



Neutral Citation Number: [2021] EWHC 88 (Comm)

Case No: LM-2020-000156

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

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

Date: 21/01/2021

Before :

**MR ANDREW HOCHHAUSER QC**  
**Sitting as a Deputy Judge of the High Court**

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Between :

- (1) WALTON FAMILY ESTATES LIMITED  
(2) AIRFIELD FARMS SULBY LIMITED  
(3) DAVID WALTON  
(4) ELIZABETH WALTON  
(5) JOHN WALTON  
(6) PETER WALTON

**Claimants**

- and -

- (1) GJD SERVICES LIMITED  
(2) GJD AEROTECH LIMITED  
(3) KEPLER AEROSPACE LIMITED  
(4) AGD SYSTEMS CORPORATION  
(5) TRISTAR AIR LLC  
(6) TEMPUS APPLIED SOLUTIONS  
HOLDINGS INC  
(7) ~~ECJ HOLDINGS LIMITED~~  
(8) JAPAN SKY SERVICES K.K.

**Defendants**

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ADAM CLOHERTY and ALEX PEPLow (instructed by **Bird Duckworth Mee**) for the  
**Claimants**

ARSHAD GHAFFAR (instructed by **Michelmores LLP**) for the **Fifth Defendant**  
JOHN CARL TOWNSEND and JOANNE KANE (instructed by **Sperrin Law**) for the  
**Eighth Defendant**

The First, Second, Third, Fourth and Sixth Defendants did not appear and were not represented.

Hearing dates: 16 (reading), 17 and 21 December 2020

I direct that pursuant to CPR PD 29A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Approved Judgment**  
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**Covid-19 Protocol: This judgment will 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 10.30am on Thursday 21 January 2020.**

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## MR ANDREW HOCHHAUSER QC :

### Introduction

1. This claim relates to the removal of certain aircraft (the “**Aircraft**”), which I shall particularise below, that are currently (and have been for some time) parked at Bruntingthorpe Airfield and Proving Ground, Bruntingthorpe, Nr Lutterworth, Leicestershire (the “**Aerodrome**”). The Claimants contend that the Aircraft are parked without authority. It is common ground that no parking fees have ever been paid in respect of them as far as the Fifth and Eighth Defendants are concerned. In addition, the proceedings concern various aircraft parts, equipment and miscellaneous scrap items (the “**Parts and Scrap**”) left at the Aerodrome.
2. The First Claimant, Walton Family Estates Limited (“**WFEL**”) is the current freehold owner of the Aerodrome. WFEL is indirectly majority owned by the Third to Sixth Claimants (the “**Waltons**”), who are also its directors.
3. WFEL is the landlord under a lease dated 13 January 2020 (the “**Lease**”) of that part of the Aerodrome, on which the aircraft are parked, to C. Walton Limited (“**CWL**”).<sup>1</sup> The Lease is for a term of 35 years from that date, with two tenant’s break clauses on 12 January 2035 and 12 January 2045, respectively. CWL was previously the freehold owner of the Aerodrome and since February 2020 has been a wholly owned subsidiary of Cox Automotive UK Limited (“**Cox**”), by which Cox acquired the non-farming and non-aviation aspects of the business that CWL previously carried on. It is to be noted that CWL is not a claimant in these proceedings. CWL now occupies the Aerodrome and uses the site for Cox's automotive business. It has notified the Aeronautical Information Service that the runway at the Aerodrome is not available for general aviation use and that aircraft can no longer land there.
4. The Second Claimant (“**AFSL**”) is WFEL’s sister company. It succeeded to the farming and aviation business previously carried on by CWL.
5. Under the Lease:
  - (1) Pursuant to Clause 4.1.3, WFEL had the right to retain the Aircraft and the Scrap at the Aerodrome in accordance with the provisions of Clause 40.1 “*together with the right (subject to Clauses 4.4 and 4.5) to enter upon unbuilt parts of the Property for the purpose of complying with the obligations imposed on the Landlord in that clause.*” Under the provisions of Clause 28.1.1, CWL cannot build upon the Property without the consent of WFEL, which cannot be unreasonably withheld or delayed. No consents have been given to date.
  - (2) Clause 40.1 provides: “*The Landlord and the Tenant acknowledge that the Aircraft and the Scrap are located on the Property at the date of this Lease. The Landlord covenants to remove all Aircraft and all Scrap from the Property by no later than 31st December 2020 and shall provide the Tenant with monthly updates as to its progress in procuring such removal.*”

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<sup>1</sup> On 13 January 2020, CWL, then the freeholder, (as landlord) granted the Lease to C Walton Nominees Limited (as tenant). Subsequently, WFEL acquired the freehold to the Aerodrome (and the landlord’s obligations under the Lease) and the Lease was transferred to CWL.

- (3) Under Clause 4.4, WFEL is entitled to enter the Aerodrome with their workers, contractors, agents and professional advisors for this purpose at any reasonable time (whether or not during usual business hours), after giving reasonable prior written notice of at least 48 hours to CWL except in case of emergency, when as much as notice as possible should be given.
  - (4) Pursuant to Clause 4.5, WFEL must cause as little damage to the Aerodrome, and as little disruption to CWL's business as possible. WFEL's access must not materially adversely affect the use and enjoyment of the Aerodrome.
  - (5) Clause 40.2 provides: "*The Landlord irrevocably appoints the Tenant to be the Landlord's Agent to store or dispose of any Aircraft and Scrap which have not been removed from the Property by the date which is 30 Working Days [i.e., 12 February 2021] following 31st December 2020. The Tenant shall not be liable to the Landlord by reason of that storage or disposal. The landlord shall indemnify the Tenant in respect of any costs and expenses incurred, and any claim made by a Third Party, in relation to that storage or disposal.*"
6. On 7 February 2020, Cox, as buyer, entered into a share purchase agreement (the "SPA") with various sellers (including the Waltons) for the purchase of the entire issued share capital in BIAS Limited, a company incorporated solely for the purpose of effecting Cox's acquisition of the automotive business at the Aerodrome. In the SPA at Clauses 11.12-11.14, the Waltons gave warranties to Cox that:
- (1) all liabilities relating to the Aircraft, both before and after the date of the SPA, would be for AFSL's account, and that AFSL assumed responsibility for such liabilities;
  - (2) they would procure the removal of the aircraft by no later than 31 December 2020; and
  - (3) AFSL, or the Waltons, would be responsible for maintaining and removing the Aircraft, but would need to seek Cox's written approval before "*undertaking any act, matter or thing in respect of any Aircraft*", such consent not to be unreasonably withheld or delayed;

Cox agreed to provide such access to the aircraft as the Waltons reasonably require in order to comply with their obligations to remove the Aircraft.

7. In submissions, reference was made to WFEL's obligations under the Lease and the Waltons' obligations under the SPA collectively as the "**Cox Obligations**". I shall use the same expression in this judgment.

### **The Defendants**

8. The First, Second, Third, Fourth, and Sixth Defendants have failed to contest the claim. Originally judgment in default was sought against each of them. Given the nature of the declaratory relief sought in the Amended Particulars of Claim, I invited further submissions from the Claimants as to exactly what orders were being sought against those Defendants. In the event, and in the light of correspondence dated 25 November 2020 between solicitors for the Claimants and Mr Gary Spoons on behalf

of the First Defendant, the only relief now sought against any of the Defendants which have not filed an Acknowledgment of Service, is against the First Defendant, as follows:

- (1) A declaration that the First Defendant is the owner of the two Vickers VC10 air to air tanker refueller aircraft with registration numbers ZD241 and ZD147 (the “**VC10s**”), forming part of the Aircraft and also the Parts and Scrap situated at the Aerodrome, as claimed in paragraphs 50 and 51 of the Amended Particulars of Claim (“**APOC**”);
- (2) An Order requiring the First Defendant to remove the two VC10s and the Parts and Scrap from the Aerodrome by 17 January 2021, in accordance with paragraphs 54.1 of the APOC (save that the date has been extended);
- (3) An Order that, if the First Defendant fails to comply with the Order in subparagraph (2) above:
  - a) the Claimants be entitled to remove the VC10s and the Parts and Scrap in such manner as they determine (or as the Court may direct) without incurring any liability to the owners thereof;
  - b) pursuant to section 13 of the Torts (Interference with Goods) Act 1977 (the “**1977 Act**”) the Claimants be authorised
    - i. to sell the VC10s and the Parts and Scrap on such terms and conditions as the Court may specify;
    - ii. to deduct from the proceeds of sale any costs of sale and any amount due to them from the First Defendant, including any costs awarded to them in these proceedings; with such directions as to the net proceeds of sale as the Court thinks fit.

as claimed in paragraphs 54.2 and 54.3 of the APOC.

9. I will consider the relief sought at the end of this judgment.
10. That leaves the Fifth and Eighth Defendants, which are the only Defendants actively participating in this action, the claim against the Seventh Defendant having been dropped.

### **The Fifth Defendant**

11. The Fifth Defendant, Tristar Air LLC (“**Tristar Air**”), is a wholly owned subsidiary company of the Sixth Defendant. I should record that Mr Johan Eliasch (“**Mr Eliasch**”) is interested in both Tristar Air and the Sixth Defendant. He is referred to in the evidence. Before the hearing I drew to the parties’ attention that as Counsel I had represented Mr Eliasch in unrelated matters on three previous occasions, in 1997, 2003 and 2014. I stated that I was not prepared to hear the application unless the parties indicated that, in the light of this information, they had no objection to me doing so. In the event no objections were raised, and the Claimants, the Fifth and Eighth Defendants expressly agreed that I should hear the matter.

12. On 11 August 2017 the Sixth Defendant entered into an aircraft purchase agreement with ME Aviation Services LLC in respect of six Lockheed L-1011 Tristar aircraft with US registration numbers N703CS, N705CS, N3049CS, N405CS and N507CS (the “**Tristars**”). The Tristars form part of the Aircraft parked at the Aerodrome and have been parked at the Aerodrome since March 2014. On 30 October 2017, the Sixth Defendant assigned to Tristar Air its interest in the Tristars by way of an Aircraft Purchase Agreement Assignment. It appears that Tristar Air is no less than the fifth owner of the Tristars since they arrived at the Aerodrome. No notice of that assignment was ever given to any of the Claimants by either Tristar Air or the Sixth Defendant. Mr Walton states at [61(d)] of his first witness statement dated 1 October 2020 that he and the other Claimants did not become aware of the assignment until April 2019. He gives no detail as to how he became aware. At paragraph 56 of his first witness statement dated 5 November 2020, Mr Steven states that it is clear from the correspondence passing between a Mr David Gilman, a manager of the Sixth Defendant and Mr Walton that Mr Walton and his solicitor, Mr Duckworth were made aware by Mr Gilman that Tristar were the owners of the Tristars on 14 May 2020 and 18 May 2020. That correspondence is not exhibited.

### **The Eighth Defendant**

13. The Eighth Defendant, Japan Sky Services Limited (“**JSS**”) are the owners of two Boeing 747-300 aircraft (the “**747s**”). The 747s also form part of the Aircraft parked at the Aerodrome. The 747s were flown, in separate flights, to the Aerodrome, in late October and early December 2012. At that time both aircraft were airworthy, as evidenced by their transit to the Aerodrome. At that time, the aircraft had been flown to the site on behalf of the Russian carrier Transaero Airlines (“**Transaero**”) the then owner, now in liquidation.

### **Legal Representation**

14. At the hearing, the Claimants were represented by Adam Cloherty and Alex Peplow of Counsel, Tristar Air by Arshad Ghaffar of Counsel and JSS by John Carl Townsend and Joanne Kane of Counsel. I am grateful to all of them for their helpful written and oral submissions.

### **The Original Application**

15. The basis of this application has evolved in the course of the hearing. The Application Notice dated 1 October 2020, in addition to claiming judgment in default against those Defendants who had failed to file an Acknowledgment of Service, sought:

*“2. Pursuant to CPR 25.1(c)(v) an order for the sale of the Aircraft and Parts and Scrap (as defined in the Particulars of Claim); and*

*3. Such further or other directions for the final disposal of the claim prior 31 December 2020 as the Court thinks fit.”*

16. The Application was supported by the second witness statement of Matthew Duckworth (“**Duckworth 2**”), a Director of the Claimants’ solicitors, Bird Duckworth Mee, and the first witness statement of the Third Claimant, David William Walton,

who is also a director of WFEL and ASFL, (“**Walton 1**”), both dated 1 October 2020, together with exhibits.

17. In their skeleton arguments the point was taken by both Tristar Air and JSS, that given the context and finality of the relief sought, in reality this was not an application for interim relief pending a hearing, but an application under CPR 24 for summary judgment, which if successful, would dispose of the entire action, no monetary relief being claimed. According to Mr Ghaffar, the final nature of the relief claimed was raised by HHJ Pelling QC, at the directions hearing on 28 October 2020. It is to be noted that there was no offer of a cross-undertaking in damages or any evidence in support of the same, were an interim order of the kind sought by the Claimants to be made. I raised this with Mr Cloherty at the hearing and invited him to reconsider the nature of the relief sought.

### **The Revised Application Notice**

18. On Sunday 21 December 2020, the day before the second day of the hearing, the Claimants served a revised Application Notice which abandoned the interim relief under CPR r.25.1(c)(v), and instead sought summary judgment against both Tristar Air and JSS under CPR 24, an Order that they remove their respective aircraft from the Aerodrome by 31 December 2020 and in default of compliance that the Claimants be permitted to sell, remove, scrap or cause to be sold, removed or scrapped, any of the Aircraft or Parts or Scrap, or any parts or components thereof, which remain located at the deadline of 31 December 2020, alternatively directions for trial. The same evidence, set out in paragraph 16 above, was referred to and relied upon.

