Neutral Citation Number: [2024] EWHC 1945 (Comm)

Case No: CL-2022-000467

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2024

Before:

MR JUSTICE PICKEN

- -

BETWEEN:

FW AVIATION (HOLDINGS) 1 LIMITED

Claimant

- and -

VIETJET AVIATION JOINT STOCK COMPANY

Defendant

- -
- -

Mr Akhil Shah KC, Mr Richard Lissack KC, Mr Robin Lööf, Ms Niamh Cleary and Mr Orestis Sherman (instructed by **Quinn Emanuel LLP**) for the **Claimant**.
Lord Wolfson KC, Mr Alexander Milner KC and Mr Giles Robertson (instructed by **Elborne Mitchell LLP**) for the **Defendant**.

Hearing dates: 4-14 June 2024.
Judgment provided in draft: 24 July 2024.

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JUDGMENT

Mr Justice Picken:

Introduction

1. This case concerns four Airbus aircraft (the 'Aircraft'), namely: two Airbus A321-271 passenger jet aircraft bearing manufacturer's serial numbers 8906 and 8937 - described as the 'NEOs' (or 'New Engine Option') aircraft; and two Airbus A321-211 passenger jet aircraft bearing manufacturer's serial numbers 8577 and 8592 - described as the 'CEOs' (or 'Current Engine Option') aircraft.

2. The Claimant is FitzWalter Aviation Holdings 1 Limited ('FWA'), a Jersey-registered company. Through a series of assignments and transactions by itself and affiliates of its parent investment fund, the UK-headquartered FitzWalter Capital, it claims to have acquired all security rights under what is known as a 'JOLCO' structure.

3. FWA now seeks to enforce these rights to recover the sums amounting to over US$180 million and possession of the four aircraft from the Defendant, VietJet Aviation Joint Stock Company ('VietJet'), the ultimate operator of the Aircraft under the scheme. FWA describes VietJet, for these purposes, as *"an admitted delinquent debtor"*.

4. For its part, VietJet disputes FWA's claim, contending that FWA (which VietJet suggests has acted in an *"underhand and unapologetically rapacious"* manner) has not acquired the contractual rights and securities which it asserts and, in the alternative, seeks the equitable remedy of relief from forfeiture to resist surrender of the Aircraft.

5. As will appear, my conclusion is that FWA's claim succeeds, albeit that the precise nature of the relief that is appropriate will need to be formulated after this judgment has been handed down.

6. What follows, by way of background, although somewhat involved, is almost entirely uncontroversial and is taken from a combination of each side's written openings.

The JOLCO arrangements involved in this case

7. The Aircraft were leased to VietJet through a Japanese Operating Lease with Call Option (or 'JOLCO'). This is a structure which is used to finance the acquisition of, among other tangible assets, commercial aircraft.

8. As Mr Alain Chrun, FWA's expert in aircraft lease financing, explained, under a JOLCO structure, the aircraft price is financed by a mix of debt finance and equity finance. The equity portion of the aircraft is provided by Japanese investors, who are the ultimate owners of the aircraft, and so the full aircraft price is financed without the use of the airline's own capital.

9. More specifically, the aircraft is acquired by a tax transparent special purpose vehicle (or 'SPV') established under or recognised by Japanese law which represents the interests of the Japanese investors. The Japanese investors are small/medium Japanese companies and single investors, who invest in the structure for tax reasons: the SPV makes substantial losses in the first years of the deal, as it depreciates the aircraft,

which the Japanese investors set off against their tax bills, thereby effectively deferring the investors' tax liabilities until the later years of the deal when the SPV makes a profit.

10. With no expertise or desire to be involved in the business of aircraft leasing, the Japanese investors do not, in substance, whether directly or through the SPV, supply the aircraft: indeed, in the present case the Aircraft were bought new from Airbus, under a purchase agreement between Airbus and VietJet, with the SPV (as Lessor) stepping in just before delivery in order to fund the acquisition through equity capital supplied by the Japanese investors (typically 25%) and through debt finance obtained by the SPV for the balance (typically 75%).

11. The aircraft is then leased by the SPV to the airline or (as in the present case) to a lessor which sub-leases the aircraft to the airline for, typically, between 8 and 12 years.

12. Under the JOLCO structure, the SPV receives scheduled rental payments under the lease with the airline or the sub-lessor if the airline is, in fact, a sub-lessee (as in the present case). Those rental payments correspond with the scheduled payments that the SPV is required to pay under the loan which the SPV has obtained in order to finance the balance (to repeat, typically 75%). The rental payments, accordingly, are used to repay that loan.

13. The SPV's liability under any such financing arrangements is, however, limited, with the lender's recourse being to the security package in place over the aircraft, including the proceeds derived from the sale of the aircraft and from the lease which is assigned to a security trustee. Specifically, as Mr Chrun explained, in the event of an early termination of the leasing, the airline may be required to pay termination sums and all other amounts due under the lease (or sub-lease as applicable). Different lines of termination sums are payable upon termination, each one corresponding to the satisfaction of a particular liability under the JOLCO structure. One line of termination sums corresponds to the repayment of the outstanding balance of the loan, another to the repayment of the Japanese investors' contribution.

14. Early interruption of the JOLCO is very damaging to the economic benefits expected by the Japanese investors. Hence, the termination sum payable upon early termination as a result of the default of the lessee will include a sum compensating the Japanese investors for the reduced tax benefit. The termination sum also includes an expected return on the equity investment for the Japanese investors.

15. Lastly, Mr Chrun explained that, during the term of the JOLCO and at its maturity, the airline may have one or more call options upon the exercise of which, it may purchase the aircraft. The airline is not obliged to exercise the call option, but, if it does, it will be obliged to pay the call option price. The call option price includes an *"equity"* portion which will be an amount sufficient to repay the original equity investment by the Japanese investors, plus a pre-agreed return on investment for those investors.

16. In a default scenario if the airline does not exercise the call option, it must pay a liquidated amount defined as the Termination Value and return the aircraft in full compliance with the return conditions set out in the lease agreement.

17. In substance, therefore, as Lord Wolfson KC put it on behalf of VietJet, JOLCOs are structures to finance the airline's purchase of the aircraft: the expected outcome, if all goes to plan, is that the airline will pay the lease rent (and thus, indirectly, the loan interest and principal) over several years, and then purchase the aircraft through the call option. The airline receives the benefit of any increase in the aircraft's value (because the price under the call option is fixed) and, in practice, is intended to bear the burden of any foreseeable decrease in value as well (until the point where the aircraft is worth so little that the airline is better off doing the expensive work required to return it, than paying the option price and keeping it).

18. The arrangements in the present case mirrored the JOLCO norm. Thus:

    (1) As explained in more detail in a moment, the relevant SPVs formed in the case of each of the Aircraft purchased the Aircraft from the aircraft manufacturer.

    (2) Debt financing for those purchases was provided in each case by a Loan Facility Agreement entered into between the SPV (as the Borrower), the Original Lenders (or the financial institutions) and BNP Paribas ('BNP') or Natixis Singapore Branch ('Natixis') – BNP in the case of the CEOs (as Facility Agent, Security Agent and Fixed Rate provider) and Natixis in the case of the NEOs (as Facility Agent, Security Trustee and hedge counterparty).

    (3) The SPVs (the Borrowers) leased the Aircraft to different SPVs owned by VietJet (the 'VietJet SPVs') pursuant to Aircraft Lease Agreements in respect of each of the Aircraft (the 'Head Leases').

