case on this issue. The evidence does suggest that it was Skytime, rather than Skyjets, which was in day-to-day control of the Aircraft, determined where it should be stored or where it should fly. I therefore accept that Skytime had possession of the Aircraft at the date of repossession. Lombard argued that Skytime could not bring a claim in conversion against Lombard (the owner of the legal estate in the Aircraft as mortgagee) because of Lombard's superior title. In this regard, both parties referred me to passages in *Halsbury's Laws of England*, Vol 97A para. 216. I accept that a mortgagee who seizes a mortgaged chattel before there has been a default can be sued by the mortgagee in conversion, albeit the damages awarded will need to give credit for the converting party's security interest. While I heard no argument on the point, I am satisfied that this is also the position where a third party has possession

or a right to possession derived from the mortgagor, and the mortgagee seizes the chattel prior to a default.

175. In this case, any claim by Skytime based on the value of the Aircraft would need to reflect both its limited interest in the Aircraft, and Lombard's rights under the Mortgage, and I am satisfied that it is Skyjets, rather than Skytime, who would have been the principal beneficiary of any value-based award if the provisions of s.7 of the Torts (Interference with Goods) Act 1977 had fallen to be applied.

176. The issue of whether Skytime could recover not simply loss of value or the cost of hiring a substitute aircraft, but loss of profit from utilising the Aircraft, and the consequential loss of its business generally when unable to do so, raises complex issues of remoteness (because, on my findings, Lombard honestly believed it was entitled to take possession of the Aircraft, such that only foreseeable losses would be recoverable). These issues received limited attention at the trial, and given the contingent nature of the issue, I will simply assume (without deciding) that such losses are in principle recoverable in this case for the purposes of the analysis which follows.

## F WHAT WOULD HAVE HAPPENED IF LOMBARD HAD NOT BEEN ENTITLED TO TERMINATE THE LOAN AGREEMENT ON 8 NOVEMBER 2012 OR HAD CORRECTLY STATED THE AMOUNT OF ARREARS AT THAT MEETING?

### F1 The state of the Sky Parties' business

177. The Sky Parties' business had suffered from poor forecasting and cashflow difficulties from an early stage. The acquisition of the two Learjets (the Aircraft and the Clydesdale Aircraft) had been intended to be cash-neutral, but instead the Sky Parties found themselves having to fund an unanticipated $1.9m over and above the amount of the Lombard and Clydesdale loans using a combination of cash and overdraft. From December 2008, Skyjets was repeatedly late in making payments under the MSP Service Plan, which I am satisfied reflected cashflow pressures, and I am also satisfied that those financial pressures were one of the main (but not the only) reasons why Mr Westlake decided to stop paying into the plan in December 2009. At that time, cashflow was so tight that Ms Welsh told Mr Westlake that payment of salary dividends would "leave us with virtually no cash, it really is that low". The Sky Parties did not themselves set aside funds for the future maintenance of the Learjets beyond the amounts "trapped" in the now-cancelled MSP Service Plans. In September 2012, Harrods noted that, based on the number of flying hours which had been accumulated by that point, over $1m would have had to have been paid into the MSP Service Plan had it continued.

178. Financial controls in the company were poor. I am satisfied that management accounts and forecasts were not prepared as a business management tool, but only when it was necessary to show such documents to third parties for fund-raising purposes. Taking the financial reports which are available:

    i) A profit and loss forecast was prepared by Skytime for the year-ending April 2009 to be provided to lenders as part of the attempt to raise funds to acquire aircraft. It forecast turnover of £9m and a net profit of £1.5m, and there is

nothing to suggest the figures may have included companies other than Skytime. In the event, turnover was £4.8m and there was an operating loss of £529,000.

ii) There were no audited accounts for the year-end April 2010 (there being no obligation to produce such accounts), but the accounts produced for Skytime for the following year record an operating loss of £75,000 for the April 2010 year-end.

iii) Skytime produced audited accounts for the year-ending April 2011, which recorded turnover of £7,839,744 and a profit of £364,000. However, the accounts were qualified because the auditors had been unable to audit the opening balance. This was not simply because the opening balance had not been audited when it formed the closing balance the previous year, but because Skytime did not have sufficient records to allow the accountants to verify the figures "using other audit procedures".

iv) The accounts for the year-ending April 2011 had to reflect the cost to Skytime of acquiring the use of the Learjets from Skyjets. On the evidence before me, there was no contractual arrangement in place between the two companies nor did invoices pass between them, and Skytime simply allocated a figure to Skyjets as to the cost of hiring the Learjets as it thought appropriate which was not always sufficient to cover the amounts Skyjets had to pay Lombard and Clydesdale under the aircraft loans.