### **The Factual Evidence**

19. There was a large amount of factual evidence before the Court. In addition to the witness statements referred to in paragraph 16 above, the following further witness statements were served on behalf of the Claimants:
  - (1) The first witness statement of Matthew Duckworth dated 3 September 2020;
  - (2) The second witness statement of David William Walton dated 12 October 2020 (“**Walton 2**”)
  - (3) The third statement of David William Walton dated 20 November 2020 (“**Walton 3**”)
  - (4) The first witness statement of Jeffrey Anderson, a former employee of the First Defendant dated 20 November 2020 (“**Anderson 1**”);
  - (5) The first witness statement of David Thomas, currently retired, but previously a former security guard and mechanic working at the Aerodrome, dated 20 November 2020 (“**Thomas 1**”);
  - (6) The fourth statement of David William Walton dated 27 November 2020 (“**Walton 4**”)
20. The evidence served on behalf of Tristar Air consisted of:



- (1) The first witness statement of Fiona Pearson, a senior associate of Michelmores LLP, Tristar Air’s solicitors, dated 23 October 2020 (“**Pearson 1**”);
  - (2) The first witness statement of Edward Steven, a consultant to Tristar Air, dated 5 November 2020 (“**Steven 1**”);
  - (3) The second witness statement of Fiona Pearson dated 5 November 2020 (“**Pearson 2**”).
21. The evidence served on behalf of JSS consisted of:
- (1) The first witness statement of Andrew Webber, who describes himself “*as having a presence socially and professionally on Bruntingthorpe airfield since 2000*”, dated 12 October 2020 (“**Webber 1**”);
  - (2) The first witness statement of Nicholas Jeys, an employee of Nightstar Aviation SL, dated 27 October 2020 (“**Jeys 1**”);
  - (3) The first witness statement of Omar Jabes, who describes an incident at the Aerodrome on a date he does not identify, dated 27 October 2020 (“**Jabes 1**”);
  - (4) The first witness statement of Fadi Qaddah, who is employed by JSS to manage the technical team of engineers recruited to engage in the restoration works on any aircraft JSS acquire, dated 11 November 2020 (“**Qaddah 1**”);
  - (5) The first witness statement of Alexey Belokopyt, the Court appointed liquidator of Transaero, dated 11 November 2020 (“**Belokopyt 1**”);
  - (6) The first witness statement of Gary Spoons, a director of the First and Second Defendants, dated 11 November 2020 (“**Spoons 1**”).
  - (7) The second witness statement of Andrew Webber dated 20 December 2020 (“**Webber 2**”).

### **The Expert Evidence**

22. By the Order of HHJ Pelling QC dated 28 October 2020, permission was granted to the Claimants to adduce written expert evidence of (i) Paul Jenkins of MYI Limited as to the physical condition of each of the Aircraft and the maintenance tasks and facilities necessary to return each of the Aircraft to commercial service and (ii) Paul Leighton of the Aircraft Value Analysis Company Limited as to the current value of each of the Aircraft and the probable value of the Aircraft if they were repaired sufficiently to return them to commercial service. In the event only Mr Leighton’s report dated 13 November 2020 was relied upon by the Claimants.
23. Permission was given to the Defendants to file and serve responsive expert evidence on these issues. This led to the following expert reports served:
- (1) the report of Justin Goatcher dated 4 December 2020 on behalf of Tristar Air, relating to the cost to Tristar Air of sourcing and purchasing six alternative aircraft, were the existing Tristars to be scrapped;

- (2) the report of Philip Leslie Seymour of the International Bureau of Aviation Group Limited dated 7 December 2020 on behalf of JSS, relating to (a) the current value of each of the 747s, (b) their value based on the probability of them flying out of the Aerodrome and (c) how the COVID-19 pandemic impacted the speed and ability of JSS to make the necessary arrangements to remove the 747s from the Aerodrome.
24. There is also a Note of a joint meeting dated 9 December 2020 between Mr Leighton and Mr Seymour, indicating areas of agreement and disagreement.
25. In the event, little reference was made to the expert evidence in oral submissions. I did not find that it was of great assistance, given that the application was now for summary judgment, rather than interim relief.
26. It will be seen from the recital of the evidence above, that there was a considerable volume of material to consider. The witness evidence ran to 274 pages. All the exhibits to the witness statements were contained in a second supplementary bundle, running to 1171 pages. The inter partes correspondence was contained in a third supplementary bundle consisting of 275 pages. How anyone thought that one day was a realistic time for the hearing of this matter is a mystery to me.

### **The Law in Relation to Summary Judgment**

27. The power to award summary judgment is to be found in CPR 24.2, which, so far as material, states that:

*“The court may give summary judgment against the claimant ... on the whole of the claim or on a particular issue if-*

*(a) it considers that:*

*(i) that the claimant has no real prospect of succeeding on the claim or issue ... and*

*(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”*

28. The relevant principles were summarised by Floyd LJ in TFL Management Services Limited v Lloyds TSB Bank Plc [2014] 1 WLR 2006 at [26] to [27]. In that passage, Floyd LJ referred to an earlier decision of Lewison J (as he then was) in Easy Air Limited (Trading as Open Air) v Opal Telecom Limited [2009] EWHC 339 (Ch) at [15], where he summarised the principles in the following way:

*“... the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*

*i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;*

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

(vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be

*wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”*

29. I also remind myself of the following:

- (1) the criterion “real” is not one of probability, it is the absence of reality: see Lord Hobhouse in Three Rivers District Council v Bank of England (Number 3) [2003] 2 AC 1 [158];
- (2) an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issues having regard to all the evidence: see Apovdedo NV v Collins [2008] EWHC 775 (Ch);
- (3) in relation to the burden of proof, the overall burden of proof rests on the applicant to establish that there are grounds to believe the respondent has no real prospect of success and there is no other compelling reason for trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief.

### **Amendments to the Defences of Tristar Air and JSS**

30. In the course of the hearing, both Tristar Air and JSS sought to amend their Defences. Each served draft amended Defences: Tristar Air at the end of the first day of the hearing; JSS on 24 December 2020, which was further revised on 5 January 2021. I shall determine this amended application on the basis of those draft amended Defences. The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new defence has a real prospect of success: see SPI North Ltd v Swiss Post International (UK) Ltd [2019] EWHC 2004 (Ch) at [5]. In that regard I refer to the authorities summarised at paragraphs 28 and 29(1) and (2) above. I received further submissions from Mr Cloherty and Mr Peplow on behalf of the Claimants on 29 December 2020, and 6 January 2021.
31. The defences of Tristar Air and JSS are based on different facts, and I shall consider each separately. There is, however, one preliminary point taken by Tristar Air and by JSS, namely whether the Claimants have any rights of suit against them. I shall consider that first.

### **The Nature of the Claims**

32. The Claimants bring their claims in trespass and involuntary bailment.

### **Trespass**

33. In relation to the claim in trespass, Tristar Air submitted (which submission JSS adopted) that only WFEL has any sort of interest in the land comprised in the

Aerodrome. Its interest is exclusively that of a freeholder. As to that, whilst this is prima facie proof of possession, WFEL has clearly, by the terms of the lease with CWL, granted CWL exclusive possession of the Aerodrome. The mere fact that the Lease obliges the landlord to clear the Aerodrome of the aircraft by a particular date has no bearing on this. Further, there is no damage to WFEL's reversionary interest by reason of the Aircraft being at the Aerodrome and certainly not damage sufficient to found a right of suit in trespass: see generally Clerk & Lindsell on Torts, 23<sup>rd</sup> Ed, Chapter 18, Section 2.

### **The Claimants' Submissions on the Claim in Trespass**

34. In his written and opening oral submissions, Mr Cloherty relied solely on WFEL's interest in the Aerodrome in relation to trespass. He put his case on two bases:
- (1) The first was based on the Lease. The rights and obligations reserved to WFEL under Clause 4.1.3 of the Lease gave it a right to retain the Aircraft at the Aerodrome until 31 December 2020 and "*to enter upon unbuilt parts of the Property for the purpose of complying with the obligations imposed on the Landlord in [Clause 40.1].*" He further relied upon Clause 4.4, summarised at paragraph 5(3) above.
  - (2) The second relied upon alleged damage to WFEL's reversionary interest in the Aerodrome.

### **The Lease**

35. The clauses referred to in paragraph 34(1) above gave WFEL a licence, limited in time, to occupy the land on which the Aircraft were parked and to enter onto it to remove them. That was a sufficient interest to bring a claim in trespass against these defendants. He submitted that a licensee is entitled to bring proceedings against trespassers in order to protect and support its legal rights under the licence irrespective of whether or not it has already entered onto the land He relied upon two authorities in support of that submission.
36. The first was Manchester Airport v Dutton [2000] QB 133. There a plaintiff was granted a licence by the landowner to occupy a wood for the purpose of carrying out works in connection with the construction of an airport runway. Three days before the plaintiff entered into occupation, the defendants, who were opposed to the works, entered the wood without permission with the intention of making it difficult or impossible for the works to be carried out. The defendants opposed the plaintiff's application for an order for possession on the ground that the plaintiff did not have a sufficient interest in the wood to seek an order for possession, since the licence granted did not give it exclusive possession of the land. The majority of Court of Appeal (Chadwick LJ dissenting) held that a licensee with a right to occupy land, was entitled to bring an action for possession against a trespasser in order to give effect to the rights under the licence. A right to exclusive possession of the land was not required in order to obtain an order for possession, but a licensee's remedy was strictly limited to the enforcement of the rights he enjoyed under that licence. Accordingly, the plaintiff was entitled to possession as against the defendants.
37. At p. 149H-150B, Laws LJ stated:

*“... the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence ... In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. this is the same principle as allows a licensee who is in de facto possession to evict a trespasser.”*

38. The second authority upon which Mr Cloherty relied was Alamo Housing Corporation v Meredith [2003] EWCA Civ 495. In that case a local authority (the “**Authority**”) granted the claimant, a housing association (the “**Association**”), a lease of a number of properties to provide temporary housing for persons in need. The lease was to last for two years but the Authority reserved the right to terminate the lease earlier in respect of some or all of the properties by serving the Association with 28 days’ notice. Clause 2(1) of the lease provided: *“On the expiration of the said notice [the Association’s] interest granted in the demised premises or such part as the case may be shall forthwith cease and determine except for the purpose of enabling eviction if required by [the Authority].* The Association let out flats in the properties to the defendants. Subsequently, the Authority served the association with notices under Clause 2(1) of the lease in respect of the properties occupied by the defendants. Shortly thereafter, the Association served the defendants with notices to quit their respective homes, under their tenancy agreements. Upon the expiry of these notices the Association commenced possession proceedings. By the time of the court hearing, the notices served on the Association by the Authority had expired. As a consequence, the defendants argued that the Association no longer had a sufficient interest to bring possession proceedings.
39. The Court of Appeal held that, following expiry of the notices served on the Association by the Authority, the Association had no legal estate in the properties. Clause 2(1) of the lease, however, conferred on the Association a continuing right to possession of the premises for the purpose of evicting the defendants, which was sufficient to enable it to bring possession proceedings.
40. At [41]-[43], Schiemann LJ, giving the judgment of the Court, stated:

*“It is clear that the Council wished, when it executed the Lease, to rid itself of the burden of managing these premises but, in effect temporarily to hand them over to Alamo. The Council wished to be able to recover possession of parts of the property bit by bit as expedient...*

*The situation must be judged as at the time when the Council’s Notice to Quit had taken effect. At that time Alamo no longer had an estate in the land. However, since the Council had, as is conceded, required Alamo to take proceedings to evict the tenants so as to be able to hand over the properties with vacant possession, it seems to us that the effect of the Exception was to confer on Alamo a continuing right to possession for that purpose and therefore the situation is exactly as that described in paragraph 39 above. That was the evident intention behind*

*its inclusion in the Lease, against the background of the decisions in Dutton and Countryside. Had the Council intended to grant Alamo any lesser right it would have been ineffective for the very purpose which the Council wished Alamo to achieve.*

*The Defendants do not claim any right themselves to occupy the premises and the Council, which is entitled to the premises, has asked Alamo to evict the Defendants so as to be able, as near as may be, to fulfil its covenant to hand over the premises with vacant possession. Possession proceedings seem eminently suitable for achieving this aim.”*

41. Mr Cloherty submitted that when rights and obligations under the Lease are properly analysed, the situation here was precisely the same.
42. In his reply, Mr Cloherty also relied upon Clauses 11.12-11.14 of the SPA, so as to confer a similar right upon the other Claimants. In particular he referred to the provisions of Clause 11.12 which obliged those Claimants to “*remove or procure the removal by WFEL in accordance with its obligations pursuant to Clause 40.1 of the [Lease] of all Aircraft by no later than 31 December 2020*” and to Clause 11.14, whereby the parties to the SPA further “*acknowledge and agree that all liabilities and assets relating to the Aircraft and the Aviation Disputes are for the account of / benefit of AFSL*”.