    (4) Those different SPVs, the VietJet SPVs, (the Sub-Lessors), in turn, leased the Aircraft to VietJet (the Sub-Lessee) pursuant to Sub-Lease Agreements (the 'Sub-Leases').

19. The Loan Facility Agreements were each supported by certain security arrangements. These included:

    (1) a New York law mortgage, pursuant to which the Borrower (the SPVs) granted the Security Trustee/Agent a first priority Security Interest over the Aircraft (the 'NY Mortgages');

    (2) a Security Assignment (Lessor) between the Lessor/Owner (the SPVs again) and the Security Trustee/Agent pursuant to which the Lessor in each case assigned its interests in, *inter alia*, the Head Leases, the Sub-Leases and the Security Assignments (Lessee) (to which I refer shortly) to the Security Trustee/Agent by way of security for *"any and all liabilities and obligations ... which are now or which may be at any time and from time to time hereafter be due, owing, payable or incurred or be expressed to be due, owing, or payable from or by the Lessor to the Financing Parties ...under any Operative Document..."* (the 'Lessor Security Assignments') - in each case VietJet signing an Acknowledgement of Assignment of Sub-Lease (the 'Assignment Acknowledgements') agreeing to the terms of the Lessor Security Assignments;

    (3) a Security Assignment (Lessee) entered into between the Lessor/Owner (the SPVs once again) and Lessee/Sub-Lessor (the VietJet SPVs) pursuant to which

the Lessee assigned its interest in the Sub-Lease and ancillary rights to the Lessor as security for *"any and all liabilities and obligations ... due… from or by any Lessee Party to the Lessor under any Operative Document…"* (the 'Lessee Security Assignments') - the Assignment Acknowledgements also confirming VietJet's consent to the Security Assignments (Lessee); and

(4) an Irrevocable Deregistration and Export Request Authorisation ('IDERA') executed by VietJet in favour of the Security Trustee/Agent and filed with the Civil Aviation Authority of Vietnam (the 'CAAV').

20. As to the terms of the Loan Facility Agreements, I will come on to address these more fully later when dealing with the issues in dispute. However, it should be noted that both the NEO Loan Facility Agreement (Clause 17.1) and the CEO Loan Facility Agreement (also Clause 17.1) provided that the Lenders could assign their rights to others provided that the new Lender was *"another bank or financial institution or ... a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"*. Clause 17.2 in each of the agreements, respectively, then, went on to provide that the Lessor's consent for such an assignment was not required if the new lender was a Qualifying Lender (albeit in the case of the CEOs, only if there was no Enforcement Event), a Qualifying Lender being defined as a bank or financial institution (for the NEOs) or a Lender (for the CEOs), which was beneficially entitled to the interest payable under the loan and was either in Japan or benefitted from a Japanese double taxation treaty such that there would be no withholding tax on the Lessor's interest payments to them.

21. As for what is an Enforcement Event, in each case this was defined as meaning either an Event of Default (as defined) or the Loan being accelerated, Clause 7.3(a) (again in each case) stating in the case of the latter that the Loan would automatically be accelerated if the Lease terminated and its termination sums became due and clause 7.1(g) (again in each case) providing that, if the majority of the lenders chose, it could be accelerated if there were a default under the Lease or the Sub-Lease.

22. Turning to the Leases and Sub-Leases, these are on substantially similar terms. Again, I will address the detail later, as appropriate, but it should be noted that (consistent with the usual JOLCO arrangement), under their terms:

(1) VietJet has the usual obligation to pay rent and receives the usual covenant of quiet enjoyment: Sub-Leases, Clauses 5.1 and 6.4, respectively, in each (CEO and NEO).

(2) The Lessee under each Lease has an option to purchase the Aircraft; VietJet has a similar option for the NEO aircraft under each Sub-Lease. (In form, the purchase option itself has been removed from the CEO Sub-Leases, although only in part: an option to purchase on default termination survives).

(3) Non-payment of rent is an Event of Default entitling the lessor (i.e. as the case may be, the Lessor or the Sub-Lessor/Lessee) to terminate and require the Lessee to redeliver the aircraft: Sub-Leases, Clauses 18(a) and 19.1/19.2(b), respectively, in each (CEO and NEO).

(4) On such a termination, the Lessor would be entitled:

i) for the NEOs, to the A Line Termination Value, being the aggregate of the Basic Termination Amount (the outstanding balance on the loan) and the A Termination Amount (one of three additional termination amounts that could apply in different circumstances) – Sub-Leases, Clause 19.3 and Schedule 3, Exhibit 2; and

ii) for the CEOs, to the Termination Value, being the aggregate of Termination Value A (again, the outstanding balance on the loan) and Termination Value B – Sub-Leases, Clause 19.3 and the CEO Lease Schedule Supplement at Exhibit 2.

Registration of international interests pursuant to the Cape Town Convention

23. Registrations were made in respect of 'International Interests' and assignments of 'International Interests' on the international registry under the Cape Town Convention on International Interests in Mobile Equipment (the 'Convention') and its associated Protocol on Matters Specific to Aircraft Equipment (the 'Protocol') in the below order of priority as international interests and assignments of international interests in respect of each of the Airframes and (as applicable) their associated Engines (as recorded at Clause 15.5(b) of the Head Leases and Sub-Leases):

(1) the international interests under the applicable mortgage with the Security Trustee/Agent, as creditor and the Lessor/Borrower as debtor;

(2) the international interests under the Head Leases with the Lessor/Borrower as creditor and the Sub-Lessor as debtor;

(3) the assignment of international interests under the Lessor Security Assignments with the Security Trustee/Agent as assignee and the Lessor/Borrower as assignor;

(4) the international interests under the Sub-Leases with the Sub-Lessor as creditor and VietJet as debtor;

(5) the assignment of international interests under the Lessee Security Assignments with the Lessor as assignee and the Sub-Lessor as assignor; and

(6) the contracts of sale created by the Manufacturer Bill of Sale with the Manufacturer as seller and the Lessor as buyer.

24. It should be noted that the Convention is implemented in the UK by The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (SI 2015/912) (the 'Regulations') and that, together with the Protocol, it provides an international legal regime for the protection of secured creditors, conditional sellers, and lessors of *"aircraft objects"* through a set of default remedies (which are available upon a default occurring under the transaction documents) and the protection of creditors' interests by registration on the International Registry.

25. Key features of the regime established by the Convention, Mr Shah suggested, are these:

(1) The Convention creates a sui generis *"international interest"* in aircraft objects, that is recognised in all Contracting States. An international interest means an interest to which Art. 2 applies.

(2) Art. 2(2) relevantly provides that an international interest is an interest in an aircraft object constituted under Art. 7 and is one: *"(a) granted by the chargor under a security agreement; (b) vested in a person who is the conditional seller under a title reservation agreement; or (c) vested in a person who is the lessor under a leasing arrangement."* International interests are confined to those specific instances.

(3) Art. 7 provides that an interest is constituted as an international interest under the Convention where the agreement creating or providing for the interest is: *"(a) in writing; (b) relates to an object of which the charger conditional seller or lessor has power to dispose; (c) enables the object to be identified in conformity with the Protocol; and (d) in the case of a security agreement, enables the security obligations to be determined, but without the need to state a sum or maximum sum secured."*

(4) An international interest is a proprietary interest that needs to be registered in the International Registry in order to preserve its priority against subsequently registered interests and unregistered interests.

(5) The Convention applies to the exclusion of otherwise applicable law where the two conflict. In the interests of promoting uniformity and predictability in its application, questions concerning matters governed by the Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law which is determined by the rules of international law of the *lex fori*: Art. 5(1)-(3).