v) The accounts for the same year-end for Skyjets record a profit of £440,000, but these were once again qualified by the accountants. Mr Westlake had concluded it was not appropriate to value the two Learjets at their market value, because there was no intention of selling them and the market was depressed. Had the auditors' recommendation as to the use of market value been followed, the effect would have been to turn an operating profit of £440,000 into a loss of £2,916,030.

vi) I should note at this point that, at the time when the accounts for the year-ending April 2011 were being prepared, the Sky Parties were entering negotiations with Danesmoor to sell them a 50% stake in the business. At a stage when it was believed that the auditors would support Mr Westlake's valuation of the Learjets, Mr Humphrey informed Mr Westlake on 24 January 2012 that provided the question of valuation of the Learjets was not raised, the accounts would "give us a great starting point for negotiations with Mark Stephenson". Later, on 25 June 2012, Danesmoor's finance director Mr Cowen sent an email seeking "confirmation of whether any property/other tangible assets held on the BS are shown at a reasonable estimation of market value". Mr Westlake told Mr Humphrey "we will just have to argue the aircraft valuation". Mr Humphrey replied:

> "The audit report in [Skyjets'] accounts states that the aircraft are overvalued so we can't attempt to avoid the subject. I was going to put something along the lines of

> 'aircraft value in the accounts is intended to reflect the value of contracted charter flights attached to the aircraft. These contracts would remain with the aircraft in the event of a sale'.
>
> What do you think?"

Mr Westlake agreed and told Mr Humphrey to make a point of saying that the "market valuations were atypically low and shouldn't affect the valuation of the business".

vii) I accept that Mr Westlake honestly believed that the market valuations were too low. However, there was no basis for the statement that the valuation was intended to reflect the value of contracted charter fights which would remain with the aircraft in the event of sale.

179. The cashflow pressures on the Sky Parties continued throughout 2012. By March 2012, Skyjets was in arrears on the Clydesdale loan, and being threatened with early termination. Its difficulties in meeting the Clydesdale payments on time continued throughout the year. On 13 April 2012, Mr Humphrey told Mr Westlake that the cash deficit stood at £2.32m. On 2 May 2012, Mr Humphrey emailed Mr Westlake about a demand for payment from a creditor called OneState, and the excuse he had offered about being out of the office for a few days and expecting money in from a client. However, as he told Mr Westlake this was the:

> "usual flim flam really. Invoice is for £11k was due at the end of March but haven't been able to pay for usual reasons, always somewhere more urgent for money to go when it comes."

180. That email reflected what I am satisfied was a standard method of operating, in which creditors were fobbed off with excuses because the business did not have the cash necessary to pay its debts. The statement by Mr Humphrey that he had told OneState he had been out of the office for a number of days was one of a number of such statements Mr Humphrey gave to creditors. It is difficult to resist the conclusion that many of these apparent absences had similar origins to the instruction Mr Westlake gave to Mr Humphrey on 14 July 2011 when RBS was trying to make contact: "I would suggest you are off sick this week until we can set up a strategy for what we say to him".

181. By 14 June 2012, Skytime was being chased by TAG Farnborough (who operated the airfield where the Learjets were based) for £207,000. It paid £27,000 of that, relating to invoices issued in April, using company credit cards. A further Clydesdale instalment of Euros 80,000 was missed on 18 June. On 27 June, Mr Humphrey explained:

> "We now officially have no money in the bank. We have not quite scraped enough together to pay the wages, as it stands I have opted not to pay mine".

He said £11,000 was coming in over the next few days and then nothing until end of the following week, observing that he was "more bothered by the queue of people chasing us for money at the moment, there's only so much we can put on the [credit] cards".

182. On the same date, Skytime found itself being asked to organise a flight for which its client had already paid, but Skytime could not afford to pay for (or get credit from) an operator necessary to undertake the flight. An internal email described Skytime as being "between a rock and a hard place", saying operators were not willing to offer credit to the business. Mr Owain Jugessur, a Skytime employee, said that operators who Skytime had used before now "know our trick as they don't get the payment for ages". On 5 July, Jetcare (another creditor) put Skytime's account on hold due to outstanding invoices.

183. All of these events took place before the flying restrictions imposed for the London Olympics came into force (they ran from 14 July to 15 August, and a reduced set of restrictions for the Para Olympics from 16 August to 12 September). This is important, because the Sky Parties suggest that it was those restrictions which were the major cause of its difficulties in 2012.

184. On 20 July Mr Jugessur stated "it's getting very difficult to manage anything that isn't on our fleet at the moment cash-wise. We have a list of operators that we can't use as we owe them money … It's got to the stage again we hope that flights we are quoting on other people's aircraft don't come off!!" On 23 July, TAG Farnborough put Skytime on "payment before departure" terms.