#### **The Alleged Damage to WFEL’s Reversionary Interest in the Aerodrome**

43. Mr Cloherty submitted that, although the Lease was for a period of a minimum of 15 years and a maximum of 35 years, the continuing presence of the Aircraft was causing damage to the reversionary interest in the Aerodrome, such as to found an alternative basis for a claim in trespass. In this regard he relied upon the decision of Parker J in Jones v Llanrwst Urban District Council [1911] 1 Ch 393. The case concerned the rights of a riparian owner on the banks of a natural stream, where a local authority was committing a trespass by permitting faecal matter under its control to escape. At p. 404, Parker J stated:

*“With regard to the first point, it is reasonably certain that a reversioner cannot maintain actions in the nature of trespass, including, I think, actions for infringement of natural rights arising out of his ownership of land, without alleging and proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured the question of whether the reversion is or is not injured is a matter for the jury: Simpson v Savage ... I take “permanent”, in this context, to mean such as will continue indefinitely unless something is done to remove it. That a building which infringes ancient lights is permanent within the rule, for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, and the exercise of an alleged right of way, are not in the nature permanent within the rule, for they cease of themselves*

*unless there be someone to continue them. In my opinion, what is complained of in the present case is of a permanent nature within the rule. The sewage of Llanwrst will continue to be turned into the Conway unless and until something is done to divert it elsewhere. It is not only a case only of the present intention of the defendants, but of the necessary consequences of the physical conditions, if nothing is done to alter them. Further, I am satisfied that the plaintiff's reversion is in fact injured and depreciated in value by what is happening at the present time."*

44. Given that Tristar Air and JSS both claimed gratuitous open-ended licences in respect of the Tristars and 747s respectively, Mr Cloherty submitted that there was an element of permanence which caused harm, applying the approach of Parker J in the *Jones* case.

### **Tristar Air Submissions on the Lack of Standing of the Claimants in Relation to the Claim in Trespass**

45. Mr Ghaffar on behalf of Tristar Air sought to distinguish the Manchester Airport case on the basis that there, unlike the present case, the terms of the licence granted were to enter and to occupy. He submitted that a mere licence to enter is insufficient. Clause 4.1.3 of the Lease does no more than that. He referred to and relied upon [27] of the Alamo case, where Schiemann LJ, referring to judgment of Kennedy LJ in the Manchester stated:

*"Kennedy LJ, to whose judgment Laws LJ made no reference, said that, on the facts of that case, the requirement of the law that in order to succeed in an action for possession a plaintiff must show that he had the right to possession of the land were met. He said at page 151:*

*"The plaintiff does have a right to possession of the land granted to it by the licence. It is entitled "to enter and occupy" (Kennedy LJ's emphasis) the land in question. The fact that it has only been granted the right to enter and occupy for a limited purpose (specified in Clause 2 of the licence) and that, as I would accept, the grant does not create an estate in land giving the plaintiff a right to exclusive possession does not seem to me to be critical."*

46. At [28] of the Alamo case, reference was made to the Court of Appeal decision in Countryside Residential (North Thames) Limited v (1) A Child; (2) Persons unknown (2001) 81 P&C.R.10 (Aldous and Waller LJJ and Rougier J), in which Waller LJ gave the leading judgment, allowing an appeal by trespassers against a licensee, with which the other members of the Court concurred. At [31] Schiemann LJ cited the following passage of Waller LJ's judgment:

*"Waller LJ said this at paragraphs 12 and 13:*



*“In my view it is important not to confuse contractual rights, in relation to which the developers may well have rights against any person who seeks to interfere therewith, with the right of possession, which is the foundation of the Order 113 remedy. ... The judgment of Kennedy LJ also supports the view that something beyond just the right to enter the land is required. ...he places emphasis on the fact that the right is to enter and occupy. It seems to me that there is a clear difference between a licence granted for the purpose of access, which does not provide effective control over the land, and a license to occupy which does.”*

47. Mr Ghaffar contended that applying the approach in Alamo, WFEL had an insufficient basis to bring a claim in trespass. He also relied upon Clerk & Lindsell on Torts, 23<sup>rd</sup> Edn, Chapter 18, Section 2 at 18-23, which referring to the Manchester case, expressly referred to the licensee’s right to occupy.
48. In relation to the alternative ground, Mr Ghaffar clarified that it was not Tristar Air’s case that it was entitled to a gratuitous indefinite licence. Although no payments had been made, it did not mean they would not be made. There is a distinction to be drawn between an obligation to pay and actual payment. He referred to invoices sent by Mr Walton on behalf of CWL to Mr Eliasch, then acting for Tristar Air<sup>2</sup> on 5 August 2019, which calculated payments due until 31 July 2019. Moreover, the licence claimed was not indefinite, but simply one for sufficient time to make the Tristars airworthy and then there would be negotiations to fly them out using the runway on the Aerodrome. In such circumstances, there was no question of there being any damage caused to the reversionary interest and this case was distinguishable from the facts of Jones.

### **Discussion and Conclusion in Relation to the Claim in Trespass**

49. In my judgment, WFEL have established a sufficient interest in the Aerodrome to sue both Tristar Air and JSS for trespass, assuming no right for the Aircraft to remain on the Aerodrome is established. The Lease, properly interpreted, gives WFEL the right to occupy the land within the Aerodrome on which the Aircraft are parked and to have access to the property for the purpose of fulfilling its obligations under Clause 40.1 thereof. The situation is therefore on all fours with the Manchester Airport case, indeed it is a fortiori here, because in the Manchester Airport case the court held it had jurisdiction to grant a licensee an order for possession against trespassers even before the licensee was in de facto possession, if such an order was necessary to give effect to the licensee’s right to occupy under the contract with the licensor. Mr Ghaffar’s submission ignores the fact that the Lease gave it a right to retain the Aircraft at the Aerodrome until 31 December 2020 and this must therefore confer a right to occupy.
50. I am not satisfied that such a right is given to the other Claimants by reason of the terms of Clause 11 of SPA, because when one examines the provisions of Clauses 11.12-11.14, there is no similar right to occupy conferred.

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<sup>2</sup> See [31] and [32] of Steven 1.

51. In relation to the alternative basis for the trespass, namely damage to the revisionary interest in the Aerodrome, given my findings in paragraph 48 above, it is not strictly necessary for me to decide this. However, should this go further, in my view this basis is not made out. I do not regard the situation of the continued presence of the Aircraft which on any view is not going to be for a lengthy period, is to be regarded as “permanent” in the sense used in the Jones case, where harmful effluent was being continuously discharged, injuring the reversion, which was “*depreciated in value by what is happening at the present.*”

### **Involuntary Bailment – the Claimants’ Submissions**

52. In this regard Mr Cloherty appeared to limit the right to such a claim to WFEL. To the extent that the Aircraft remain on the Aerodrome, WFEL is an ‘involuntary’ “bailee” of the Aircraft, the sale of which the Court could accordingly order under Section 13 of the Torts (Wrongful Interference with Goods) Act 1977 (the “**1977 Act**”). The significance of this in the present case is that “*bailor*” and “*bailee*” include their respective successors in title<sup>3</sup>. Since it is plain that the Court could and would order a sale against Tristar Air and JSS’ predecessors in title, it can and should make such an order against them, save to the extent that they can establish a credible case that they have their own independent right to continue parking the Aircraft for the 3-6 months that they claim.
53. Mr Cloherty placed reliance on the passages at Volume 4, Bailment and Pledge, of Halsbury’s Laws of England (2020) at paragraph 112 entitled “**Deposit without Agreement**”, which provides: “*While the orthodox or literal translation by way of depositum is a consensual bailment deriving from express agreement between bailors and bailee there exist certain analogous forms of relationship based on one person’s unrewarded possession of another’s goods which, while not directly the product of agreement, may produce obligations akin to those of an orthodox bailment by way of depositum and might in some cases traditionally be viewed as deriving from an implied agreement to possession.*” and at paragraph 120 entitled “**Involuntary Deposit**”, which provides: “*Where a chattel is sent, without request or arrangement, by one person to another who does not hold himself out as willing to receive it, the person to whom it is sent is deemed to be an involuntary bailee and will ordinarily owe no responsibility to the sender to exercise reasonable care for its safe custody or protection, but must not deliberately convert it to his own use and must take reasonable care when purporting to redeliver the chattel to the owner or his authorised representative (which would otherwise render him liable in conversion).*” This is to be distinguished from the situation where there is an existing licence (which is the situation relied upon by Tristar Air and JSS). He submitted that Tristar Air purchased the Tristars without any valid licence to park at the Aerodrome. Under Clause 4.1.3 of the Lease the right to retain the Aircraft is reserved to WFEL, coupled with the obligation to remove them by 31 December 2020, under Clause 40.1 and he accepted that should these Defendants not remove the Aircraft as ordered, and the Court were to make any order for sale, WFEL would have to account for the proceeds of sale to Tristar Air and JSS, after deducting the costs thereof.

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<sup>3</sup> See s. 12(7)(a) of the 1977 Act.

### **Tristar Air's Submissions on Involuntary Bailment**

54. Mr Ghaffar's primary position was that Tristar Air has the right to continue parking the Tristars at the Aerodrome, but even were that not the case, the Claimants were not involuntary bailees. He relied upon the fact that none of them have any right to occupation or possession of the land on which the aircraft are currently parked. Furthermore, none of the Claimants have ever had possession or custody of, or duty of safekeeping of, the aircraft, which have been on the land pursuant to a pure contractual licence and not as a result of any bailment of the aircraft by Tristar Air to any other person (see generally Halsbury's Laws of England (2020), Volume 4, Bailment and Pledge, at paragraphs 101–104 and 120). In particular, he relied upon the passage at paragraph 102: "*...but in general the weight of authority is that in such cases there is no basis unless possession rests in the hirer. Possession as a licensee will not suffice to create bailment.*".
55. Referring to the evidence, he pointed to [52] of Steven 1, which made clear that neither WFEL nor CWL had keys to the Tristars and neither was given permission to enter the Tristars for any reason or for any purpose. At [31] of DW3, Mr Walton indicated that he had no knowledge of what maintenance or other work (if any) was being done to the Tristars and played no part in any decisions regarding such work.

### **JSS' Submissions in Relation to Involuntary Bailment**

56. Additionally, on behalf of JSS, Mr Townsend submitted the Claimants' pleaded case in respect of involuntary bailment is inherently misconceived. The Claimants do not have any interest in the 747s, nor do they seek to persuade the Court of any such interest. Whilst he accepted that it has long been trite law that the deposit of goods on the land of another may give rise to bailment, that requires that both of the following conditions be met:
- (1) the occupier can reasonably be regarded as asserting rights of retention over the goods and assuming custodial responsibilities towards them; and
  - (2) the party depositing the goods can reasonably be regarded as relinquishing control in favour of the occupier.
57. Mr Townsend relied first upon the alleged existence of a continuing licence agreed between Mr Qaddah and Mr Walton, prior to JSS' purchase of the 747s, so that no question of involuntary bailment arose. If that be the case, then a situation cannot have arisen whereby the Claimants could be regarded as asserting rights of retention or custodial responsibility and there can be no question of JSS having relinquished control in favour of the Claimants. I note, however, that paragraph 63 of the original Defence states: "*...by the representations of [Mr Walton] the Claimants became voluntary Bailees.*", and paragraph 43.5 of the draft amended Defence, which I will address later in this judgment, states: "*If the Claimants are bailees, they are voluntary bailees...*"
58. Mr Townsend argued that Section 12 of the 1977 Act is directed towards a bailee's power of sale in connection with uncollected goods. For this to arise, the Claimants are required to prove that there has been a breach of an obligation by JSS to take

delivery of the goods or, alternatively, a failure by JSS to give directions as to delivery. On the facts, there is no breach or failure by JSS.

59. Further or alternatively, under paragraph 1(3) of Schedule 1 to the 1977 Act, a notice to collect the goods pursuant to Section 12 must:

- (1) specify the bailee's (in this case, the landlord's) name and address;
- (2) give particulars of the goods and the address at which they are held;
- (3) state that the goods are ready for delivery to the bailor (in this case, the former tenant);
- (4) specify the amount, if any, due to the bailee in respect of the goods before giving the notice.

Mr Townsend contended that the notice served on behalf of the Claimants was defective in that it failed to comply with these requirements, in particular it does not specify a value due to the bailee in respect of the goods.

60. Importantly, a bailor must be given a reasonable opportunity to collect the goods, before the bailee sells them. The provisions of paragraph 6(2) of Part II of Schedule 1 of the Act require that: "*The period between giving of the notice and the date specified in the notice as that on or after which the bailee proposes to exercise the power of sale shall be such as will afford the bailor a reasonable opportunity of taking delivery of the goods.*" It is plain that any consideration of "reasonable notice" will require an analysis of the surrounding facts. In the instant case, the relevant facts are that:

- (1) the repairs would have had to have been made in the midst of an unprecedented global pandemic with the use of specialist and suitably qualified engineers;
- (2) the 747s are highly complicated machines which must be repaired in compliance with necessarily strict and complex service schedules; and
- (3) regulatory approval as to airworthiness and flight safety would be required prior to departure. Such approvals would have to be obtained in the midst of the pandemic and could only be obtained upon completion of the repairs and restoration.

For all of those reasons, the notice period cannot be characterised as "reasonable".

61. Paragraph 7 of Part II of Schedule 1 to the 1977 Act bars a bailee from serving notice pursuant to Section 12(3) of the 1977 Act or exercising his right to sell the goods pursuant to such a notice, if he is aware of a dispute concerning the goods or the bailor is questioning or refusing to pay all or any part of sums the bailee claims to be due to him in respect of the goods. It is clear from correspondence between the parties that a significant dispute exists in relation both to damage to the 747s and parking charges.