Events leading up to service of the Termination Notices

26. The CEOs were delivered together: MSN 8577 on 20 November 2018, and MSN 8502 on 21 November 2018.

27. The NEOs followed the next year, MSN 8937 being delivered on 25 July 2019, and MSN 8906 on 24 September 2019.

28. In early 2020, the COVID-19 pandemic spread. Vietnam was affected early, being close to the source in China. VietJet participated in the effort to bring Vietnamese citizens home. In late March 2020 the Vietnamese government placed restrictions on movement and implemented a national quarantine. However, by May 2020 VietJet was able to resume operations, and by April 2021 it expected operations to return to normal by the end of 2021.

29. Shortly thereafter, the 'Delta' variant of COVID-19 began to pose a fresh threat to public health. In Vietnam, between 31 May 2021 and 30 September 2021, the government imposed an extensive hard lockdown. In Ho Chi Minh City, under 'social distancing' people could 'only leave home in case of necessity', shops and recreational facilities were closed, and severe restrictions were placed on travel.

Between 19 July 2021 and 8 October 2021, the Civil Aviation Authority of Vietnam (the CAAV) suspended VietJet's operations. Only very limited domestic flights were permitted, and VietJet was not amongst the operators allocated to fly them. VietJet was prohibited from selling tickets and required to refund those it had already sold.

30. Restrictions were only lifted in early 2022. In those circumstances, VietJet sought to negotiate further deferrals with its lessors and financiers. On 27 May 2021, VietJet's Mr Ta wrote to Natixis, the lender for the NEO aircraft, identifying that *"we have seen the number of aircraft utilization reduced to less than 20 and capacity dropped immediately by 90% with less than 20% of load factor"* and asked *"for further support to extend the all coming payments [which would fall due on 30 June] to end of July – that is the time we are hopefully the covid wave will be weaker"*.

31. Natixis responded, asking VietJet to *"issue us two separate deferral requests in a letter format as usual"*. However, it became clear this wave of COVID would not clear as quickly as VietJet had hoped, and so by August 2021 VietJet was requesting a more comprehensive 'loan holiday' between 2021 and 2023, to be supported by increased interest payments.

32. Natixis replied, on 31 August 2021, saying that *"a preliminary feedback of the lender group is supportive in principle of accepting the airline's deferred period of 12 month request"* through to June 2022, provided that, amongst other things, *"VietJet either pays a full unpaid June payment or at least a default interest (1% plus the interest rate), otherwise, the facility will be treated as a non performing loan for the lenders and afraid it will trigger an EOD"* and *"the airline repays the overdue payments as soon as the airline raises any liquidity via CB issuance or private placements in Oct/Nov this year"*.

33. VietJet proceeded to send Natixis cashflow forecasts to support its request.

34. By 8 September 2021, VietJet indicated it agreed the 1% default interest rate Natixis had proposed (and was processing the payment for it), but requested a slightly longer deferral (to September 2022) and an overall extension of the term by 2 years. On 9 September 2021, Natixis' Mr Ahn, however, indicated that could not be agreed, explaining as follows:

> *"... the lender group and lessors won't be able to accept any deferral period that is beyond June 30 2022 – that was the worst case scenario that the lenders and lessors could consider. That is all the deferred JOLCO rentals that are originally due in June, August, September, November and December 2021 and Feb, March and May 2022 shall be settled subject to the prepayment of the then unpaid rentals as soon as the proceeds under the CBs, private placements and etc., VietJet is currently planning to issue becomes available."*

35. Mr Ahn reiterated that position on 20 September 2021, setting out the lenders' proposal in the same terms, and adding two more, namely:

> *"* Default interest (1% plus the interest rate) to be paid on a quarterly basis at each original payment date of respective JOLCO facilities;*
>
> ** Any unpaid IR fees and FA/ST fees to be paid as soon as practical."*

36. VietJet continued to seek to negotiate terms, but Mr Ahn made it clear that this was the lenders' final position.

37. After a call between the parties on 6 October 2021, in which VietJet sought to persuade Natixis to accept its proposal, as Mr Ta Quang Ngoc, VietJet's Director of Aircraft Fleet Planning, Acquisition and Financing, explains *"we decided that we had no option but to accept the Natixis offer"*. The next day, 7 October 2021, he wrote to Mr Ahn, accepting (or purporting to accept) the 20 September terms.

38. It is VietJet's case that, in the circumstances, there was an agreement preventing termination of the NEO Leases. This is a matter to which I will return. That, however, is not the position that was adopted by Natixis, at least by the time that the termination notices were sent, since in respect of the NEO Aircraft, Natixis (as assignee of the NEO Lessors and NEO Sub-Lessors) sent such notices to VietJet and the NEO Sub-Lessors on 18 October 2021. This was followed by BNP doing the same in respect of the CEO Aircraft: on 22 October 2021 (for the 8592 Aircraft) and on 26 October 2021 (for the 8577 Aircraft).

39. It is FWA's case that these Termination Notices – those served by Natixis and subsequently by BNP - terminated the leasing of the Aircraft under the Sub-Leases and the Head Leases with immediate effect pursuant to Clause 19.1 of the Sub-Leases and the Head Leases, the Termination Date in each case being the date of the Termination Notice.

40. The validity of the Termination Notices is another issue to which I will return. However, FWA's case is that VietJet's non-payment of rent as at that point amounted to an Event of Default under Clause 18(a) of the Sub-Leases, the amounts outstanding by way of unpaid rental in respect of each of the Aircraft as at the dates of termination of the Sub-Leases in October 2021 being: US$ 2,424,887.64 for Aircraft 8937; US$1,195,034 for Aircraft 8906; US$2,241,716.10 for Aircraft 8577; and US $2,239,512.18 Aircraft 8592.

41. FWA's position (disputed by VietJet) is that, as a result of service of the Termination Notices:

    (1) VietJet's right to possess, access, or operate the Aircraft under the Sub-Leases was terminated immediately upon service of the Termination Notices; and

    (2) the termination of the Sub-Leases triggered VietJet's liability to pay the termination amounts specified by Clause 19.3 of the Sub-Leases (the Termination Sums) and, in turn, the Sub-Lessor's obligation to pay those amounts to the Lessor under Clause 19.3 of the Head Leases.

42. FWA also says that termination of the leasing also triggered VietJet's option to take title to the Aircraft pursuant to Clause 19.3 of the Sub-Leases. However, exercise of the option (which was to be exercised within 30 days of the Termination Date) was conditional upon payment of the Termination Sums. VietJet failed to pay the Termination Sums within 30 days of the Termination Date (or at any time thereafter). Accordingly, FWA's position (which VietJet denies) is that VietJet's limited rights to purchase the Aircraft from the Lessors under clause 19.3 of the Sub-Leases have lapsed irrevocably.

43. FWA maintains also that the Events of Default in their own right, and in addition to the termination of the leasing, led to separate Mandatory Prepayment Events under the Loan Facility Agreements, which, in turn, caused, without more, the outstanding indebtedness under the Loan Facility Agreements to become due and payable. Following service of the Termination Notices, the (then) Facility Agents, Natixis/BNP, served Mandatory Prepayment Notices on the Head Lessors declaring in each case that the Loan and the accrued interest had become due and payable immediately, together with all other sums owing by the Borrower.

44. Furthermore, FWA suggests, the acceleration of the Loans triggered the automatic termination of the leasing of the Aircraft under Clauses 8.1(c) and (y)/8.1.3 and (y) of the NEO/CEO Sub-Leases without the requirement for any further act or notice, and also constituted an Enforcement Event as defined in the transaction documents for each Aircraft.