185. Other creditors included HMRC (who chased payment on 25 July 2012), Eurocontrol (who provided flight navigation services) and Bombardier (who threatened to ground the Learjets or suspend the Smart Parts Programme for non-payment). By 15 August, Skyjets was in arrears to Clydesdale in the sum of Euros 159,000. On 11 September, PremiAir (a maintenance provider) threatened legal action over an outstanding invoice of £34,700 and issued a court summons. Rizon (another maintenance provider) also chased an outstanding debt on 18 September. On 12 October, TAG Farnborough stated that if the accounts of Manhattan and Skytime were not up to date by 15 October, that would affect any future movements of aircraft into and out of the airfield.

## F2 The STCFFs

186. I have referred already to the First STCFF and LTCFF prepared by Mr Humphrey and provided to Duff & Phelps on 28 September and in a revised form on 30 October 2012 (see [59] and [67] above). There is a dispute between the parties as to how thoroughly these were prepared, it being Mr Westlake's evidence that he did not have the opportunity to engage with the documents in any detail at the time, and that they were highly inaccurate, in particular in failing to pick up the full extent of anticipated Flight Commitment (**FC**) contract renewals. As to this:

    i) I do not accept that Mr Westlake was not involved in the process of producing or approving the First and Second STCFFs. They were being sent to Duff & Phelps, who were carrying out a review into Skytime's viability, at a time when Lombard was actively considering terminating the Loan Agreement. They were documents of obvious importance.

    ii) Further, on 27 September, Mr Westlake emailed Mr Humphrey identifying additional creditors to be included in the STCFF, and stating that he "would like to use the [First] STCFF to determine who we pay and when".

iii) On 1 October, Mr Westlake told Mr Humphrey that they needed to discuss the First STCFF before making any proposals to Lombard, and he told Lombard that he intended to go through the First STCFF with Mr Humphrey the following morning.

iv) The First STCFF appears to have been discussed at a board meeting attended by Mr Westlake, Mr Stephenson and Mr Humphrey on 4 October, in the course of which the issue of how many FC contracts were coming up for renewal was discussed. Mr Humphrey sent Mr Westlake an email that day, explaining the assumptions he had made and stating that he had been going through the "FC getting close to or already out of hours", which Mr Westlake forwarded to Mr Cowen.

v) Mr Stepheson's email of 4 October following the meeting also referred to the need to get the new customer contracts signed, and the need for a system to flag expiring contracts.

vi) Mr Westlake emailed Mr Humphrey again on 7 October suggesting the First STCFF presented a worst-case scenario on renewals, and another version should be produced showing the best-case scenario.

vii) It is clear that throughout this time, Mr Westlake and Mr Humphrey were working their client contacts hard, in an attempt to drive forward some renewals.

viii) On 9 October, Mr Westlake sent Mr Humphrey an email saying, "let's discuss the short-term forecast", and on 11 October, Mr Westlake told Mr Stephenson that he was "spending the day tomorrow with Ed to nail down the STCF", addressing various issues which had popped up, some negative and some positive. He also said he would "get as accurately as possible the contract renewal situation and cash revenue for this period".

ix) On 12 October, Mr Humphrey sent Mr Cowen a revised version of the First STCFF, stating "Steve and I have been through this in as much detail as we can" and that it included provision for new business and renewals.

x) On 29 October, Mr Humphrey sent Mr Westlake an email saying he had been carrying out further work on the cashflow forecast over the weekend and produced a new version, which became the Second STCFF. It is clear that the prospects of renewal contracts had been carefully considered, Mr Humphrey stating that he had assumed £799,000 of flight commitment income but that "we are going to need far more than that and starting to come in very quickly and also need way more charter cash than currently being generated to have much of a chance in the short term, things are pretty bleak unless we can start generating sales to the level of the previous capital years very quickly".

xi) Mr Westlake responded acknowledging that the Second STCFF was "significantly worse than the last one", with Mr Humphrey responding, "in addition sales over the last few weeks have been lower than forecast which has not helped".

187. In short, the issue of what flight commitment payments might come in over the short-term appears to have received close attention, with two STCFFs being produced, both of which presented a very bleak outcome for the business. I am satisfied that Mr Westlake was fully engaged with the forecasts and familiar with their contents.