62. As to Section 13 of the 1977 Act and the Court's inherent discretion, he submitted that the discretion ought not to be exercised, as Section 12 does not apply by virtue of both the facts and the defective nature of the notice served by the Claimants.

### **Discussion and Conclusion in Relation to the Claim Based on Involuntary Bailment**

63. I am satisfied that, if it can be established that the Tristars and 747s are parked at the Aerodrome unlawfully and there is no dispute in relation to those aircraft, the First Claimant (but not the other Claimants) can be regarded as an involuntary bailee. I reject Mr Ghaffar's argument that none of the Claimants have any right to occupation or possession of the land on which the Aircraft are currently parked, having found in paragraph 49 that WFEL have established a sufficient interest in the Aerodrome to sue both Tristar Air and JSS for trespass. I accept Mr Townsend's submission that Section 12 of the 1977 Act is directed towards a bailee's power of sale in connection with uncollected goods, and it must be established by the First Claimant that there has been a breach of an obligation by Tristar Air and JSS to take delivery of their respective aircraft by removing them from the Aerodrome.
64. I also accept the submission made by Mr Townsend that a bailor must be given a reasonable opportunity to collect the goods, before the bailee sells the goods and any consideration of "reasonable notice" will require an analysis of the surrounding facts. In relation to the Tristars notice was given to the Sixth Defendant on 19 March 2019 to remove the Tristars by 30 September 2019. I will consider in due course whether it was valid as against Tristar Air. A further notice was given to Tristar Air on 18 May 2020, requiring removal of the Tristars by 31 July 2020. In relation to JSS a notice was given on 18 May 2020 and re-served on 21 May 2020, requiring removal of the 747s by 31 July 2020. If necessary, I will consider in due course whether those notice periods were reasonable.
65. As to whether those notices were compliant with Section 12 of the 1977 Act, I would point out that Section 13(1) of the 1977 Act, which gives the Court the power to authorise a sale applies "*If a bailee of the goods to which Section 12 applies satisfies the court that he is entitled to sell the goods under Section 12 or that he would be so entitled if he had given any notice required in accordance with Schedule 1 to this Act, the court may (a) authorise the sale of the goods, subject to such terms and conditions as may be specified in the order.*" This indicates that the Court can make an order for sale, regardless of whether a Section 12 Notice has been served, and if it has been served, whether the requirements of Schedule 1 have been complied with, so long as the bailee would have been entitled to serve such a notice.
66. In relation to standing to bring a claim, I therefore find that the First Claimant has the right to sue in trespass and as an involuntary bailee in relation to the Tristars and 747s, subject to being able to prove its case on the facts.

### **The Claim against Tristar Air**

67. I now turn to the factual background to the claim against Tristar Air.
68. The history of the ownership of the Tristars is set out at paragraphs 26-27 of the APOC. I do not propose to set it out here at length. Suffice it to say that the Tristars have been parked at the Aerodrome since March 2014. They were brought there by

the then owners, the First and Second Defendants and subsequently sold. As Mr Steven points out at [23] of Steven 1, the terms of a Settlement Agreement and Mutual Release dated 22 August 2017 between CWL and LJ Properties Inc, one of the previous owners of the Tristar, acknowledged the existence of an earlier oral parking agreement, based on a “*commercial relationship between the parties*”, so that some form of agreement existed in relation to the Tristars at least from then, albeit with another company.

69. The predecessor in title to Tristar Air was the Sixth Defendant, its parent. At paragraph 12 above I have referred to the assignment from the Sixth Defendant to Tristar Air on 30 October 2017 (the **Assignment**). It is common ground no notice of the assignment was given by either company to any of the Claimants or CWL. According to Mr Walton, at paragraph 62(d) of Walton 1, neither he nor any of the other Claimants were aware of that assignment until mid-April 2019.
70. Paragraph 27 of APOC states:

*“By an informal oral licence CWL agreed to allow [the Sixth Defendant] to park the Tristars at the Aerodrome, with effect from 1 January 2018, in consideration of Tempus agreeing to pay parking charges at the rate of £50 per Tristar per day. That licence and its terms were acknowledged by (among other things) an email dated 5th November 2018 from Scott Terry, CEO of [the Sixth Defendant] to Mr David Walton, (then of CWL).”*

That is simply not admitted by Tristar Air at paragraph 22 of both the original and the draft amended Defence. No alternative case is positively advanced. Unknown to the Claimants, given that the Assignment had already been executed by then, the licence appears to have been granted in respect of the Tristars on behalf the then owners, Tristar Air as undisclosed principal, the Sixth Defendant no longer having any interest in them. That fact does not appear to have been fully appreciated in submissions on either side.

71. By an email dated 25 January 2019, Mr Walton wrote to Mr Scott Terry (“**Mr Terry**”) on behalf of the Sixth Defendant, asking for payment of the accrued parking charges and a progress report regarding the anticipated departure dates “*as we need the space that they occupy as a matter of urgency.*” There was no response to that email. There was a renewed request for information from Mr Walton on 20 February 2019, as “*we need the space for vehicle storage*”. On the same day there was a response from Mr Terry that “*he was hoping this could all be finalised with the next 3-4 weeks.*”
72. By a notice dated 19 March 2019 (the “**2019 Notice**”) to the Sixth Defendant, sent to Mr Terry by email and airmail to the company’s address in Virginia, Bird Belderbos & Mee, solicitors acting for CWL, terminated the licence with effect from 19 September 2019, by which date the Tristars were required to have been removed from the Aerodrome. Tristar Air’s defence states at paragraph 23 that the Notice was not addressed to it, it does not concern it, and no notice was ever addressed to or served on it.

73. It is clear that both the Sixth Defendant and Tristar Air were aware of the 2019 Notice. It is clear from an email from Mr Steven entitled “MD/C/1/DR85”, which was the solicitor’s reference on the 2019 Notice, to which he responds, asking Mr Duckworth to call him. As noted in paragraph 20 above, Mr Steven is one of Tristar Air’s witnesses. He describes himself as its consultant, and states that “*Since mid-2019 I have had day-to-day conduct of the subject-matter of the Application.*” Interestingly he referred only to the Sixth Defendant in his email and made no reference to any assignment in favour of Tristar Air or any protest then or thereafter that the wrong party had been served with the 2019 Notice.
74. Following a conversation with Mr Eliasch on behalf of Tristar Air, an invoice was submitted for the parking of the Tristars on 5 August 2019. It covered the period 1 January 2018, the date on which the Claimants maintain the licence commenced, to 31 July 2019. Mr Walton ceased to be involved in CWL, having resigned his directorship and transferred his shares therein by 4 March 2020.
75. The Tristars were not removed by 19 September 2019 or at all. Thereafter, after the Claimants became aware of the Assignment, and the Lease and SPA were entered into, in addition to the 2019 Notice, on 18 and 19 May 2020 additional notices entitled “NOTICE OF COMMENCEMENT OF LEGAL PROCEEDINGS AND NOTICE UNDER SECTIONS 12 AND 13 OF THE TORTS (INTERFERENCE WITH GOODS) 1977” (the “**2020 Notices**”), requiring “*the owners of the [Tristars] to remove the [Tristars] from the Aerodrome forthwith and in any event **by 4pm on 31 July 2020***” [original emphasis] were sent to a large number of postal and email addresses for Tristar Air (on 18 May 2020), the Sixth Defendant, and associated individuals, including Mr Eliasch and Mr Steven.

### **The Claimant’s Case against Tristar Air**

76. The Claimants’ position is simple. After 19 September 2019, there was no right for the Tristars to remain at the Aerodrome, any licence having been validly terminated by the 2019 Notice. In the alternative, if for some reason the 2019 Notice was ineffective, there was an obligation to remove the Tristars by the 2020 Notices by 31 July 2020. That has not happened, and they are entitled to the relief sought. The correspondence, to which I shall turn when considering the defence, clearly demonstrated that there was no estoppel or oral agreement between Tristar Air or any of the Claimants or CWL permitting the Tristars to remain parked at the Aerodrome, and it was not even alleged in the draft amended Defence that there was an agreement reached about an entitlement to use the runway at the Aerodrome, which was blocked with parked cars, or that the estoppel alleged applied to such use.

### **Tristar Air’s Defence**

77. The essence of the Defence can be found at paragraphs 23 to 29 of the draft amended Defence. These provide:

*“23 The Fifth Defendant does not plead to paragraph 28 which does not concern it nor refer to any letter addressed to it. No notice to quit or to deliver up vacant possession of the relevant part of the Aerodrome has ever been served on or addressed to the Fifth Defendant.*”

24 Paragraph 29 is denied. In mid-2019, Ed Steven, acting on behalf of the Fifth Defendant, approached Dave Walton, acting on behalf of CWL, the licensor of the parking space at the Aerodrome. Mr Steven made it clear to CWL that the Fifth Defendant was the owner of the Tristars and again discussed the US Navy contract with him, stating that works on the Tristars needed to be completed and that the Fifth Defendant required assurance from CWL that the Tristars would be able to be flown out of the Aerodrome, before that contract could be progressed or fulfilled. Mr Steven also explained that representatives of the US Navy would be visiting the site.

25 Subsequently, there was further communication between Mr Walton and Mr Johan Eliasch, also then acting on behalf of the Fifth Defendant. On 5 August 2019 Mr Walton sent to the Fifth Defendant, care of Mr Eliasch, a number of invoices showing the monies currently owed for parking of the Tristars. These invoices included invoices relating to prior owners of the Tristars. On 27 November 2019 Mr Steven on behalf of the Fifth Defendant again requested copies of all outstanding invoices in respect of the Tristars.

26 Subsequently Mr Steven, on behalf of the Fifth Defendant, made an oral offer to CWL to make full payment of all outstanding invoices and to agree a long-term storage fee. In his conversations with CWL / Mr Walton, Mr Steven again made CWL fully aware that the Tristars were not airworthy and could not be removed from the Aerodrome without considerable work being done on them and Mr Walton / CWL acknowledged and accepted this fact, as is implicit in an email dated 9 December 2019 from Mr Walton to Mr Steven and an email from Mr Steven to Mr Walton dated 1 January 2020.

27 During the calendar year 2019 Mr Steven made a number of visits to the Aerodrome with the US Navy in pursuance of the US Navy Contract. Mr Walton was fully aware of this and at no stage did he mention to Mr Steven that the Tristars had to be removed from the Aerodrome by the Fifth Defendant by any particular date.

28 Between ~~January 2020~~ July 2019 and July 2020, and subject to the lockdown imposed by reason of the coronavirus pandemic, Mr Steven communicated both with Cox and Mr Walton – believed to be acting on behalf of CWL as the owner of the Aerodrome – regarding the Tristars and their continued parking at the Aerodrome until the works needed to be done to make them airworthy again could be completed. Mr Steven informed Mr Walton that those works, which would take about 6 months to complete,



*could not be done unless and until the Fifth Defendant had some assurance from CWL that on their completion the runway at the Aerodrome could be used for the purposes of flying the Tristars out. In all of these communications it was accepted, ~~and~~ understood and agreed that:*

- a) The Fifth Defendant, as owner of the Tristars, had an informal licence – whether through conduct or through having succeeded to the licence(s) held by the previous owner(s) of the Tristars - for the Tristars to be parked at the Aerodrome;*
- b) No notice of termination of that licence had ever been served on or communicated directly to the Fifth Defendant;*
- c) The licence would continue indefinitely until the Fifth Defendant had performed the works necessary to make the Tristars airworthy whereupon they would, subject to CWL making the runway available, be flown out of the aerodrome.*

*29 No valid notices under Section 12 of the 1977 Act have ever been properly served on or received by the Fifth Defendant at its principal office address.”*

78. It is to be noted that until 15 December 2020, when Tristar Air served its skeleton, there was no reliance on any period prior to January 2020, and not until 17 December 2020, when Mr Ghaffar began his oral submissions, was there any allegation of any agreement. I turn therefore to Mr Steven’s account, since he is the material representative of Tristar Air, on which the defences of estoppel and a binding oral agreement are based.
79. According to Mr Steven, the Sixth Defendant purchased the Tristars as an investment opportunity, not as scrap. Three of them were to be restored to service as mid-air refuellers, to provide additional “probe and drogue” aerial refuelling capacity to the US Navy and Marine Corps tactical aviation and for many NATO/allied aircraft which use this type of refuelling system.
80. In relation to the Assignment, the FAA register is publicly accessible, and Tristar Air submitted that the Claimants could at any time have checked that register to ascertain ownership. It was always the intention of Tristar Air to renovate three of the Tristars with the remaining three being cannibalised for spare parts. The time estimated to return the Tristars to service is six months.
81. In June 2018 Tristar Air placed a bid for a contract with the US Navy (the “**US Navy Contract**”) which was announced as being successful on 18 April 2019 and plans for the refurbishment began. However, after a legal challenge, the award of the contract was terminated on 7 August 2019, Tristar Air being told of this only on 7 November 2019. Tristar resubmitted their bid on 20 July 2020, however Mr Ghaffar informed me of recent developments, namely that the resubmitted bid was disqualified because one