45. On this basis and for these various reasons, notwithstanding that the unpaid rental at the time of the purported terminations was just over US$8 million, if the terminations took effect as FWA suggests, then:

    (1) On the NEOs, FWA's case is that VietJet owes it US$107 million representing the A Line Termination Value and on the CEOs, FWA says that VietJet owes it US$57 million as Termination Value A, adding up to at least US$164 million on termination.

    (2) On top of that, FWA also claims the Aircraft themselves, which are (obviously) very valuable assets. From the termination dates to the end of the leases, FWA's case is the market rental on the aircraft (discounted) would amount to US$111 million.

    (3) FWA also claims a host of costs consequent on termination, swap breakage loss, and the cost of putting the aircraft into the (uneconomically exacting) redelivery condition.)

46. The effect of termination (if valid) is thus to impose on VietJet a loss of well over US$275 million, and a consequent gain to the Lessors or lenders.

47. As I say, I will come back to these matters since FWA's position is not accepted by VietJet. First, however, I should say something about how FWA came to be involved.

FWA's involvement

48. FitzWalter Capital raised its first fund in the first half of 2021. As a brochure it filed with the US Securities and Exchange Commission explained:

    "FitzWalter seeks to invest in distressed credit assets for the purpose of resolution, in particular 'fulcrum' instruments in a capital structure which offers de facto equity upside participation.

    Examples of investments in situations of financial stress may include:

    - 'Loan-to-own': FitzWalter will seek to acquire loans and other credit assets for the purposes of acquiring economic ownership of the underpinning collateral and

prosecuting requisite restructuring in order to own, and ultimately exit a resolved, stabilized, and developed business or asset."

49. On 24 September 2021, FitzWalter Capital Partners (Financial Trading) Limited ('FWC') was incorporated in England, owned by FitzWalter Capital Partners (Master HoldCo) Limited ('Master Holdco'), a Jersey company which holds the investments of FitzWalter's first fund.

50. By 18 October 2021, it had engaged Airborne Capital ('Airborne') to run a sales process for the aircraft, and incurred over £200,000 in solicitors' fees.

51. Between 8 and 26 October 2021, FWC bought up the outstanding loans from the original lenders:

Trade Date	**Lender**	**MSN**	**Outstanding (US$m)**
8 Oct 21	Mega ICBC	8906	15.9
8 Oct 21	Mega ICBC	8937	16.3
18 Oct 21	Natixis	8906	22.0
18 Oct 21	Natixis	8937	23.2
21 Oct 21	BNP	8592	7.3
21 Oct 21	Chang Hwa	8592	15.1
21 Oct 21	First Commercial	8592	7.9
25 Oct 21	Tokyo Star	8577	11.9
26 Oct 21	BNP	8577	5.7
26 Oct 21	Hyakugo	8577	7.9
21 Oct 21	Chang Hwa	8577	4.8
	Total		**138**

52. FWC took assignments of the Loans on 26 October 2021 (the 8592 Loan Facility Agreement), 28 October 2021 (the 8577 Loan Facility Agreement) and 29 October 2021 (the 8906 Loan Facility Agreement and the 8937 Loan Facility Agreement). In each case, this was after Natixis and BNP had served the Termination Notices and Mandatory Prepayment Notices on behalf of the Original Lenders, and was purportedly effected in accordance with the transfer provisions of Clause 17 of the Loan Facility Agreements.

53. It is a fair inference (and not, as I understand it, disputed) that the Termination Notices were co-ordinated behind the scenes by FWC; indeed, FWC was copied into each of them.

After termination: FWC as security trustee

54. On 27 October 2021, four (4) affiliated companies of FWA and FWC were incorporated, namely FW Aviation (Holdings) 8906 Limited, FW Aviation (Holdings)

8937 Limited, FW Aviation (Holdings) 8577 Limited, and FW Aviation (Holdings) 8592 Limited (the FW Trustees). All were 100% owned by Master Holdco at the time.

55. Thereafter, on 2-3 November 2021, at least so FWA says (but this is disputed by VietJet), Natixis and BNP resigned as Security Trustee and Security Agent respectively under each of the transactions, and FWC was appointed as Security Trustee and Security Agent, with Natixis and BNP assigning and transferring all of their rights as Security Trustee/Security Agent to FWC pursuant to Resignation and Appointments Agreements dated 2 November 2021 (the 'Resignation Agreements').

56. This was followed, on 8-9 November 2021, by FWC selling the Security Trustee's rights under the Leases and Sub-Leases to FWA, for US$825,000 for each of the NEOs, and US$600,000 for each of the CEOs, totalling US$2.85 million.

57. It is VietJet's case that this was a sale at an undervalue, given that the outstanding unpaid rental was some US$8 million and given, furthermore, that the amount of the claim which FWA could, then, bring using the rights that it was acquiring was well over US$100 million.

58. Subsequent to this, in December 2021-January 2022, the NEO Aircraft were sold by the NEO Lessors to the NEO Trustee Owners pursuant to a strict foreclosure sale under the Uniform Commercial Code as applied under New York law (the 'UCC') and pursuant to Art. 9 of the Convention by which, *inter alia*, the NEO Lessors consented to transfer title to the NEO Aircraft to FWC's nominee and, in exchange, the NEO Lessors were discharged from certain outstanding obligations under the NEO Loan Agreements.

59. As for the CEO Aircraft, these were sold to the CEO Trustee Owners following a public auction process.

60. VietJet's position is that the sales were far from satisfactory. In this respect, VietJet highlights how the Aircraft were sold 'as-is, where-is' but without FWC taking any steps to gain access to the Aircraft or provide more than minimal information about them, and how, furthermore, they were sold without the contractual rights which had previously been assigned to FWA and without the benefit of the IDERA which FWA also retained. VietJet also points to the facts that what it describes as perfunctory adverts were placed in the Wall Street Journal and on some websites, and how bidders had to submit 5% deposits in cash, unless they were connected to the lender, in which case they could simply assign the proceeds of the sale by way of deposit. It was not surprising, in the circumstances, Lord Wolfson observed, that nobody found the offer attractive, and so that the CEOs were sold to two affiliates of FWA, which each bid US$200,000 more than the debt secured on the relevant Aircraft at the time.

61. As for the NEOs, the relevant Lessors appear to have approached FWC, and offered to sell their stake, which they ultimately did, it appears for the aggregate of the outstanding debt, US$10.5 million, and around ¥19 million, through an agreement apparently dated 1 January 2022. By these means FWA acquired what is described in the Head Leases as the 'Excluded Property' for the NEO Aircraft.

Repossession of the Aircraft and subsequent events

62. The Termination Notices had included a direction that VietJet ground the aircraft and redeliver them in accordance with the terms of the Head Leases and the Sub-Leases. Since, however, VietJet did not consider the Termination Notices to be valid, it did not follow that direction, and continued to operate the Aircraft for over a year after receiving those notices. As Mr Shah pointed out, VietJet did not pay any rent for its continued use of the Aircraft during that period.

63. This continued use was contrary to several notices demanding redelivery. The first of these came on 7 April 2022 in the form of Grounding Notices which advised VietJet of the change of ownership of the Aircraft, and demanded that the Aircraft be grounded and returned as required under the Sub-Lease Agreements.

64. This was followed on 15 July 2022, when Redelivery Demands were sent to VietJet, which demanded immediate redelivery of the Aircraft to Alice Springs Airport in Australia, which VietJet maintains FWA had no right to demand since under the Sub-Leases the redelivery location is a matter to be agreed between the parties.