188. In these circumstances, I am unable to place any reliance on the much more optimistic STCFF prepared by Mr Westlake, without the benefit of the Sky Parties' books and records, for the purposes of the litigation in 2021. The contemporaneous assessment, given the detailed consideration and external scrutiny brought to bear on it, is clearly much more reliable. Further, as I have noted, I have found it necessary to approach Mr Westlake's evidence with some caution and have concluded that he generally held an over-optimistic view of the business's prospects (see [8] above). That tendency can only have become more pronounced when viewing the issues in retrospect for the purpose of supporting a damages claim. By way of an example of the difference between the two, the Second STCFF forecast was predicting a £750,000 cash deficit by the end of January 2013 (over and above the amount of the business' overdraft), whereas Mr Westlake's 2021 STCFF predicted a positive cash surplus of £606,000 with no overdraft: a £2.359m difference in cashflows over a period of 13 weeks. Further, it is apparent from contemporary documents that Mr Westlake's 2021 STCFF assumes FC renewals which would not have happened – for example Mr Walters who had moved to the US, the Bollingers who were not really using the hours on their existing FC contract; or Mr Siva-Jothy who turned down an offer of further hours in August 2012 because his new business was absorbing all of his cashflow.

189. The effect of my conclusions up to this point is as follows:

    i) The Sky Parties could not meet an ACP call from Lombard from their own resources.

    ii) The Sky Parties did not have sufficient short-term liquidity to survive from their own resources.

    iii) Any claim for damages necessarily requires the Sky Parties to establish, to whatever may be the requisite standard, that external funding or support could have been obtained to allow them to meet the ACP call, and the further demands I have found Lombard would have made as conditions for not terminating (see [167] above) in order to continue trading.

190. The case was argued by both parties on the basis that the issue of whether external support could have been obtained was to be determined on the balance of probabilities rather than on a loss of a chance basis. Given that consensus, I have approached the issue on that basis as well, and have not independently considered whether that was, as a matter of analysis, the right approach.

## F3 The position of Danesmoor

191. By July 2012, the sale of 50% of the Sky Parties' business to Danesmoor had been completed. The profit and loss statement for the year-ending April 2012 which had been provided to Danesmoor recorded a net profit of just under £700,000, although Mr Westlake accepted that the business had been loss-making in the first half of 2012 (and he said as much in a memorandum to staff of 25 November 2012). There is a dispute

between the parties as to whether Danesmoor had fully understood the extent of the cash difficulties the business was in when it made its investment, and as to Danesmoor's readiness to provide the support necessary to enable the business to continue trading.

192. As to this:

i) On 17 August 2012, Mr Humphrey told Mr Westlake that he had had a brief chat with Mr Cowen and was "just playing with the forecasts at the moment so they will reflect the requirement for the additional increase but not look too bleak. It's a bit of a tricky balancing act".

ii) There was a board meeting on 3 October 2012 attended by Mr Westlake, Mr Humphrey and Mr Stephenson. After the meeting, Mr Stephenson emailed Mr Westlake stating that he:

> "was absolutely shocked by the poor financial status of the business when this was reported at the meeting … It was pretty clear that [Mr Humphrey] either did not want to report to me the full extent of the problem or he didn't know the full extent of the problem. Either way I have poured cash into a business that was days aware from being closed down. I'm not sure you were fully aware of the severity of the situation either which is alarming".

iii) Mr Westlake replied the following day saying he had only found out about the cash situation a couple of weeks before (although I do not accept that was correct). In the instructions to counsel of 17 January 2013 discussed at xv) below (**the Instructions**), it was Danesmoor's position that it found out that Lombard was threatening to repossess the Aircraft at this meeting, and that this has been deliberately withheld from it before (I make no finding as to whether that was correct or not, but the document does provide evidence of Danesmoor's perception that material had been withheld). The Administrator's Report of 6 February 2013 also stated that at the meeting, Mr Stephenson became aware of threats by Lombard to re-possess the Aircraft for failure to comply with the ACP.

iv) Pausing there, it is clear at this point that Mr Stephenson did not believe he had been fully informed as to the financial condition of the business, but his attitude was that he was willing to support the business to turn it around and salvage his investment. He clearly retained trust in Mr Westlake at that point. The issue is whether his attitude changed subsequently.

v) I have already referred to the further work which Mr Humphrey did to produce the Second STCFF over the weekend of 27 and 28 October 2012, and the fact that this showed a much worse outlook (see [67]). On 5 November 2012, Mr Stephenson (who had not himself seen the Second STCFF but had spoken to Mr Cowen about it) said that "judging by Ian's comments we have a basket case on our hands. I am pretty speechless really, how could you let it all go wrong so quickly?" He continued "just so I know, do you have any cash to fund the extra requirement?", and "I am sure you can imagine I am VERY unsettled by the situation".

vi) Mr Cowen gave his response to the Second STCFF to Mr Humphrey on the same day, saying "it looks as if things are getting considerably worse and that you are going to be short by another £750k by the end of January. I have to say I am completely at a loss to understand how things have deteriorated so suddenly from when the deal was signed. Nor do I know where this money is going to come from. We appear to have a major crisis on our hands".