- of their sub-contractors submitted their documents one hour after the deadline. Their protest against disqualification was denied on 11 December 2020, but Tristar intends to appeal against that denial, the US Navy Contract having not yet been awarded.
82. When Mr Steven commenced his consultancy with Tristar Air in mid-2019, he was informed by Mr Terry of the verbal licence with CWL going back to 2014, which permitted the Tristars to be parked at the Aerodrome.
83. At [28] of Steven 1, Mr Steven refers to a conversation with Mr Walton in “June or early July 2019” to discuss the US Navy Contract and the inspection of the Tristars by the US Navy . He states that Mr Walton “...*did not raise any objection to the planned visits by the US Navy and did not suggest accessing the Tristars or flying them out of the Aerodrome would be a problem, but refused to provide any firm assurances.*” [emphasis added].
84. As set out in paragraph 73, on 29 July 2019, Mr Steven sent an email acknowledging the 2019 Notice, asking for a call from CWL’s solicitors.
85. There then followed a call between Mr Walton and Mr Eliasch on behalf of Tristar Air in early August and on 5 August Mr Walton sent Mr Eliasch an email with the invoices for the outstanding parking fees, referred to at paragraph 74. The highest it is put is at [32] of Steven 1, where he states: “*There was no mention in [Mr Walton’s] email of any intention to terminate the Parking Licence or for that matter any assertion that it had been terminated...*”
86. Thereafter in August and September 2019, Mr Steven states that there were conversations between him and Mr Walton about the parking charges. At [34] of Steven 1 he says: “*At no stage in any of these conversations was Tristar’s right to have the Tristars parked at the Aerodrome ever questioned or discussed. Both David Walton and I proceeded on the basis that there was no question as to this.*” In my view this fails to take account of the 2019 Notice, already sent, which required the Tristars to be removed by 19 September 2019.
87. At [41] of Steven 1, he states: “*The terms of the Parking Licence did not impose an end date and it has always been my understanding that the Parking Licence would continue until the refurbishment of the Tristars had been completed and they then could be flown out of the Aerodrome in all of my conversations with and communications with David Walton this was never in issue.*” Notably he does not say that Mr Walton at any time withdrew the 2019 Notice, but at [68] of Walton 1, Mr Walton states: “*Or around August or September 2019, I spoke to Mr Steven by telephone, and told him that Tristar Air was running out of time and that the aircraft needed to be gone by the end of March 2020 at the latest because the runway would be used for the parking of cars from that point, thereby preventing aircraft from flying out of the site.*”
88. At [37] of Steven 1, Mr Steven states: “*In or around September 2019, the decision was made to halt the maintenance works on the Tristars as it was not economical to continue to pay for the Tristars to be maintained, without a firm commitment from David Walton that we would be able to fly the Tristars out of the Aerodrome.*”

89. Communications between Mr Steven and Mr Walton resumed on 25 November 2019 in which he made a request for the correct parking charges, but at [40] of Steven 1 he says that nothing was forthcoming, despite repeated requests by emails. There was a telephone call with Mr Walton on 3 December 2019 referred to at [44] of Steven 1, when Mr Steven wanted to get “*a clear timeframe on when the works could be completed and whether the Tristars would be able to be flown off*”, during which Mr Walton “*refused to provide any assurance that upon completion of the work the runway at the Aerodrome could be used to fly the planes out.*”
90. I should add that in relation to the conversations with Mr Walton in November and December 2019, Mr Walton at [34] states: “*Regarding paragraphs 38-45 generally, while I do not recall precisely what was said during all of my conversations with Mr Steven, I do recall making clear that the Tristars needed to be removed by the end of March 2020, rather than Mr Steven asking me for assurances as to the availability of the runway.*” (See also a similar account at [68] of Walton 1 by reference to an earlier conversation with Mr Steven in August or September 2019, referred to at paragraph 87 above). Mr Ghaffar submitted that this demonstrated the need to test the respective accounts in cross-examination at a trial.
91. On 9 December 2019, Mr Steven received an email from Mr Walton, informing him that there were plans to cover the runway with parked cars by spring 2020, which would likely prevent the Tristars from taking off from the Aerodrome after that period and “*we need to know what plans there are for the Tristars*”.
92. As a result of that email there was a telephone conversation on that same day between Mr Steven and Mr Walton. According to Mr Steven the discussion centred around for how long the runway would be operational, the need to fly the Tristars out of the Aerodrome and the fact that Tristar Air would not pay for any parking charges relating to any period prior their ownership. He said that Mr Walton was very vague. Mr Walton deals with this conversation at [38]-[40] of Walton 3. He says that Mr Steven informed him of Tristar’s intention to appeal against the termination of the US Navy Contract and asked if the Tristars could remain at the Aerodrome until the conclusion of that appeal.
93. On or around 18 December 2019 there was another call. According to Mr Walton, he informed Mr Steven that his proposal was not acceptable and that the Claimants would not agree to the Tristars remaining at the Aerodrome on that basis. Mr Steven’s account is that Mr Walton “*was unable to confirm definitely how long the runway would be operational for... As we were going around in circles, I decided that I would use the Christmas break to formalise an offer to David Walton in an attempt to break the deadlock.*”

### **The Subject to Contract, Without Prejudice letter of 1 January 2020**

94. On 1 January 2020, Mr Steven made an offer to Mr Walton which was subject to contract and without prejudice (the “**Offer**”), making a proposal in relation to the outstanding parking fees, suggesting arrangements for the removal of the Tristars from the Aerodrome, and seeking a licence for a maximum period of 10 months, with payment in advance “at the current rate”.

95. At [48] of Steven 1, Mr Steven says on 10 January 2020, there was a telephone call between Mr Steven and Mr Walton. Mr Steven says that during it, Mr Walton said that he was considering the Offer and he made no mention during the call of any plans to sell or close the runway. In the event the Offer was not accepted, and Mr Steven heard nothing more from Mr Walton. The Lease was signed with Cox three days later.

96. At [40]-[41] of Walton 3, Mr Walton states:

*“At some point in January 2020, I spoke with Mr Steven. I am not sure of the date but his account of our conversation at [48] is incorrect. I told him that:*

*(a) his proposal was unworkable due to the length of time involved in removing the Tristars;*

*(b) Tristar Air could have until June 2020 to remove the Tristars (i.e. 6 months from the start of the year) but no later, and if they were gone by then, CWL would waive all outstanding parking charges.*

*Mr Steven never responded to this.”*

97. Between 25 March 2020 and 11 May 2020, the national lockdown in the UK as a result of COVID-19 meant that the Aerodrome was forced to close.

98. On 19 May 2020, the 2020 Notices were served on a number of entities, including Tristar Air, requiring removal by 31 July 2020. As a result, Mr Steven says he spoke to Mr Peter Bell, the Managing Director of Cox on 12 June 2020. It is to be noted the 2020 Notice was not sent on behalf of Cox. Whilst Mr Bell was prepared to cooperate with the removal of the aircraft, he suggested that Mr Steven liaise with Mr Walton in that regard. To Mr Steven’s concern, he did not promise Mr Steven that the runway could be used for that purpose. At [62] of Steven 1, Mr Steven says: *“There was no mention made of the Parking Licence being revoked.”* By the same token there is no mention of the 2020 Notice being withdrawn. Mr Ghaffar made clear that he was not asserting that Cox granted a licence, but he referred to and relied upon two emails, both dated 12 June 2020, one from Mr Bell to Mr Steven, and the other from a Mr Nigel Myers of Cox to Mr Bell, copied to Mr Steven, which when read properly, amounted to an acknowledgement of a continuing licence in respect of the Tristars.

99. On 1 July 2020, Mr Steven wrote to Mr Walton, stating, inter alia:

*“I spoke last week to the Cox team who were very helpful. It seems there is a possible plan that would allow the works to be completed and the aircraft flown off towards the end of the year. There are a number of logistical issues with this (namely removing cars from the portion of the runway that will be used for car storage and ensuring parked cars are not damaged) but I think working together with Cox and yourselves we can overcome this. Cox have asked me to liaise with yourself in the first instance as they’ve told us commercially we need to reach*

*agreement before we get into the technical details with Cox – I assume this is correct?”*

Mr Ghaffar submitted that the reference to the “*need to reach agreement*” related solely to the issue of access to the runway, which was “a sticking point”. He accepted that there was no obligation on the Claimants or CWL to provide access to the runway, but that was not incompatible with a continuing licence to park the Tristars, regardless of the 2019 and 2020 Notices.

100. Thereafter Tristar considered alternative means of removing the Tristars. They still remain parked at the Aerodrome, however.

### **The Claimant’s Response to the Draft Amended Defence**

101. As earlier indicated, I gave Mr Cloherty the opportunity to make further submissions on the draft amendments to the Defence.

102. He made the following submissions:

- (1) Importantly, Tristar Air still does not expressly plead that it ever had the benefit of any contractual licence. This must be correct: no consideration is relied upon as having been given by Tristar Air for the alleged licence. It has never paid a penny to the Claimants in respect of parking charges throughout its term of ownership, even now. Therefore, the licence for which Tristar Air contends is gratuitous and, therefore, is determinable on reasonable notice. Such notice has in fact been given.
- (2) The mere addition of the word “*agreed*” does not assist Tristar Air. In particular:
  - a) No proper particulars are given as to the alleged agreement, the words used, by whom, where, or when.
  - b) To say that it was “*agreed*” that Tristar Air had an informal licence “*whether through conduct or through having succeeded to the licence(s) held by the previous owner(s) of the Tristars*” is to plead two inconsistent positive factual cases.
- (3) It is in the nature of a licence that a licensee may only use the land for the purpose permitted by the licence. Thus, a licence to park aircraft on an area of land does not entitle the licensee to use a runway on another part of the same land to take off aircraft.
- (4) Tristar Air does not plead that any licence was granted at any time for the use of the runway, only for parking the Tristars at the Aerodrome. At the hearing on 17 December 2020, Tristar Air accepted that it had no entitlement to demand the use of the runway.
- (5) Tristar Air rests its case on Mr Walton having, in oral, undocumented conversations with Mr Steven, entirely contradicted and undermined what he said in writing. When the Court put to Mr Ghaffar on 21 December that the agreement in paragraph 28 of Tristar Air’s defence is attributed to no-one but

Mr Walton, who was desperate to get the Tristars offsite, Mr Ghaffar's submission was that his desperation was not as significant as appears from his written communications, and that orally he was not so determined. That is simply fanciful.

### **Discussion and Conclusion on the claim against Tristar Air**

103. Applying the principles referred to at paragraphs 28 and 29 above, I have reached the conclusion that this is a suitable case for summary judgment in favour of WFEL against Tristar Air, because neither the existing Defence nor the draft amendments have a real prospect of success, nor is there any other compelling reason why the case should be disposed of at trial.
104. My reasons are as follows:
- (1) In my judgment there is nothing in Mr Steven's account as set out in Steven 1, assuming all the facts stated therein in his favour, that amounts to a defence to the claim that there is no lawful basis for the Tristars presently to remain at the Aerodrome. There is no need for there to be a trial in order to hear cross-examination of the witnesses to determine that issue;
  - (2) The 2019 Notice, which required the Tristars to be removed from the Aerodrome by 30 September 2019, was valid as against Tristar Air. The licence granted orally with effect from 1 February 2018 was one for its benefit as undisclosed owners of the Tristars. In my view Tristar Air is not entitled to take advantage of the fact that the Assignment was never drawn to the attention of CWL or any of the Claimants by either the Sixth Defendant or Tristar Air, so as to prevent the 2019 Notice being effective. There is no evidence that on 19 March 2019 any of the Claimants or CWL were aware of the Assignment. When the licence was granted orally to Mr Terry, he had represented that the Sixth Defendant was the owner of the Tristars and thereafter neither he nor anyone else had referred to the Assignment. It is no answer to say that the Claimants or CWL should have carried out a search of the FAA Register to discover that Tristar Air were in fact the owners.
  - (3) That the 2019 Notice was drawn to the attention of Mr Steven on behalf of Tristar Air is apparent from his email dated 29 July 2019 to CWL's solicitors, which refers to it (see paragraph 73 above);
  - (4) Mr Steven's account of his conversations and communications between Mr Walton and Mr Steven between August and December 2019, summarised above, do not begin to lay the foundation for any form of estoppel or agreement with CWL. There was no suggestion that the 2019 Notice was withdrawn, and his statements at [32] and [34] referred to above simply indicated the matter was not mentioned. However, based on the evidence of Mr Walton at [68] of Walton 1, (see paragraphs 87 and 90 above), in or about August or September 2019, he indicated to Mr Steven that the Tristars "*needed to be gone by March 2020 at the latest*". It is arguable that this amounted to an extension of the time for the Tristars to be removed, entitling them to remain at the Aerodrome until March 2020. Mr Walton made a similar statement in

November or December 2019 (see paragraph 90 above). The Tristars, however, remained on site after the end of March 2020;

- (5) In my view, the fact that paragraph 28 of the original Defence did not refer to or rely upon anything said or done by Mr Walton in the period from July to December 2019, is telling;
- (6) The statement by Mr Steven at [41] that “*The terms of the Parking Licence did not impose an end date and it has always been my understanding that the Parking Licence would continue until the refurbishment of the Tristars had been completed and they then could be flown out of the Aerodrome in all of my conversations with and communications with David Walton this was never in issue.*” wholly ignores the service of the 2019 Notice, the fact that it was never withdrawn by Mr Walton in any of the conversations he had with Mr Steven, and the point made repeatedly in Steven 1 that Mr Walton refused to give any assurances about the availability of the runway at the Aerodrome (see: [28], [44] and [62] of Steven 1). Indeed, Mr Ghaffar in oral submissions conceded that there was never any entitlement to demand access to the runway to fly the Tristars out of the Aerodrome;
- (7) Moreover, if Mr Steven’s understanding was as set out at [41] of Steven 1, it is unclear to me why it was necessary for him to make the Offer of 1 January 2020. It is common ground that offer was never accepted. This is unsurprising, given that the negotiations with Cox were concluding, the Lease being signed on 13 January 2020. It would have been commercially absurd for the Claimants on the one hand to take on the obligations contained at Clause 40 of the Lease and to permit the Tristars to remain on site for an undefined period until their refurbishment on the other;
- (8) There is also the fact that the agreement now pleaded in paragraph 28 of the draft amended Defence has no specific date, is not in writing, nor is it evidenced by any contemporaneous document;
- (9) Finally, irrespective of the 2019 Notice, the 2020 Notice, which was served on Tristar Air, made plain that any existing licence was to be terminated by 31 July 2020. By then Mr Steven was well aware of the existence of the Lease and the fact Cox were using the Aerodrome and the runaway to park cars. That Mr Steven was aware of this and the need to put in place a further agreement, in order for the Tristars to remain on site after this date, can be seen from his email dated 1 July 2020 to Mr Walton referred to at paragraph 96 above, where he stated, *inter alia*: “*Cox have asked me to liaise with yourself in the first instance as they’ve told us commercially we need to reach agreement before we get into the technical details with Cox – I assume this is correct.*” I do not accept Mr Ghaffar’s submission that the “*need to reach agreement*” was limited to the issue of access to the runway, or that the two emails both dated 12 June 2020, one from Mr Bell to Mr Steven, and the other from a Mr Nigel Myers of Cox to Mr Bell, referred to at paragraph 98 above, amounted to an acknowledgement of a continuing licence in respect of the Tristars;
- (10) In those circumstances the plea at paragraph 28 of TriStar Air’s amended Defence fails.