65. Thereafter, Repossession Notices were sent to VietJet on 1 August 2022 and again on 8 August 2022.

66. This was followed by FWA's commencement of the present proceedings on 26 August 2022. At the same time, FWA applied by way of speedy relief under the Regulations for an injunction to obtain possession, custody and control of the Aircraft pending final determination.

67. In the meantime, and VietJet suggests in response to the Repossession Notices, although it continued to disagree with FWA's position, VietJet had begun to cease operating the Aircraft. MSN 8937 took its last flight on 4 July 2022, and MSN 8906 on 5 August 2022. MSN 8592 took its last flight on 18 September 2022, with MSN 8577 following on 23 September 2022 (before being ferried to Hanoi on 8 October 2022).

68. On 17 October 2022, VietJet made an open offer to purchase the four aircraft for just under US$180 million, which was apparently intended to reflect the amount that would be payable if the Sub-Leases had been terminated at that date. FWA rejected the offer.

69. This was followed by the parties compromising the injunction application through a consent order sealed by the Court on 16 November 2022 (the 'Consent Order'). This order was expressed to be made under Art. 13 of the Convention and *"without prejudice to any arguments that either party may wish to raise in the substantive trial of this claim"*, under which: FWA was to take over the Aircraft (and an engine in Singapore that had been sent for maintenance) from 15 November 2022; FWA was entitled to *"possession, custody and control"* of the Aircraft until further order; and VietJet agreed to write letters consenting to FWA's deregistration and export of the Aircraft, and provide assistance to FWA in deregistering (but not in export), as follows:

> *"7. Following a written request from the Claimant, the Defendant shall, within 7 calendar days of such a request, provide any relevant authority in Vietnam with a letter confirming its consent to the deregistration and export of the Aircraft.*

> *8. The Defendant shall take reasonable steps to provide the Claimant with such other information and documentation which the Claimant reasonably requires in connection with its application to the relevant authority in Vietnam to deregister the Aircraft."*

70. VietJet duly gave possession of the Aircraft to FWA on 15 December 2022.

71. Between December 2022 and January 2023, the Aircraft were de-registered from the Vietnamese Civil Aviation Registry and re-registered on the Guernsey Aviation Registry (the 'Deregistration Decisions').

72. There is a dispute between the parties as to what has happened since the Aircraft were handed over, and the reasons why they have not left Vietnam. FWA's case is that VietJet has engaged in a course of conduct with the aim of frustrating the export process and keeping the Aircraft in Vietnam. VietJet disputes this, highlighting in particular how Art. X(6)(a) provides as regards *"the remedies in Article IX(1)"* that *"they shall be made available by the registry authority and other administrative authorities, as applicable, in a Contracting State no later than five working days after the creditor notifies such authorities that the relief specified in [Art. 13(1)] is granted or, in the case of relief granted by a foreign court, recognised by a court of that Contracting State, and that the creditor is entitled to procure those remedies in accordance with the Convention"*, and that it would seem that FWA has never sought to have the Consent Order recognised by a court in Vietnam.

73. This is not to say, however, that there have not been proceedings before the Vietnamese courts. On the contrary, there have been certain proceedings– albeit not brought by FWA.

74. The first set of proceedings were initiated by Silva Star Capital PTE Ltd ('Silva Star') on 17 February 2023.

75. Silva Star is a Singapore-incorporated company and a minority shareholder of VietJet. Madam Nguyen Thi Phuong Thao, VietJet's founder, then General Director (now Chairwoman) and one of VietJet's three statutory legal representatives, is its ultimate beneficial owner and controlling party. Dr Dinh Viet Phuong, then Vice General Director of VietJet and also one of its three statutory legal representatives, is a director of Silva Star's parent company, Polar Star.

76. On 23 February 2023, Silva Star obtained a preliminary injunction in Vietnam to suspend the Deregistration Decisions and declaring VietJet to be entitled to the continued registration for operation of the Aircraft. In obtaining the preliminary injunction, Silva Star relied upon documents that FWA considers could only have been supplied by VietJet, including a draft of the Consent Order that had been sent to the English Court for sealing.

77. Shortly thereafter, on 26 February 2023, FWA wrote to VietJet, noting the existence of financial links between Silva Star and both VietJet and Dr Phuong. Following that correspondence, the second set of proceedings was initiated by Ms. Nguyen Thi Thu Phuong, Universe Land Vietnam Real Estate Company Limited and Mango Trading Joint Stock Company on 8, 9 and 13 March 2023, respectively (the 'Replacement Shareholder Claimants').

78. On 13 March 2023, FWA wrote to VietJet, noting the connection between Madam Thao and Silva Star. Four days later, on 17 March 2023, the Replacement Shareholder Claimants applied for a preliminary injunction to the same effect as that obtained by Silva Star, and, on 21 March 2023, Silva Star applied to discontinue its claim.

79. The result of the applications was that the People's Court of Hanoi consolidated the Replacement Shareholder Claimants' claims with that of Silva Star, replaced the preliminary injunction granted to Silva Star with one on materially identical terms granted to the Replacement Shareholder Claimants and removed Silva Star as a claimant.

80. On 4 April 2023, a few days after FWA brought contempt of court proceedings in this jurisdiction against VietJet with respect to the Shareholder Proceedings, the preliminary injunction granted to the Replacement Shareholder Claimants was withdrawn. However, the underlying proceedings, which seek a determination that the de-registrations were invalid, are continuing in Vietnam.

81. FWA's position is that VietJet, through Madam Thao and Dr Phuong, procured the Shareholder Proceedings with a view to frustrating FWA's right to possession, custody and control of the Aircraft under the Consent Order. Accordingly, on 31 March 2023, FWA applied on an *ex parte* basis for, and obtained, an order that VietJet is prohibited from, *inter alia*, interfering with FWA's right to possession, custody and/or control of the Aircraft.

82. That order was continued until further order on 14 April 2023 by Mr Richard Salter KC (sitting as a Deputy High Court Judge) and was clarified on 16 February 2024 by Foxton J as covering interference, directly or indirectly, with the export of the Aircraft.

83. FWA has also brought proceedings before the Singapore Supreme Court against, *inter alios*, Madam Thao, Dr Phuong, VietJet, Silva Star and the Replacement Shareholder Claimants, alleging a conspiracy to frustrate these proceedings and the Consent Order. Those proceedings remain on foot.

84. In the meantime, on 4 May 2023, unbeknown to FWA, VietJet wrote to the CAAV seeking guidance with respect to whether an Export Certificate of Airworthiness ('ECoA') would be required to export the Aircraft and whether it was possible for the CAAV to issue an ECoA for the Aircraft.

85. The CAAV confirmed by reply that it could issue an ECoA. Nevertheless, VietJet subsequently maintained in correspondence with the CAAV that the CAAV does not have jurisdiction to issue ECoAs in respect of the Aircraft. It appears, indeed, that VietJet wrote also to the Vietnamese Ministry of Transportation on 10 October 2023, the day after the CAAV certified the 8577 Aircraft as airworthy, asserting certain state secrecy provisions to resist inspection of the document in these proceedings.

86. Furthermore, the CAAV issued a letter on 25 December 2023 certifying that, *inter alia*, the 8906 Aircraft fully met the regulations on export airworthiness standards of Vietnam, which was followed, on 4 March 2024, by FWA receiving oral confirmation from the Vietnamese Customs Authorities (the 'VCA') that the 8906 Aircraft was, in principle, approved for export.