vii) A board meeting of Manhattan Jets (of which both Skytime and Danesmoor were shareholders) took place on 7 November which identified a number of facts which had contributed to the group's financial position and acknowledged that Skytime was reporting losses.

viii) On 8 November, Mr Cowen attended the meeting with Lombard which I have referred to at [69] above. I accept that, for all its clear misgivings, Danesmoor went into that meeting willing to offer significant, but not unlimited, support for the Sky Parties. It is clear that Danesmoor was not willing to pay the late payment charges, which it was not persuaded were due, but that during the meeting it became aware of other debts and trade creditors about which Mr Cowen had not previously been informed. The Instructions set out Danesmoor's position that Mr Cowen learned for the first time at that meeting that Lombard had been complaining of arrears and breaches for over 18 months.

ix) In the aftermath of the meeting, Danesmoor transferred £150,000 to Skytime to "get us through the next week or so only paying the people we have to pay". I am not persuaded that this evidences Danesmoor's willingness to provide whatever support the business needed, so much as a desire for breathing space while it reviewed the position it found itself in. During that breathing period, further revelations about Skytime's financial condition came to light – for example that a further £32,000 debt to Clydesdale had been omitted from the Second STCFF. The Instructions said that during this period the group's affairs were investigated and "it was discovered that a large number of liabilities had not been disclosed to Danesmoor" in July 2012.

x) On 16 November, Mr Stephenson emailed Mr Westlake stating:

> "I am to blame for not doing proper due diligence but you have seriously misled me and I have spent millions of pounds investing in a business that is worth nothing. I want to recover my investment and as such want to take control of the business and make some decisions to get it onto a solid footing. I think my shareholding should reflect that status".

Mr Westlake replied, "I haven't misled you intentionally just didn't realise we had so many weaknesses", to which Mr Stephenson replied, "I have been horrified by some of the things that Ian had discovered this week" (i.e., after the 8 November meeting). Those discoveries were claimed by Danesmoor to include the fact that the business had moved from having a £400,000 overdraft with RBS when the sale share completed to a £2m overdraft at that point, and that there was £120,000 outstanding to HMRC. In December, Mr Stephenson said he had just discovered a further significant tax liability in respect of undeclared P11D benefits.

xi) It is clear that Mr Stephenson was nonetheless willing to contemplate continuing to support the business, but on his own terms. These included Mr Westlake assigning back the loan to Danesmoor which had been the consideration provided for the shares Danesmoor acquired, and the security over the Clydesdale Aircraft which had previously supported that loan. Danesmoor's position, as communicated to Mr Westlake, was that:

> "Danesmoor has paid £2.25m for shares which, in reality, have no value and in a company which is insolvent as we discussed half an hour ago. If you do not sign these documents we will have no option but to pull the plug and let the whole thing collapse".

Mr Westlake was not willing to accept Mr Stephenson's terms.

xii) At the end of November 2012, Danesmoor sought advice from an insolvency practitioner. The Instructions record that Mr Danesmoor realised that Skytime was insolvent as a result of investigations carried out after 8 November.

xiii) Danesmoor did put another £100,000 cash into the business on the day that Skytime was placed into administration. However, I am satisfied that this reflected its desire to ensure an orderly administration, rather than being a manifestation of a willingness to support the business in continuing trading.

xiv) Danesmoor sent a letter of claim to Mr Westlake on 17 December 2012.

xv) On 13 January 2013, Danesmoor's solicitors sent the Instructions to counsel to plead a claim in deceit against Mr Westlake. The Instructions said that Danesmoor had not carried out due diligence when acquiring is stake in Skytime and referred to a number of what were said to be concerning transactions which had since come to Danesmoor's attention. I have set out extracts from the Instructions above.

193. It is against that background that, on the assumptions which arise at this stage of the analysis, I must decide whether Danesmoor would have been willing to offer the financial support necessary to prevent Lombard from taking steps to terminate the Loan Agreement (i.e. an offer of a guarantee or security of a further £750,000 or so):

i) to bring the ACP back to a point which Lombard was willing to live with; and

ii) to prevent Lombard terminating for a Material Adverse Change (which would have required Danesmoor to offer some form of guarantee for Skyjets' future performance).

194. In considering this issue, I have heard no evidence from Mr Cowen or Mr Stephenson of Danesmoor, even though Danesmoor remains a shareholder and creditor of Skytime and would stand to benefit from the Sky Parties' success in this litigation. I have not drawn any adverse inference in relation to Danesmoor's absence.