105. I therefore order that by 15 March 2021, Tristar Air must remove the Tristars from the Aerodrome. I impose that date because the country is currently in a state of lockdown, due to the pandemic and although transportation of goods is continuing, the steps physically to remove those aircraft from the Aerodrome will be complicated and will take time.
106. In relation to paragraph 29 of the Defence I refer to my finding at paragraph 65 above, namely that the Court can make an order for sale, regardless of whether a Section 12 Notice has been served, and if it has been served, whether the requirements of Schedule 1 have been complied with, so long as the bailee would have been entitled to serve such a notice. I find that WFEL was and is entitled to serve such a Notice, although the 2020 Notices which were served were not fully compliant with the provisions of paragraph 1(3) of Schedule 1 in that they did not specify any amounts due in respect of the Tristars. I also find that the period of notice contained in the 2020 Notice was reasonable in the circumstances, particular given the 2019 Notice and the earlier correspondence, referred to above, asking Tristar Air to remove the Tristars.
107. In those circumstances I order that, in default of compliance with the order to remove the Tristars by 15 March 2021, pursuant to Section 13 of the 1977 Act, WFEL be authorised to sell the Tristars in such manner as it reasonably determines, provided in the event of any sale, WFEL would have to account for the proceeds of sale to Tristar Air and JSS, after deducting the costs of such sale.
108. I am also asked by the Claimants to make a declaration that the Tristars are owned by Tristar Air. That seems to be admitted and is therefore uncontroversial.

### **The Claim Against JSS**

109. The facts relating to JSS are very different and are as follows.
110. As stated earlier, the 747s were flown by Transaero, in separate flights, to the Aerodrome in October and early December 2012.
111. Prior to JSS' acquisition of the 747s, CWL's solicitors sent a Notice under Section 12 of the 1977 Act to Transaero and Mr Belokopyt, the liquidator of Transaero, stating that, pursuant to the 1977 Act, the 747s would be sold or removed unless they were removed by 19 May 2019. At that time considerable sums were outstanding in relation to claimed parking charges. No reference to this is made in the evidence served by JSS, either by Mr Qaddah or by Belokopyt. By an email dated 28 May 2019, that Notice was acknowledged by Mr Belokopyt. No action was taken and the 747s remained parked at the Aerodrome.
112. Pursuant to Bills of Sale dated 18 February 2020, JSS purchased the 747s from the then owner, ATSLM Limited, recording a sale and purchase completed on 5 January 2020. The purchase was with a view to restoration of the 747s.
113. According to the evidence of Mr Qaddah and Mr Walton, there were pre-contractual meetings with Mr Walton on 25 or 26 October 2019 and in December 2019 at the Aerodrome. Mr Walton states at [99] of Walton 1 that in October 2019 he was approached by a Mary Bolton of a company called Nightstar Aviation SL



(“**Nightstar**”), which expressed an interest in purchasing the 747s. He invited Ms Bolton and Mr Qaddah, described by Ms Bolton as her manager, to visit the Aerodrome. He says Mr Qaddah visited the Aerodrome on 26 October (rather than 25 October<sup>4</sup>) to inspect the 747s inside and out. Mr Qaddah told him that he was the principal of the entity which would be purchasing the 747s, which Mr Walton thought would be Nightstar Aviation. It was not until after the purchase that he discovered that it was JSS. Mr Qaddah, who attended with a legal adviser, Mr Jose Miguel Lares, says that Mr Walton spoke as if “*he was the owner of the 747s and the overall decision maker, able to conclude any potential sale to JSS and to enable unrestricted access to the Aerodrome for the restoration works.*” The meeting concluded with Mr Qaddah stating he would return with a technical team of engineers to carry out a feasibility study. That visit occurred in December 2019.

114. On 3 December 2019, Mr Walton wrote a series of emails to a Virginia Dominguez de la Torre of Nightstar. In one of them he said: “*I must make clear to you that neither I nor my company (C. Walton Ltd) are in a position to authorise any works on these aircraft... We will not allow the aircraft to be removed from site by any party until we have reached agreement regarding the parking charges... I suggest you approach the administrator with a view to relieving him of this responsibility for these aircraft because they can hardly be viewed as an asset...!*” Insofar as there had been any impression that CWL was the owner of the 747s, that must have been dispelled by this email.
115. There is a conflict between Mr Walton and Mr Qaddah in relation to what was said at a meeting in December 2019 (which must have taken place in the week preceding 13 December, according to an email from Ms Bolton to Mr Walton dated 13 December 2019). Mr Qaddah states at [13] of Qaddah 1 in relation to the December meeting: “*[Mr Walton] continued to maintain he would be supportive of JSS’ efforts to render the 747s airworthy so that they would be capable of being flown out. [Mr Walton] raised no issue regarding the runway or any restrictions on the 747s being able to use it to fly out for that purpose. [Mr Walton] was fully aware that it was JSS’ intention to restore the 747s to make them air worthy and capable of being flown out of the Aerodrome. He accepted that this would require time and effort and the facilitation of access to achieve that project.*”, and at [16] “*[Mr Walton] therefore made no indication that there was any timeframe by which the project needs to be completed. He certainly confirmed that there would be no issue in granting access to the Aerodrome and raised no impediment to facilitating access for those works or regarding the ability of the 747s to use the runway to be flown out once they were restored. To the contrary, [Mr Walton] represented that he would do all he could to support that aim and still maintains this in his statements, despite it clearly being belied by his actions since completion of the purchase by JSS.*”
116. Mr Qaddah refers to and relies upon the fact that the pre-acquisition correspondence between and Nightstar and Mr Walton makes no mention of the need to remove the 747s by a particular date.

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<sup>4</sup> From an email dated 28 October 2019 from Ms de la Torre of NightStar, Saturday 26 October appears to be the correct date.

117. Mr Walton's account of that meeting, which he says took place on 8 December 2019<sup>5</sup>, states at [102] of Walton 1:

*“(a) I told him that if his company did purchase the 747, the Claimants required their removal very quickly and certainly by the end of March 2020 at the latest and that he should not underestimate the scale of the task involved in making the 747s airworthy and capable of removal. I explained that the number of cars being stored on the runway was continuing to grow and by the end of March 2020 there would be so many on the runway that it would not be possible for the aircraft to fly out;*

*(b) I encouraged him to arrange engineers to inspect the 747s to make sure that the planned restoration was viable;*

*(c) I informed him that ... there was no supporting engineering capability at the Aerodrome for this type of project;*

*(d) He told me he was very confident that his company could readily remove the 747s within two to three months ...*

*(e) Mr Kaddah asked me whether £100,000 pounds would be acceptable in respect of outstanding charges. I told him that this was a bit lean and that £150,000 would be more acceptable. We did not reach a specific agreement on this.”*

It is common ground, however, that future parking charges were not discussed and no mention was made of the negotiations with Cox. Indeed, JSS contend they were never informed of the Cox Obligations.

118. Thereafter, after JSS acquired the aircraft, relations between Mr Walton and the staff of JSS deteriorated. After the visit in December 2019, there does not appear to have been another visit by JSS' technical team until March 2020, or any work carried out to the 747s at all by JSS for nearly three months.
119. It is alleged by JSS that when their technical team attended in March, prior to lockdown on 25 March 2020, they were shocked at the damage which had been caused to the 747s, since their last visit. At [28] of Qaddah 1, Mr Qaddah refers to this as *“deliberate acts of sabotage by the Claimants and/or their authorised representatives”*. It is to be noted, however, that there is no Counterclaim presently advanced, it having been abandoned in the draft amended Defence. The draft amended Defence states in paragraph 1: *“Despite the deletion of the advertised counterclaim, for the purposes of this amendment, the Eighth Defendant reserves all rights as to any claims that it may wish to bring as a result of the conduct the Claimants.”*
120. As stated earlier, between 25 March 2020 and 11 May 2020, the national lockdown in the UK, as a result of COVID-19, meant that the Aerodrome was forced to close.

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<sup>5</sup> Which date JSS appears to accept at paragraphs 30.2, 40.4 and 41 of the draft amended Defence.

121. By a notice dated 18 May 2020 (the “**JSS Notice**”), the Claimants gave notice to JSS that they required the removal of the 747s from the Aerodrome by 4pm on 31 July 2020, failing which proceedings for their removal would be commenced. The letter was re-served on 21 May 2020.
122. On 8 June 2020, Mr Lares of JSS’ legal department sent an email to the Claimants’ solicitors, protesting about the JSS Notice. Amongst other things, it drew attention to the inability of JSS, based in Spain, to travel because all Spanish airports were closed to international travel. It contained, however, no specific assertion of any right to remain based on a contractual licence or an estoppel. At the end of the email, Mr Lares said: “*Hindering our attempts to cooperate with you will only have the effect of delaying the satisfactory resolution of this project and will most likely force us into unreasonable delays to create a UK engineering team specifically to prepare the aircraft for flight. We hope we can count on your cooperation and support to address this situation satisfactorily.*”
123. On 9 June 2020, Mr Lares made a request to the Claimants’ solicitors for access to 747s on 10 June by certain engineers and a cleaner, with the CVs. That permission was granted. There were further requests on 16 June for another engineer to attend on 17 June 2020, on 17 June 2020 for two cleaners to attend on 18 June 2020, on 18 June 2020 for a sheet metal mechanic to attend on 19 June 2020, and on 19 June 2020 for a representative of a transport company to assess the removal of the aircraft on 22 June 2020, all of which were granted.
124. On 30 June 2020, a Spanish lawyer, Ms Patricia Munoz Burrezo acting for both JSS and Nightstar, wrote to Mr Duckworth of the Claimants’ solicitor, stating, inter alia, “*Mr Kaddah strongly denies that they had agreed to remove the [747s] in March 2020, as the project scope had not even been agreed upon by that time.*”
125. On 1 July 2020, Mr Duckworth responded Ms Burrezo’s letter, whilst stating that his clients were not unsympathetic to the effects of COVID-19, JSS had over 11 weeks to remove the 747s before site closure and by 31 July 2020 will have had 11.5 weeks for such removal following the re-opening of the site, he therefore indicated that the Claimants still required the removal of the 747s by 31 July 2020.
126. In July 2020, JSS sent a technical team to the Aerodrome to carry out some works. At [32] of Qaddah 1, Mr Qaddah says that this culminated in JSS moving to the engine test phase of the restoration works in the week commencing 21 September 2020. This did not progress, however, because of an alleged lack of co-operation on the part of the Claimants and security staff on site in removing vehicles parked on site to a safe distance. The Claimants contended that this could not be done because of health and safety issues. Their solicitors having sought a risk assessment in connection with the engine testing, when it was provided, it revealed that several of the risks of Engine Test Runs were classified as ranked at ‘15’, which could “*cause catastrophic damage or death*”. A proposal that JSS cover the cost of Cox bringing in an aviation consultant to approve JSS’ method statements and risk assessments was rejected in late September. That has led to an impasse and the only work that could then be carried was in relation to securing the 747s. On 10 November 2020, JSS’ solicitors wrote to Mr Duckworth, reiterating JSS’ commitment to the removal of the 747s, but reiterating the need for engine testing.

## The Claimants' Case Against JSS

127. JSS does not have the benefit of any licence to park the 747s on the Aerodrome and they should be removed. Based upon JSS' original defence, Mr Cloherty submitted that JSS' case is that an indefinite gratuitous licence was granted orally by Mr Walton prior to JSS' acquisition of the 747s. However, that case is fanciful. Prior to the final draft amendment of the Defence, which accepted that the purchase from ATSLM not Mr Belokoypt, he submitted that it is inconceivable that Mr Belokoypt would not have made JSS aware of the notice, referred to at paragraph 111 above, when selling the 747s. Both he and Mr Qaddah notably omit this notice from their evidence. The defence based on estoppel has no real prospect of success. I will turn to his submissions on the amendments once I have set them out below.