87. The 8906 Aircraft was, indeed, flown to Ho Chi Minh City the same day, only for, that evening (4 March 2024), a letter to be written by the judge in the Shareholder Proceedings to the CAAV and the VCA, seeking information about the import and export procedures of the Aircraft. The Shareholder Proceedings had lain dormant by that stage for just under a year.

88. The result was that final inspections in the export approval process for the 8906 Aircraft were suspended, albeit that on 3 April 2024, FWA was informed by the VCA that the 8906 Aircraft was, once again, in principle approved for export.

89. The next day, 4 April 2024, however, Mango applied to the People's Court of Hanoi for an on-site inspection of the Aircraft. Upon that application, on 15 April 2024, the People's Court of Hanoi made a request to the People's Court of Ho Chi Minh City for it to carry out an on-site inspection and appraisal of the NEO Aircraft, which were located at an airport in Ho Chi Minh City, within 30 days. This was followed, on 22 April 2024, by the People's Court of Hanoi ordering an on-site inspection and appraisal of the CEO Aircraft, which were located at an airport in Hanoi, on 20 May 2024.

90. The practical effect of the orders for on-site inspection is to ground the Aircraft pending their completion as any interference with the inspection orders could result in criminal prosecution.

91. There is one other set of Vietnamese proceedings to mention before coming on to address the issues in this case. These are claims brought by VietJet against Natixis and BNP in the People's Court of Hanoi as filed on 2 February 2023. It would appear that these entail VietJet alleging that it concluded agreements with each of Natixis and BNP to substitute itself for the Lessors under the Loan Agreements as the obligor, and agreed a deferral of the repayments (formerly, on VietJet's case) owed by the Lessors.

The issues to be determined

92. In his opening submissions, Lord Wolfson produced a document described as a *"flowchart"*, which helpfully set out – separately by reference to the NEOs and the CEOs – the issues which, as far as VietJet is concerned, fall to be decided and the answers which, again as far as VietJet is concerned, ought to be provided.

93. This document was slightly revised as a result of Lord Wolfson's closing submissions. However, in his closing submissions Mr Shah made more substantial revisions, adding certain issues which he suggested also fall to be decided. Lord Wolfson objected to Mr Shah KC's formulation. He complained, in particular, that the additional questions involved issues which had not been pleaded by the Claimant, and that some of the issues raised entailed the potential application of New York law.

94. I agree with Lord Wolfson to an extent. It makes no sense, nonetheless, not to deal with points which have been raised and which can be dealt with. That said, I do not propose to address points which do not arise on the basis of what I have decided on earlier points. I have in mind, in this respect, Questions 9A, 9B and 9C, which have as their focus a scenario that does not arise given, as will appear, my answers to Questions 8 and 9.

95. I appreciate that it would be open to me, similarly, not to answer Questions 7 and 8 also. However, it is convenient to address those issues and, given also that at least in the case of Question 8 (albeit with some reformulation by FWA) it has been identified throughout, I propose to deal with Questions 7 and 8, in any event.

96. Rather than setting out the flowchart (as amended by FWA and slightly also by VietJet) here, instead I attach it as an annex to this judgment. In what follows, therefore, I should be taken as referring to the various questions as set out in that annex. As noted above, VietJet disputes parts of this document insofar as it reflects amendments proposed by FWA, but in the event these disputes are not material for the purposes of this judgment.

97. A particular aspect concerns Question 9 and, as appears from the annex, the situation in the event that this is answered 'yes': I do not address, at this stage, the conversion issue since VietJet's position is that this is better done in the context of the quantum hearing which is to take place next year.

98. I should say, by way of preliminary, that FWA says that VietJet lacks standing to raise objection to some of the steps taken by FWA given that there has been no objection raised by FWA's contractual counterparts. An example arising as part of Question 2 concerns Clause 7.5(a) of the Loan Facility Agreements, which Mr Shah submitted was intended to benefit the Lessors and where they have not complained about the form of the Mandatory Prepayment Notices. I agree with Lord Wolfson, however, that it is incumbent upon FWA to establish that it has the rights that it says it has and which need to be made out in order for FWA's claims to succeed.

A. Did the leasing terminate in October 2021?

1. Could the Security Trustee terminate the leasing absent an Enforcement Event under the Loan Facility Agreements?

99. This question is common to both the NEO Aircraft and the CEO Aircraft, although the consequence of the question being answered 'yes' in the case of the CEO Aircraft differs from the position in relation to the NEO Aircraft.

100. Clause 19.1(b) of each of the Head Leases and the Sub-Leases provide that *"if an Event of Default"* occurs, then, the Lessor/Sub-Lessor may serve a notice upon the Sub-Lessor/VietJet terminating the leasing of the Aircraft.

101. Under Clause 18(a), Events of Default included the failure by the Sub-Lessors/VietJet to make any payments due under the Head Leases or Sub-Leases, including rental payments. VietJet admits that there were such failures in respect of the CEO Aircraft and also in respect of the NEO Aircraft albeit that in the case of the latter it alleges that it entered into what has been described as the NEO Restructuring Agreement – a matter which is addressed under Question 3.

102. It is FWA's primary case that, as a result of the non-payment of rent, the leasing of the Aircraft terminated upon the service of the Termination Notices by the Security Trustees (at that time, Natixis and BNP) on both the Sub-Lessors and VietJet in circumstances where those notices expressly relied upon breaches of Clauses 18(a) of

the Head Leases and Sub-Leases respectively in terminating the leasing of the Aircraft pursuant to Clause 19.1 of each of those agreements.

103. VietJet, however, disputes the validity of the Termination Notices since its case is that the Security Trustees could not terminate the leasing of the Aircraft in the absence of an Enforcement Event given that Clause 7.1 of the Security Assignments (Lessor) is in these terms:

"DEFAULT AND REMEDIES

7.1 Powers of Security Trustee

Without prejudice to any of its other rights whether conferred under any of the Operative Documents or by law generally, at any time upon or following the occurrence of an Enforcement Event provided the same is continuing the Security Trustee shall be entitled (subject to Clauses 3.4 (Excluded Property), 3.5 (Co-extensive Rights) and 3.6 (Restrictions on dealing with the Excluded Property and Co-extensive Rights)):

...

7.1.5 to execute and do all such acts, deeds and things in relation to the Assigned Property as the Security Trustee may consider necessary or proper for or in relation to any of the purposes aforesaid;

...".

104. Lord Wolfson observed that it is not in dispute that an Enforcement Event (defined in the Security Assignment (Lessor) at Clause 1.1 as the occurrence of a Loan Default which is continuing and/or the Loan becoming, or being declared, due and payable in full in accordance with the terms of the Loan Agreement and not being paid when due) had not occurred at the time that the Termination Notices were served. On that basis, he submitted, it was not open to the Security Trustees to serve the Termination Notices since Clause 7.1 grants the Security Trustee wide powers to take steps in relation to the Assigned Property only following the occurrence of an Enforcement Event under the Loan Agreements and, he maintained, it was not open to the Security Trustee to terminate the Sub-Leases independently of the express powers conferred on it by Clause 7.1.

105. Lord Wolfson submitted, in particular, that the drafting of the Operative Documents strongly indicates that the parties did not contemplate that Security Trustees would be able to do what they did since the list of powers given to the Security Trustee and set out in Clause 7.1 is extensive. He observed that it is difficult to conceive of anything that the assignee might do with the Assigned Property which is not included in Clause 7.1, noting specifically that the right to terminate the Sub-Leases is contained within Clause 7.1.5's reference to an act *"necessary or proper for or in relation to"* the enforcement or realisation of the security.