195. I am not persuaded that Danesmoor would have been willing to offer the level of commitment necessary for Lombard to stay its hand in relation to the ACP and Material Adverse Change issues. It is clear that in the period from 3 October 2012 onwards,

Danesmoor was coming increasingly to the view that the real financial condition of the business had not been revealed to it, and that its perception of the business's financial position had grown progressively more pessimistic over that period (whether justified or not). Its trust in Mr Westlake had also been damaged. Further investigation of the position would only have thrown up further concerns (of the kinds which later featured in the Instructions). In those circumstances, I do not believe Danesmoor would have got itself into a position in November and December 2012 whereby it would have provided the level of additional security necessary to meet Lombard's requirements, thereby allowing the business to continue to trade.

### F4 Could the Sky Parties have obtained financial support from a source other than Danesmoor?

196. There was a faint suggestion by the Sky Parties that it might have been possible to raise the funding necessary to enable Skytime to continue trading from other sources. In particular, Mr Cliff in the Joint Statement referred to possible refinancing in the "form of debt, convertible debt, equity, selling shares in the aircraft or selling discounted flights upfront". In oral evidence, he said:

> "There would be a range of alternatives that the company could look at, including asking for a bigger overdraft or more money or lots of other options I could talk about".

197. He later expanded on this:

> "So there's lots of options. You could extend the overdraft. You could ask Danesmoor for more money. You could enter discussions with debt providers to change the profile or write down some debt. You could discuss an equity injection from Danesmoor or somebody else. I think there were lots of options to explore".

198. I have already dealt with the position of Danesmoor, so far as further debt or equity funding is concerned. There was no serious attempt to make good the argument that there were any other realistic options for funding. Mr Coppel QC argued it was possible to "pile in all of the possibilities .. you pile all of those in and you say – you look at the totality and you say 'were none of these exit doors?"

199. However it was not sufficient simply to throw out speculative possibilities, all of which depended on Skytime being able to attract third party financial support notwithstanding its perilous financial condition, and say that they had not been ruled out. The financial position of the Skytime business as at 8 November 2012 and its accounting history were such that if Danesmoor (who had already sunk a significant amount of cash into the business) was not prepared to provide the funding to enable the business to trade through, there was no realistic basis for suggesting anyone else would. Nor was it realistic to suppose that Skytime, who had only been able to obtain an overdraft of £1m from Barclays rather than the £1.5m it had hoped for, would have been able to obtain an additional overdraft of £750,000 without Danesmoor's support (Danesmoor having guaranteed the £1m overdraft).

## G THE QUANTUM OF SKYTIME'S LOSS

200. I heard expert evidence from Mr Paul Cliff (for the Sky Parties) and Mrs Annette Barker (for Lombard) as to the value of Skytime's business had it been able to continue trading. Each side was heavily critical of the other side's expert in their approach to the task. However, the difficulties facing both experts – given the paucity of contemporaneous documentation – should not be underestimated.

201. Mr Cliff accepted that his calculation of loss assumed that Skytime would have been able to continue trading had the Aircraft not been repossessed. In reaching his conclusion that it could, Mr Cliff's relied on the STCFF which Mr Westlake had produced in 2021 for the purposes of the litigation, and without the aid of Skytime's books and records, and in relation to which Mr Cliff had not carried out his own assessment. I have already found that I am unable to place reliance on the 2021 STCFF (see [186]-[188]) and that the Second STCFF produced on 30 October 2012 is far more likely to be accurate. On the basis of the Second STCFF, Mr Cliff said that the business was "not necessarily not viable", depending on what other options for funding there might be, but he accepted that the business could not, without further funding, meet its debts as they fall due. I have set out above my reasons for concluding that there were no alternative realistic sources of finding for the business in November 2012. I have therefore concluded (accepting Mrs Barker's evidence in this respect) that Skytime was not a going concern in November 2012, and would not have been even if the Aircraft had not been repossessed. In particular, the business was not a going concern on a cashflow basis, and once the seriously adverse market conditions for Learjet aircraft are taken into account, it was not solvent on a balance sheet basis either.

202. I would not, however, have accepted Lombard's alternative causation argument – that Skytime could have carried on trading using aircraft chartered from third parties. It is clear that, even before the Aircraft was re-possessed, Skytime was finding it increasingly difficult to charter-in aircraft because of its cashflow difficulties, and poor payment record. The repossession could only have made those difficulties even more acute. In any event, repossession triggered the obligation to repay the $2m advance made by Aerofleet LLP which was secured on a second charge on the Aircraft.