## JSS' Draft Amended Defence

128. Very substantial amendments have been made to JSS' statement of case. I refer to the final version served on 6 January 2020, highlighting those aspects of the amendments which contain the essence of the defence. Where passages had been deleted, I have not reproduced them:

- (1) Paragraph 18.2 contains the following amendment: "The Eighth Defendant proceeded with its purchase on express assurances, given by David Walton, that they would be provided with sufficient access and time to carry out such works as were necessary to ensure that the aircraft could be flown from site."
- (2) Paragraph 20.1 states: "Any inference that the notice served on the Eighth Defendant on 18 May 2020, and as re-served on 21 May 2020, is reasonable, appropriate, valid and in compliance with the [1977 Act] is denied".
- (3) Paragraph 20.2 states: "The date of removal of 31 December 2020, is unreasonable in all the circumstances and particularly given the Claimants' actions in deliberately frustrating, delaying, destabilising and stalling the attempts of the Eighth Defendant to promptly render the 747s airworthy within a reasonable timeframe by inter alia:

20.2.1 Failing to ensure that the 747s were not damaged following the Eighth Defendant's purchase;

20.2.2 The improper use of the 747s for commercial ventures that benefited the Claimants, as admitted by David Walton such as combat stimulation events and sniffer dog training without the authorization of the owner of the 747s, which showed disregard for the integrity of the aircraft;

20.2.3 The retention by the claimants of the profits derived from their unauthorised and improper use of the aircraft for financial gain; and

20.2.4 The unauthorised and undisclosed removal of components from the aircraft including seats, as admitted by David Walton, and other essential electronic and mechanical

components including key navigational instruments, avionics, and various integral flight components.

(4) Paragraph 22 states: “The Claimants are prevented from demanding the removal of the aircraft by 14 February 2020 on account of their own actions, omissions and negligence and the Eighth Defendant reserves the right to bring such claims as arise from that conduct.”

(5) Paragraph 29 states: “Paragraph 38 is admitted. At the time of this meeting and at all times subsequently, David Walton on behalf of the Claimants encouraged the purchase of the 747s by the Eighth Defendant by the express oral representation that they could remain on the Aerodrome until rendered airworthy. There was also an express understanding between the parties that it was mutually desirable for the 747s to be made airworthy as soon as reasonably practicable, but no timeframe was stipulated by Mr Walton...”

(6) Paragraph 30 states: “As to Paragraph 39:

30.1 It is denied that David Walton gave any notice, whether express or implied, orally or in writing, to Mr Qaddah regarding a requirement that the 747s be removed by 31 March 2020, or by any specified date, or prior to them being rendered airworthy. This is supported by the fact that neither Mr Walton nor his representatives make any reference, whatsoever, to this supposedly serious and pressing requirement in any of the email communications with the representatives of the Eighth Defendant prior to purchase of the 747s. Accordingly, the Claimants’ assertion of a breach of notice is denied. Had such notice been given, the Eighth Defendant would not have proceeded with the purchase.

30.2 It is denied that Mr Walton told Mr Qaddah that the scale of the task in making the 747s airworthy should not be underestimated. The suggestion that Mr Walton commented on the scale of the task “not being underestimated” is impossible to reconcile with the supposedly onerous timeframe alleged by the Claimants. In fact, during the meeting at the Aerodrome between Mr Qaddah and Mr Walton on 8 December 2019, Mr Walton accepted Mr Qaddah’s assessment that it would take both time and effort to return the 747s to airworthiness, albeit that there was a clear understanding that the Eighth Defendant sought to complete that task without delay.

30.3 Following purchase of the aircraft, the Eighth Defendant was delayed in the completion of its works by a combination of the unexpected impact of the Covid-19 Pandemic and the conduct of the Claimants. The Eighth Defendant reserves its right to claim for any damages arising from that conduct.”

(7) Paragraph 31.1 states: “As to Paragraph 40:

31.1 It is denied that there was any stipulated timeframe for removal; and

31.2 Mr Qaddah did not refer to a timeframe of 2 to 3 months at any stage, as such a timeframe was plainly unrealistic and, in any event, he could not have committed to any timeframe prior to the completion of purchase.

(8) Paragraph 33 states:

“As to paragraph 42, The Eighth Defendant admits that notices were served purportedly in compliance with Section 12 of the 1977 Act. If, which is denied, the presence of the aircraft amount to a bailment, the notices were defective and are incapable of being relied upon for the purpose of this claim, or at all. By letter dated 30 July 2020, from Richard Nelson, the Eighth Defendant’s then solicitors, the Claimants were informed that the purported notice was defective.

33.1 In particular, the notice fails to provide a reasonable opportunity for collection in breach of Schedule 1, Part 1, paragraph 6(2) of the 1977 Act; and

33.2 In breach of Schedule 1, Part 2, paragraph 7(1) of the 1977 Act the Claimants seek an order for sale in circumstances where they are on notice of a significant dispute regarding the goods, which include:

32.2.1 allegations of theft from and damage to the aircraft by the Claimants and/or their agents;

33.2.2 the Claimants obstruction of access, which has prevented necessary works to the aircraft to enable flight; and

33.2.3 unauthorised use of the aircraft.

(9) Paragraph 34 provides: “Additionally, or in the alternative, the Eighth Defendant has been consistent that it requires that the aircraft are capable of flight prior to removal and have made every effort to facilitate this outcome.”

(10) Paragraph 36 provides: “The Defendant is concerned that the proceedings are motivated by the Claimant’s desire to scrap the aircraft themselves and retain a substantial fee for doing so, such that any, even diminished value, to the 747s shall be extinguished by the Claimant’s claim to the value of the fee for dismantlement. This would be particularly unconscionable given the Eighth Defendant’s stated objective, from the outset, that it would only purchase the aircraft if assured that they would have an opportunity to return them to airworthiness. It is evident that the Claimants have the capacity to scrap by virtue of the content of an email sent by David Walton on 14th June 2019, to the liquidators of Transaero, which states: “it appears to me that you have very little option other than to sign the aircraft over to see Walton limited to scrap. We will not allow access to either of the aircraft by any other party other than those appointed by us!;”

(11) Paragraph 37 states: “The Claimants have prevented or alternatively failed to facilitate any potential for the Eighth Defendant to access the Aerodrome to

*perform and complete the remedial works necessary to render the 747s airworthy and ensure their prompt removal. These works have deliberately been frustrated and complicated by the removal of various components including key navigational systems, avionics, and intake various integral flight components. The Eighth Defendant has been prevented from accessing the Aerodrome and therefore the 747s since 18 September 2020. This is following the lockdown of the site between March and June on account of the restrictions imposed by the Covid-19 pandemic.”*

- (12) I should set out the entirety of Paragraphs 40 and 41, entitled “D. PARKING WITHOUT AUTHORITY: TRESPASS; INVOLUNTARY BAILMENT which provide:

“40. *As to paragraphs 44 and 45:*

*40.1 It is denied that any licence to permit the parking of the Aircraft, or the placing of Parts and Scrap, has been revoked.*

*40.2 In so far as it is pleaded that the Claimants have required the removal of the aircraft for more than 16 months, it is denied that this is applicable to the Eighth Defendant given the date of its purchase of the aircraft in early 2020 and the Claimants’ awareness of the Eighth Defendant’s intention to remove the aircraft by flight.*

*40.3 It is denied that the continuing presence of the Aircraft is unlawful, and that their presence constitutes a trespass.*

#### Contractual Licence

#### Offer and Terms

*40.4 The presence of the aircraft cannot amount to trespass or a bailment, whether involuntary or otherwise, given the existence of a contractual licence. That licence arises from the representations made by David Walton to Fadi Qaddah during meetings that took place in October 2019 and on 8 December 2019 at Brunthorpe Aerodrome. The contract contained the following express terms made by the oral representations of David Walton at the Brunthorpe Aerodrome to the Eighth Defendant, via Mr Qaddah, that inter alia:*

*40.4.1 He supported the aircraft being restored and flown from the site and expressed a wish for the aircraft to be removed, by flight, through the efforts of another.*

*40.4.1 That he would provide access to the site for the purposes of the restoration of the 747s, for the express purpose of making them airworthy as soon as reasonably practicable.*

*40.4.2 In making those representations, Mr Walton acknowledged that the Eighth Defendant’s purchase of the aircraft was contingent on its ability to restore them to airworthiness and subsequently fly them from the Aerodrome with the use of the runway. There has*

never been any suggestion that the runway is not fit for that purpose. Mr Qaddah was clear that a return to airworthiness was crucial to the Eighth Defendants commercial objectives.

40.4.3 It was an implied term of the contract that the aircraft would be removed as soon as their restoration to flight could be reasonably achieved by the Eighth Defendant and that the Eighth Defendant would take reasonable steps to achieve that aim.

Contractual Right to Park, Access the Aerodrome and use the Runway

40.4.4 In awareness of the matters pleaded above, Mr Walton encouraged Mr Qaddah to authorise the purchase of the aircraft on behalf of the Eighth Defendant. Mr Walton's assurance of the opportunity to gain access is demonstrated by the subsequent grant of access for the purposes of works being conducted by Eighth Defendant's engineers, cleaners and technical team for the aircraft to be made ready for flight.

40.4.5 The aircraft were already parked at the airfield when viewed and subsequently purchased by JSS. JSS' decision to purchase the 747s on the Claimants' land, with reliance on the Claimants promises and inducement, over and above alternative 747s that would have been available at other locations, gave rise to a contractual right for the aircraft to remain parked on site after JSS' purchase and until such time as they could reasonably be made airworthy for the purposes of flight. The right to use the runway was a necessary component of the contractual relationship.

Acceptance and Reliance

41. In reliance, to its detriment, upon the express assurances given by Mr Walton on 8 December 2019, and following the matters discussed at their joint meeting in October 2019:

41.1 JSS purchased the 747s from ATSLM on 5 January 2020, with the relevant bills of sale being provided on 18 February 2020. Those same bills of sale were provided to David Walton by Mr Qaddah during a visit to the United Kingdom in March 2020.

41.2 In further consideration for the agreement reached through David Walton, the Eighth Defendant committed financial resources and manpower to making the 747s airworthy, so that they could be removed from site.

41.3 The Eighth Defendant ensured that works were undertaken as soon as reasonably practicable after access was permitted following the first national lockdown in the United Kingdom, as a result of the Covid-19 pandemic, between the dates of 25 March 2020 and 11 May 2020 and upon its additional team becoming available to work on 29 June 2020.



41.4 The works undertaken by the Eighth Defendant in acceptance of Mr Walton's offer to allow access for removal and in consideration of that access, the client engaged in procedures towards airworthiness by engaging specialists to attend at site throughout the permitted period until stopped by the Claimants in September 2020, including amongst others:

41.4.1 On 10 June 2020: Dan Edwards (Engineer), Carrie Sherrard (Cleaner).

41.4.2 On 17 June 2020: Michael Dreyer (Engineer);

41.4.3 18 June 2020: the attendance of Sebastien Gzywa (Cleaner) and Lukasz Gzywa (Cleaner) for the purposes of power washing;

41.4.4 19 June 2020: Gary Murphy (sheet metal mechanic);

41.4.5 22 June 2020: Nick Jones (transport specialist);

41.4.6 Between 11 to 31 July 2020: Fadi Qaddah (Managing Director of the Eighth Defendant and qualified pilot), Omar Fares Jaber (Ground operations), six additional engineers (including Steven Clayton and Nicholas Jeys), Bernie Dayapera (metal worker), Melchor Pombo Aresgado (metal worker), Reymund Garcia (metal worker), Anthony Azarcon Aznar (metal worker)

41.4.7 20 July 2020: Adam Nicholson Roe (Inspection)

41.5 On 18 September 2020, there was a request to move to the engine testing phase and that was planned to start from 21 September 2020. Considerable works has been undertaken to reach that stage. The Claimants unreasonably denied the Eighth Defendant's request to commence those tests.

#### Gratuitous Licence

41.6 Alternatively, which is not accepted, if the licence is a gratuitous licence that has been withdrawn on notice, the Claimants were required to provide the Eighth Defendant with a reasonable period of notice in which to vacate the aerodrome. Paragraph 20 is repeated mutatis mutandis as to why a reasonable period of notice has not been provided by the Claimants.

#### Proprietary Estoppel

41.7 Alternatively, the Claimant's [sic] are estopped from seeking the claimed relief in respect of the Eighth Defendant, as a result of:

41.7.1 the assurances and/or representations provided by David Walton; and in respect of which paragraphs 18.2, 29 and 40.4 are repeated;

41.7.2 the reliance placed upon those assurances and all representations by the Eighth Defendant and in respect of which paragraph 41 is repeated; and

41.7.3 the detriment caused to the Eighth Defendant by its reasonable reliance upon those assurances and/or representations by undertaking the works specified at paragraph 41 on the understanding that access to the site would continue until such time as the aircraft were airworthy. The withdrawal of the assurance of access and use of the runway, following JSS' detrimental reliance upon those assurances, renders the withdrawal of the assurances unconscionable given the resultant economic loss and loss of chance that would be suffered by the Eighth Defendant;

41.7.4 It is unconscionable for the Eighth Defendant to suffer economic loss and loss of chance as a result of the Claimants' decision to alter its position by contracting with Cox after it had provided assurances to the Eighth Defendant and in circumstances where the Claimants admit that they did not disclose the existence of those obligations for reasons of commercial confidentiality.

41.7.5 the benefit derived by the Claimants in the facilitation of the removal of the aircraft from the Aerodrome by the Eighth Defendant.