106. Lord Wolfson added that it is difficult to understand why the parties would have gone to the trouble of identifying such a comprehensive list of powers (and specifying that they were only exercisable on the occurrence of an Enforcement Event), if, in fact, the

Security Trustee was entitled to exercise them at will from the moment that the assignment was executed.

107. Lord Wolfson went on to submit that the powers conferred by Clause 7.1 cannot merely be additional to those which the Security Trustee already enjoyed by virtue of the assignments in its favour since the powers to be found in Clause 7.1 are all powers which an assignee, as the owner of the Assigned Property, would be able to exercise in the ordinary course. Indeed, he observed, it could not be otherwise given that the Security Trustee had acquired the Assigned Property *"absolutely and unconditionally"*, meaning that the Lessor was not in a position to confer any additional powers on the Security Trustee which it did not already possess.

108. Furthermore, Lord Wolfson suggested, VietJet's construction is reinforced by Clause 16.3 of the Loan Facility Agreements. This provides that:

"On and at any time after the occurrence of an Enforcement Event which is continuing the Security Trustee may, and shall if instructed by the Instructing Group:

(a) take such steps as it considers necessary or desirable to preserve, protect and enforce the rights of the Financing Parties under the Operative Documents; and/or

(b) take such steps as it considers necessary or desirable for the enforcement, protection and preservation of the Security Interests constituted by the Security Documents."

Lord Wolfson submitted that this provision makes it clear that the parties did not contemplate that the Security Trustee could exercise the rights concerning the Assigned Property before an Enforcement Event had occurred.

109. Mr Shah disagreed with Lord Wolfson's submissions. He explained that, whilst it is accepted that as regards the NEO Aircraft there was not an Enforcement Event, that is not accepted in relation to the CEO Aircraft, hence Question 3A. He went on to submit that, in any event, the Security Trustees were under no obligation to serve the Termination Notices under Clause 7.1 of the Security Assignments (Lessor).

110. Mr Shah submitted, in particular, first, that the power which was exercised by the Security Trustees was not a power granted by Clause 7.1 of the Security Assignments (Lessor) since it was open to the Security Trustees to serve the Termination Notices other than under Clause 7.1, and there was no requirement that it should be. Secondly, Mr Shah submitted that the power which the Security Trustees were exercising when serving the Termination Notices was not, as he put it, *"conditioned"* by Clause 7.1. Thirdly, he submitted that the relevant power was not exercisable only with the consent of the Lessors.

111. I agree with Mr Shah about this. I am clear that the Security Trustee was not confined to the ability to exercise its powers under Clause 7.1 of the Security Assignments (Lessor) when choosing to serve the Termination Notices, and so that it was open to the Security Trustees to do what they did and rely not on Clause 7.1 but on Clauses 18(a) of the Head Leases and Sub-Leases respectively in terminating the leasing of

the Aircraft pursuant to Clause 19.1 of each of those agreements. I say this for a number of reasons.

112. First, I agree with Mr Shah when he noted that it is necessary to distinguish between the powers assigned by the Security Assignments (Lessor), on the one hand, and the powers granted by the Security Assignments (Lessor), which were agreements between the Security Trustees and the Lessors in their own right, on the other.

113. The power exercised when the Termination Notices were served fell into the former category, being the power to terminate the leasing of the Aircraft that the Security Trustees held which was granted by Clause 19.1(b) of the Head Leases and Sub-Leases, namely:

"Termination of Lease Period

If an Event of Default occurs, then at any time thereafter so long as such Event of Default shall be continuing (but without prejudice to any other rights of the Sub-Lessor under this Agreement or the other Operative Documents or at law):

...

ii) *the Sub-Lessor may serve notice upon the Sub-Lessee (a 'Notice of Termination') terminating the leasing of the Aircraft hereunder and the date specified in such Notice of Termination (which date may be the date on which such Notice of Termination is issued or any later date) shall, in this Clause 19 (Remedies) be the 'Termination Date'."*

114. As Mr Shah pointed out, that power had been granted to the Security Trustees at the outset of the transactions. Thus, the definition of Assigned Property in the Security Assignments (Lessee) is *"all of the right, title and interest, present and future, of the Lessee"* in the Sub-Leases, together with (at (e)) *"all proceeds in respect of any of the foregoing, together with"* (at (ii)):

"all rights of the Lessee to require, enforce and compel performance of all of the provisions of any of the Agreements, and otherwise to exercise all claims, rights and remedies thereunder, including without limitation all rights to terminate the leasing of the Aircraft under or pursuant to the Sub-Lease, and all rights to give and receive notices, reports, requests and consents, to make demands, to exercise discretions, options and elections in accordance with the terms of the Agreements and to take all other action thereunder, pursuant thereto or in connection therewith".

115. The Assigned Property was assigned to the Lessors pursuant to Clause 3.1, as follows:

"The Lessee hereby, with full title guarantee, assigns and agrees to assign the Assigned Property, free from any Security Interest (other than Permitted Liens which is not a Sub-Lessor Security Interest (as defined in the Sub-Lease)), absolutely and unconditionally by way of security to and in favour of the Lessor, in order to secure the payment, performance and discharge in full of all the Secured Obligations."

116. Accordingly, Mr Shah must be right when he submitted that the rights of the Sub-Lessors to terminate the leasing of the Aircraft under the Sub-Leases was assigned to the Lessors.

117. He was also right to submit that the rights of the Sub-Lessors to terminate the leasing of the Aircraft under the Sub-Leases, being rights that had been assigned under the Security Assignments (Lessee), and the rights of the Lessors to terminate the leasing of the Aircraft under the Head Leases were assigned to the Security Trustees. That is because the definition of Assigned Property in the Security Assignments (Lessor) included *"all of the right, title and interest, present and future, of the Lessor"* in both the Head Leases and the Security Assignments (Lessee), and (at Clause 1.1(k)) *"all proceeds in respect of any of the foregoing, together with"*:

> *"(i) all claims, rights and remedies of the Lessor arising out of or in connection with a breach of or default under or in connection with any of the Agreements (including, without limitation, all damages and other compensation payable for or in respect thereof); and*
>
> *(ii) all rights of the Lessor to require, enforce and compel performance of all of the provisions of any of the Agreements, and otherwise to exercise all claims, rights and remedies thereunder, including without limitation all rights to terminate the leasing of the Aircraft under or pursuant to the Lease, and all rights to give and receive notices, reports, requests and consents, to make demands, to exercise discretions, options and elections in accordance with the terms of the Agreements and to take all other action thereunder, pursuant thereto or in connection therewith."*

Again, the Assigned Property was assigned to the Security Trustees pursuant to Clause 3.1.

118. It follows that, as Mr Shah submitted, the power which the Security Trustees sought to exercise when serving the Termination Notices was a power that had been assigned to the Security Trustees through the assignments which had taken place, rather than a power granted by the Security Assignments (Lessor).

119. That this is the position - that the assignment to the Security Trustees of the power to terminate the leasing of the Aircraft pursuant to the terms of the Head Leases and the Sub-Leases - is, as Mr Shah pointed out, supported by the provisions in the Security Assignments (Lessor) which deal with Co-Extensive Rights. Thus, Clause 1.1 defines Co-Extensive Rights as meaning *"all of the rights, title, benefits, claims and interest … of the Lessor in, to, under or in respect of"* certain clauses of the Head Leases and *"also the rights of the Lessor to the equivalent provisions in the Sub-Lease as assigned pursuant to the Security Assignment (Lessee)"*. Those clauses include Clauses 18 and 19 (but not, as made clear at (r), any right to repossess, require redelivery of and/or to sell the Aircraft), and so the power to terminate the leasing of the Aircraft pursuant to Clause 19.1(b) of the Lease Agreements.