203. Given the highly contingent nature of this issue on my findings, I do not propose to lengthen this judgment further by addressing those questions which would have arisen as to the quantification of Skyjets' or Skytime's loss if the Sky Parties had (i) established (contrary to my findings) that Lombard was not entitled to take possession of the Aircraft; (ii) (contrary to my findings) that but for this, Skytime would have continued to trade and (iii) had succeeded on the remoteness issue which I did not need to decide. However, I should briefly mention two things.

204. First (as he acknowledged), Mr Cliff faced severe limitations in the available evidence when arriving at the calculated loss claimed. Mr Cliff had relied on the audited and management accounts which had been produced for the period from the financial year 2009 to April 2012. He did not rely on those management accounts which Mr Westlake said were unreliable (which related to periods in 2012). Mr Cliff accepted that the management accounts only gave a partial picture of the financial state of the business (in particular there was no balance sheet or cashflow statement). So far as the available audited accounts are concerned, Mr Cliff accepted that the audit qualification to Skytime's April 2011 accounts so far as the April 2010 opening balance is concerned indicated that there had been poor financial management or insufficient record-keeping. The accounts for Manhattan for the year-ended 31 July 2012, on which Mr Cliff also

relied, were also qualified because the auditors did not have sufficient evidence to provide the basis for an audit opinion, as were Skyjets' accounts for the year-ended 30 April 2012. Mr Cliff also relied on the price Danesmoor had paid to acquire 50% of Skytime, but he accepted that this assumed that Danesmoor was a "knowledgeable party" so far as the financial condition of the business was concerned. The contemporary documents, which I have summarised above, strongly suggest that (for whatever reason) Danesmoor did not have a proper understanding of the financial state of the business when they acquired it.

205. Second, I have reservations as to the calculation approach adopted by Lombard, in relation to the treatment of amounts owed by Skytime to its creditors (which did not appear to have been factored into its analysis).

## H ISSUES RELATING TO THE SALE OF THE AIRCRAFT

### H1 The applicable legal principles

206. It was common ground that Lombard owed Skyjets an equitable duty to obtain the best price reasonably obtainable for the Aircraft; that this involved the exercise of an informed judgment; and that provided that Lombard as mortgagee went about the exercise of its judgment in a reasonable way, it will not be held to be in breach of duty: Silven Properties v Royal Bank of Scotland [2004] 1 WLR 997; Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949.

### H2 Complaints about the storage of the Aircraft

207. Skyjets criticised Lombard for not flying the Aircraft from Farnborough to a location where it would have been cheaper to store it and where there would have been less risk of corrosion. However, no consequences of those criticisms were identified. Farnborough was where the Aircraft was located when repossessed, and on repossession, the Aircraft Operator's Certificate was rescinded, such that the Aircraft could not be flown to another destination without a significant amount of work. It would not have been apparent at the time how long it would take before the Aircraft was sold.

208. Against this background, I am not persuaded that Lombard breached its duty as mortgagee by keeping the Aircraft *in situ*, nor that this occasioned any loss to Skyjets.

### H3 Skyjets' complaints about the sale process

209. Skyjets made a number of complaints about the sale process, on which I heard expert evidence from Mr Seymour for the Sky Parties and Mr Butler for Lombard. There was a complaint that Lombard delayed in appointing a sales agent between 8 November 2012 and early February 2013. However, I accept that Lombard was engaged in various activities during that period, including securing the Aircraft, performing maintenance checks, researching the position on maintenance contracts and negotiating the commission. Lombard had been touch with the eventual sales agent (Colibri) prior to the repossession. It was also said that Lombard delayed too long in commissioning an external valuation (which it obtained in April 2013). However, it had the benefit of internal valuations in December 2012, as well as Colibri's own assessment.

210. Lombard was criticised for failing to market the Aircraft on the basis that it benefited from an MSP credit. However, I have seen no evidence as to the amount of any credit still in existence in 2014, that it could be transferred with the Aircraft or that it could be called upon elsewhere than at Harrods. The MSP Service Plan for the Clydesdale Aircraft does not readily disclose the right to transfer a credit under a cancelled MSP Service Plan.

211. The appointment of Colibri as the sales broker was criticised on the basis that it was essentially a one-person business based in London, whereas most Learjets are operated in North America. However, I was not persuaded that the use of a small broker was in any way atypical in this market (and I accept Mr Cox's evidence that it was not). It is apparent from Colibri's list of leads / enquiries that it was able to market the Aircraft effectively to North America, and it was eventually sold there. Mr Seymour position in cross-examination pertained not so much to the location of the broker as that of the Aircraft (for inspection purposes), but similar issues of distance between the Aircraft and a potential purchaser could arise in North America, and it is always possible to instruct local consultants to perform an inspection.