- (13) Paragraph 43 states: "As to paragraph 47 it is denied that the Claimants are involuntary bailees:

43.1 The Claimants' had knowledge of the aircraft at the time that the Eighth Defendant was induced to purchase by David Walton, on behalf of the Claimants, and at the time that the Cox obligations came into effect.

43.2 Through the express representations made by David Walton [sic], on behalf of the Claimants, that the Eighth Defendant would be permitted, in the event of purchase, to access and use the Aerodrome for the purposes of making the 747s airworthy there has plainly been consent to the continued presence of the aircraft until such time as they could reasonably be prepared for flight following the best endeavours of the Eighth Defendant.

43.3 Although it is not asserted by Cox (as they are not a party to these proceedings) that there is a lack of consent, any lack of consent by Cox would be irrelevant to this claim. Further they would have been aware of the presence of the aircraft at the time of the negotiations surrounding the Cox obligations and, if they were not aware, that failure must be the responsibility of the Claimant.

43.4 The Aerodrome is manned by security for which the Defendants are not responsible, in circumstances in which the aircraft should be

*protected for the purposes of the works, there is a clear obligation of safekeeping and, therefore, involuntary bailment cannot arise.*

*43.5 If the Claimants are bailees, they are voluntary bailees.*

### **The Claimants' Submissions on the draft amended Defence**

129. These are contained in two further documents, submitted on 29 January 2021 and 6 January 2021. I have read them carefully. I will not set them out in full, instead I summarise them below.
130. JSS now rests its defence to the claim for trespass on:
- (1) an alleged contractual licence (raised for the first time in its skeleton argument for the hearing on 17 December 2020);
  - (2) alternatively, a gratuitous licence which has been withdrawn, but for which a reasonable period of notice has not been given; and
  - (3) an alleged proprietary estoppel (raised for the first time at the hearing on 21 December 2020).
131. JSS now defends the claim brought under the 1977 Act, principally by denying that the Claimants are involuntary bailees, and have re-introduced a plea (in the version served on 5 January 2021) that if they are bailees at all, they are voluntary bailees.

### **The Contractual Licence Defence**

132. Turning to the contractual licence claim, the pleading is wholly inadequate in that it fails to set out the terms of the contract, in particular it fails:
- (1) to identify distinctly (i) a contractual right to park the 747s at the Aerodrome, and (ii) a contractual right to use the runway;
  - (2) to state the period for which the licence was allegedly granted, either by reference to a fixed end date or to any specific conditions by which the licence would automatically come to an end;
  - (3) to indicate whether or not it was revocable on notice, and if so, how much notice.
133. Insofar as it arises from representations, those are to be found at paragraphs 40.4.1 and 40.4.2 and are inadequately particularised. They are contrary to the earlier pleaded case at paragraph 35 of the original Defence that Mr Walton made a representation which “*implied that access to the Aerodrome would at all times be granted and facilitated in order that the programme of works could be completed in good time to achieve that aim [of rendering the 747s airworthy]*” [emphasis added]. The contractual effect of the matters at paragraphs 40.4.3 and 40.4.4 is unclear. The implied term pleaded at paragraph 40.4.4 appears to be conjured from thin air and is wholly insufficient.

134. There is no mention of any contractual licence in any contemporaneous documents, the witness evidence relied upon by JSS and the subsequent correspondence from JSS and its legal representatives between 16-22 July 2020, in which they indicate a desire to reach a commercial agreement: the premise of those overtures being that there is no existing contract.
135. The date of the conclusion of the contract is unclear. Paragraph 40.4 contains the contractual offer. Paragraph 41.4 indicates that JSS accepted the offer by carrying out certain works from 10 June 2020. By that time, even if an offer had been made, it would have been revoked by the JSS Notice served on 18 and 21 May 2020.
136. There is no proper pleading of consideration for the grant of a licence. It does not appear that JSS were obliged to pay any consideration for their parking the 747s at the Aerodrome. The only reference is at paragraph 41.2 which states: *“In further consideration for the agreement reached through David Walton, the Eighth Defendant committed financial resources and manpower to making the 747s airworthy, so that they could be removed from site.”*
137. Insofar as paragraph 40.4.4 is relied upon to support a claim for consideration, it cannot succeed for the reasons given in paragraph 14.9 of the Claimants’ supplementary submissions dated 29 December 2020. No basis is given for the implication of the term. Paragraph 40.4.4 refers to the removal of the 747s, *“...as soon as their restoration to flight could be reasonably achieved by the Eighth Defendant and that the Eighth Defendant would take reasonable steps to achieve that aim.”* JSS did no work at all on the 747s prior to the closure of the Aerodrome on 25 March 2020.
138. Paragraph 40.6.6 does not make clear why the right to use the runway was a necessary component of the alleged contractual relationship. If it is said to be an implied term, no basis for the implication is given. Paragraph 40.4.3 does not refer to an express reference to use of the runway by Mr Walton, but it appears to be based on an inference. It is not stated that he said that there would be unlimited access to the runway.
139. The case advanced by JSS is wholly implausible against the factual background of what was happening in December 2019. The Cox Obligations were in the process of being negotiated and would inevitably have included a fixed date by which the Aircraft had to be removed. On 9 December 2019, the day after the meeting with Mr Qaddah, Mr Walton was writing to Mr Steven stating that the runway would not be available for use in the near future and by spring it would be covered with cars. *“That will result in flying ceasing and there will never be an opportunity to operate the aircraft again.”*
140. The allegation at paragraph 36 that *“the proceedings are motivated by the Claimants’ desire to scrap the aircraft themselves and retain a substantial fee for doing so”*, is fanciful given that the scrap value of each of the 747s is said to be in the region of £20,000.
141. Similarly, JSS’ case in paragraph 20.2 that Cs have engaged in *“deliberately frustrating, delaying, destabilising and stalling the attempts of the Eighth Defendant*

*to promptly render the 747s airworthy within a reasonable timeframe*”, while subject to the Cox Obligations to remove the 747s by 31 December 2020, is wholly fanciful.

142. The reasonableness of the period of notice must be judged against the fact that JSS has had from 11 May 2020 until 19 September 2020 (when JSS’ solicitors confirmed that it was freely able to access the 747s) to remove them.

### **The Gratuitous Licence Defence**

143. Insofar as reliance is placed on a gratuitous licence, JSS has had reasonable notice of its withdrawal, following the service of the JSS Notice.

### **The Defence of Proprietary Estoppel**

144. The fundamental objection to this defence taken by Mr Cloherty is that the right for which it contends, namely a licence, is a personal rather than a proprietary right, which is insufficient. For an equity to arise, the party contending for the estoppel must have been led to believe that it would obtain some right or benefit in or over the other party’s property, but *“a belief that he will acquire a right of a non-proprietary character will not suffice”* (see Megarry & Wade, 9<sup>th</sup> edn, at [15-012]).
145. Further, [15-020] of Megarry & Wade states that *“Absence of unconscionability is fatal to [the claim by the party alleging the estoppel]”*. As a result of that submission, the draft was further amended to plead reliance on allegations of unconscionability in support of its proprietary estoppel defence. The plea of the withdrawal of the use of the runway, does not allege that there was any agreement for the use of the runway in the first place. There is no particularity of the alleged *“economic loss and loss of a chance”* in paragraph 41.7.4.

### **Bailment**

146. Even in the final version of the draft Defence, JSS has still sought to withdraw from its earlier position contained in paragraph 62 of the Defence, namely that *“...by the representations of [Mr Walton] the Claimants became voluntary Bailees.”* The current plea at paragraph 43.5 of the draft amended Defence is that *“If the Claimants are bailees, they are voluntary bailees.”* If the Claimants are voluntary bailees, then they plainly have standing to bring a claim under Section 13 of the 1977 Act.

### **Discussion and conclusion in relation to the Claimants’ application for summary judgment and JSS’ application to amend its Defence**

147. I turn to the three heads of defence. First, in relation to the claim now based on proprietary estoppel, I agree with Mr Cloherty’s submission that the right for which it contends, namely a licence, is a personal rather than a proprietary right, which is insufficient. For an equity to arise, the party contending for the estoppel must have been led to believe that it would obtain some right or benefit in or over the other party’s property, but *“a belief that he will acquire a right of a non-proprietary character will not suffice”* (see Megarry & Wade, 9<sup>th</sup> edn, at [15-012]). In such circumstances, it stands no real prospect of success.

148. In relation to the claim for a gratuitous licence, again in my view, this defence stands no real prospect of success, given the JSS Notice, which in my view amounts to reasonable notice to remove the 747s.
149. That leaves the defence of a continuing contractual licence. I have noted above at paragraphs 115 and 117, that there is a clear conflict of evidence between Mr Walton and Mr Qaddah as to what was discussed and what was said by Mr Walton at the meeting on 8 December 2019. Whilst that suggests that it may require a court to see those witnesses and assess their evidence at a trial, it is important in my view, to look at that evidence carefully, to see the way in which the newly alleged contractual licence is pleaded and the history of the matter, when reaching a conclusion.
150. I remind myself that, whilst one must not conduct a “mini-trial”, a realistic claim is one that carries a degree of conviction, which is more than fanciful, and a court is not obliged to take at face value and without analysis everything that a witness says in a witness statement: see principles (i)-(iv) at [15] of the *Easy Air* case.
151. When one conducts that exercise, I am driven to the conclusion that this is a claim which stands no real prospect of success and the amendment in that regard should not be allowed.
152. I reach that conclusion for the following reasons:
- (1) the first time that any suggestion of a contractual licence was raised was in the Eighth Defendant’s skeleton argument served on 15 December 2020. It receives no mention in contemporaneous documents, inter-party or inter-solicitor correspondence, the original Defence or the numerous witness statements served on behalf of JSS;
  - (2) the date on which the contract is concluded is unclear, as is its duration. It is silent as to whether it is terminable on notice, and if so what that notice was, if any was agreed. I accept Mr Cloherty’s submission that an acceptance by reference to the undertaking of work referred to in paragraph 41.4 cannot work, because all the activities relied upon were carried out on or after 10 June 2020, after service of the JSS Notice on 18 and 22 May 2020. In my judgment that notice must be regarded as a withdrawal of any earlier offer;
  - (3) the Eighth Defendant apparently gets the benefit of this licence free of charge, and nothing was agreed about the outstanding parking charges. It is difficult to see what incentive Mr Walton would have to enter into such an agreement, when the negotiations with Cox were on-going, and which resulted in the Cox Obligations. It is difficult to see any commercial incentive on his part to create such a conflicting obligation.
  - (4) moreover, the Eighth Defendant appears to have an open-ended entitlement to carry out the works to the 747s and apparently, implicitly to use the runway, when the very next day, 9 December 2019 Mr Walton is writing to Mr Steven, indicating the opposite – see paragraph 139 above;
  - (5) despite there being an implied term set out at para 40.4.4 that “*the aircraft would be removed as soon as their restoration to flight could be reasonably*

*achieved by the Eighth Defendant and that the Eighth Defendant would take reasonable steps to achieve that aim”, nothing was done in relation to carrying out any work to the 747s before closure of the Aerodrome on 25 March 2020. That does not appear to be consistent with that implied term;*

- (6) the consideration is difficult to ascertain from the amended Defence. From paragraph 41, it appears to be based on detriment to JSS, rather than giving any benefit at all to CWL.

153. In these circumstances, I do not regard this amendment as having a real prospect of success and it should not be allowed.

### **Bailment**

154. That leaves the defence in relation to the involuntary bailment. This has to be examined in the light of the failures of the other defences raised and my finding at paragraph 63 and 66 above. I repeat the point made in paragraphs 65 and 106 above. In relation to the validity of the JSS Notice, there appears to have been nothing agreed in relation to any parking charges, and therefore there would be nothing due to be stated in the notice. On that basis the Notice appears to be compliant with the requirements of paragraph 1(3) of Schedule 1 to the 1977 Act. Further, even if the First Claimant was a voluntary bailee, there is no reason why it should not have recourse to s.13 of the 1977 Act.

155. In relation to the length of the notice given by the JSS Notice, in my judgment it was not unreasonable in all the circumstances, given the reopening of the Aerodrome and the access given to the JSS technical team.

156. I therefore make similar orders against JSS to those I have made against Tristar Air at paragraphs 105 and 107 above.

### **Judgment in default against the First Defendant**

157. The conditions in CPR r. 12.3 are satisfied in this case. The Claimants have made the necessary application for default judgment for any other remedy, pursuant to CPR 12.4(2). The proceedings have been duly served on the First Defendant which has failed to file any acknowledgement or defence, and under CPR r. 12.11(1) the Court has power to give such judgment as it appears that Claimants are entitled to on their statement of case.

158. In those circumstances I make the declaration and Orders sought against the First Defendant as stated in paragraph 8 above, save that in relation to the proposed order in paragraph 8(3) it should be in favour of the First Claimant only, which I have found is the only Claimant with the requisite standing.

### **Conclusion**

159. I therefore grant summary judgment to the First Claimant against Tristar Air and JSS as set out above. I dismiss Tristar Air's and JSS' applications to amend their respective Defences. I make the declaration and Orders sought against the First Defendant as set out in paragraph 158 above.

160. I would be grateful if a draft Order could be agreed, reflecting the findings, declarations, and orders in this judgment. I would like to hear further argument on the relief sought against Tristar Air and JSS at paragraph 54.2 of the APOC and paragraph 3 of the revised draft order. It only remains for me to thank Counsel for the assistance they have given me. I will hear any consequential applications on the handing down of this judgment.