212. Calibri was criticised for not advertising the Aircraft in trade journals (it was advertised on websites such as AmState, Aeroclassified, Controller and AvBuyer). I was not persuaded that this would have had any meaningful impact on the success of the marketing campaign, and I accept Mr Butler's evidence that this was not a common marketing approach at the relevant time. Nor am I persuaded that Colibri acted unreasonably in reducing the price, in the absence of a sale, or referring to the price decreases on the face of its brochure. These are matters of judgment.

213. Finally, it was suggested that Lombard had killed a potential purchase opportunity (that being language Mr Philip Brown of Lombard had used in communications on the subject). What happened was that Mr Westlake had approached Lombard, having himself been approached by someone called Attul, claiming to represent a potential buyer, Veling. That intermediary was clearly angling for commission on any sale. Lombard insisted that any approach be made to Colibri and stated that it would not pay a second commission. Mr Brown observed that that response would kill the enquiry. I do not think Lombard acted unreasonably in saying that any purchasers had to deal with Colibri, it being a matter for Colibri whether it wished to share commission or not. Mr Seymour accepted that brokers for such sales are invariably appointed on an exclusive basis, and he withdrew many of his criticisms of this particular exchange when taken through the documents. Further, there is no evidence that Attul or Veling ever contacted Colibri.

## H4 Complaints about the sale price

214. This issue would only arise if I had concluded that there had been a breach of the duty to take reasonable steps to realise the best value of the Aircraft, although I accept that if I was persuaded that the Aircraft had been sold for markedly below market value, that of itself would be material on which Skyjets could rely in support of its breach of duty case.

215. Mr Seymour expressed the view that the market value of the Aircraft on a distressed basis in 2014 was $4.5m. Mr Butler arrived at the lower figure of $3.12m.

216. Mr Seymour had arrived at his valuation by taking Blue Book rates, adjusting them by reference to four transactions said to be comparable, and also adjusting them for particular features of the Aircraft. However, under highly effective cross-examination from Ms Eborall, Mr Seymour qualified his evidence in significant respects:

i) He qualified his evidence that the on-sale value achieved by Omni (the purchaser from Lombard) in October 2014, after reinstating the MSP plan for the Aircraft's engines and auxiliary power unit (**APU**), provided a relevant comparable, agreeing that this was not available information at the relevant date, and that the price achieved in a sale 8 months later had "no bearing at all" in a highly volatile market. In addition, there was no clear information as to the sale price achieved or the full extent of the costs incurred by Omni in securing it.

ii) He relied on the "asking price" for his four comparable sales (but stated in re-examination that asking prices were often "wishful thinking"). He accepted that for one of these four examples, the actual price might have been significantly less than the asking price, for another, that the target price was significantly below the asking price and that for a third, there was evidence the contract price was significantly below the asking price.

iii) Making those adjustments, the average price of the comparables Mr Seymour used was $4.5m. I accept, however, that the Aircraft was highly unusual in being sold without the benefit of an MSP package for the engines and APU, which required a downward adjustment on the evidence of some $952,000, and for the reasons I have set out above, I am not persuaded an upwards adjustment is required for "optional extras" in this context (see [146(v)]).

iv) This brings Mr Seymour's valuation down to about $3.55m. That results in a figure that is not that far removed from Mr Butler's valuation, particularly when regard is had to the fact that the Aircraft was being sold by a mortgagee in possession, after a lengthy period on the market. I am persuaded in those circumstances that the sale price fell within the range of reasonable market values.

## I THE QUANTUM OF LOMBARD'S CLAIM

217. Lombard quantified its claim in a schedule to its closing in the sum of $3,566,297.40. The mathematics of that calculation were not challenged. On the basis of my findings, I hold that Lombard is entitled to judgment against Skyjets in this amount.

218. The Sky Parties argued in opening that because Lombard had pleaded it was entitled to possession of the Aircraft *or* the balance of the loan, it could not recover any balance not satisfied by the proceeds of sale. However, the paragraph in the pleading reflects the fact that if Skyjets had immediately repaid the full balance of the loan, Lombard would not have exercised the power of sale. The form of pleading does not prevent Lombard recovering any balance of the loan not covered by the proceeds of the sale. I am also satisfied that a claim to contractual interest is clearly pleaded. Lombard does not (contrary to Skyjets' case) need any findings by the court in relation to the Mortgage, which is not an ingredient of its cause of action, although for the reasons I have set out I am satisfied that Lombard validly accelerated and terminated the Loan Agreement and thereby became entitled to enforce the Mortgage in respect of the

outstanding balance of the Loan. These were among a number of unmeritorious and unrealistic pleading points taken by the Sky Parties in the course of a granular analysis of the statements of case in its written opening. I do not propose to extend what is an already long judgment by addressing each of them individually.