120. It follows that that power was a Co-Extensive Right, which means, in turn, that it was a power (or a Co-Extensive Right) which was vested in both the Security Trustee and the Lessor. That is because Clause 3.5.1 is in these terms:

> *"Notwithstanding any other provision of this Assignment (other than paragraph (b) below and Clause 3.6 (Restrictions on dealing with the Excluded Property and Co-extensive Rights)), the Lessor shall be entitled to exercise, and to benefit from the Co-extensive Rights as separate, independent and co-extensive rights (but without*

prejudice to the rights of the Security Trustee by virtue of the assignment under Clause 3.1 (Assignment) to exercise, and to benefit from such Co-extensive Rights (it being agreed that the Lessor and the Security Trustee (or any Receiver) shall be entitled to exercise, and to the benefit from, such Co-extensive Rights independently of each other) … ."

121. Accordingly, the Security Trustees had the right to terminate the leasing of the Aircraft pursuant to Clause 19.1(b). Lord Wolfson, indeed, appeared to acknowledge that this is the case. His submission was, rather, that the fact that the Lessor was entitled to terminate the leasing (either before or after an Enforcement Event) says nothing about whether the Security Trustee could exercise that right at any time (as FWA would have it) or only after an Enforcement Event (as VietJet maintains). The difficulty with this, however, is that, if Lord Wolfson is right, then, the assignment of the power to terminate is necessarily to be regarded either as though it had not taken place or, possibly, as though it should be understood as somehow subject to the restriction contained within Clause 7.1 when that is not what either Clause 7.1 or Clause 3.5 itself even hints at being the position.

122. I agree, in short, with Mr Shah that, regardless of whatever additional rights might have been granted to the Security Trustees pursuant to the Security Assignments (Lessor) by virtue of Clause 7.1, it is clear that the rights to terminate the leasing under both the Head Leases and Sub-Leases, which existed prior to the execution of the Security Assignments (Lessor), were assigned to the Security Trustees pursuant to those Assignments.

123. Turning to the second of Mr Shah's propositions, I consider that there is nothing in Clause 7.1 which somehow conditions the power that was exercised by FWA (*qua* Security Trustee) when serving the Termination Notices.

124. Clause 7.1 begins with the following wording:

"Without prejudice to any of its other rights whether conferred under any of the Operative Documents or by law generally, … ."

I agree with Mr Shah when he submitted that, in the circumstances, if Clause 7.1 is to be taken as conferring upon the Security Trustees <u>all</u> their powers concerning the Assigned Property, then, this introductory wording would not be required; in fact, it would make no sense at all to have the wording since there would be no *"other rights"* which would need protecting – at least if VietJet is right that the power to serve the Termination Notices is a power contained within Clause 7.1.5 (a matter to which I will return).

125. Clause 7.1, then, goes on, after the reference to *"at any time upon or following the occurrence of an Enforcement Event provided the same is continuing"* to spell out that what follows at Clauses 7.1.1 to 7.1.6 is *"subject to Clauses 3.4 (Excluded Property), 3.5 (Co-extensive Rights) and 3.6 (Restrictions on dealing with the Excluded Property and Co-extensive Rights)"*. Again, however, this *"subject to"* wording makes no sense if the Security Trustees could only exercise the powers conferred by Clause 7.1 following an Enforcement Event. The more so, given that Clause 3.5.1, in conferring Co-Extensive Rights on the Lessor, begins by making it

clear that this was *"Notwithstanding any other provision of this Assignment (other than paragraph (b) below and Clause 3.6 ...)"*.

126. It is clear, therefore, that Clause 7.1 ought not to be treated as disabling the Security Trustee from exercising the power under Clause 19.1(b) of the Head Leases and the Sub-Leases or as somehow conditioning the exercise of that power by requiring that there be an Enforcement Event.

127. That this is the position is, furthermore, supported by a number of factors.

128. First, there is the fact that, although VietJet proceeds on the basis that Clause 7.1.5 contains the power to terminate the leasing of the Aircraft, the fact is that nowhere is this expressly stated. On the contrary, the language used (*"to execute and do all such acts, deeds and things ..."*) is very general and non-specific. In contrast, the provisions concerning Co-Extensive Rights specifically refer to the right to terminate. It is not obvious, in the circumstances, why the parties would choose to deal with this aspect with such particularity in one place but not also in the context of Clause 7.1 if VietJet's position were right.

129. This point goes further, however, because, secondly, it should be noted that, after referring to the execution and doing of *"all such acts, deeds and things"*, Clause 7.1.5 goes on to say *"in relation to the Assigned Property as the Security Trustee may consider necessary or proper for or in relation to any of the purposes aforesaid"*. Clause 7.1.5 is, therefore, and in this sense, ancillary to the rights granted under Clauses 7.1.1 to 7.1.4, none of which has anything to say concerning termination; these are provisions which, rather, are concerned with what might loosely be described as powers of disposal in relation to the Assigned Property which were, in substance, additional to the powers to exercise the Assigned Property.

130. Thirdly and picking up on the last point concerning the nature of the powers conferred by Clause 7.1, it is tolerably clear why, in the circumstances, Clause 7.1 requires there to be an Enforcement Event in order for those powers to be exercised. That is why, taking Clause 7.1.1 as an example, there is the power to deprive the Lessors of their title to the secured assets. By contrast, the rights assigned under the Head Leases and Sub-Leases assumes the title of the Lessors to those assets, which permits action to be taken against the Sub-Lessors/VietJet, were concerned with regulating the lessor/lessee relationship - including by terminating the Sub-Leases for non-payment of rental. That is why, I agree with Mr Shah, it makes sense for such powers to be exercisable in a broader range of circumstances than the powers of disposal granted by Clause 7.1. It would make no sense at all for such rights only to be exercisable where there is an Enforcement Event. However, on VietJet's case, the Security Trustee would not even, for example, be able to inspect the Aircraft engines pursuant to Clause 12.3(a) of the Head Leases and Sub-Leases in the absence of an Enforcement Event.

131. Indeed, as Mr Shah also submitted, in circumstances where an Event of Default under the Leases was sufficient for the Facility Agent to accelerate the Loans and, in turn, automatically terminate the leasing of the Aircraft, it would be somewhat odd if the Lenders could instruct only the Facility Agent, but not also the Security Trustee (in this case, FWA in both guises), to terminate the leasing of the Aircraft when there had (only) been an Event of Default under the Leases.

132. Lord Wolfson submitted that there is nothing remarkable about this, observing that, if anything, the fact that the Lenders had a separate mechanism available by which they could terminate the Sub-Leases tends to support, rather than undermine, VietJet's case that the Security Trustee route was only available following an Enforcement Event. He added also that there is a significant difference between, on the one hand, calling in the loan and thereby causing the termination of the leasing and, on the other hand, terminating the leasing without calling in the loan. There is no reason, in such circumstances, he suggested, why these different rights should necessarily be subject to the same conditions on their exercise.

133. It does not seem to me, however, that this really answers Mr Shah's point since what is here under consideration is why it should be the case that in one scenario, at least on VietJet's case, there has to be an Enforcement Event if there is to be termination but not in another scenario in circumstances where, as previously explained, the Security Trustee has had assigned to it the very rights which, on VietJet's case, can only be exercised if there is an Enforcement Event despite the fact that the assignment is not subject to that qualification other than, again at least on VietJet's case, as set out in Clause 7.1. As Mr Shah put it, the transactions contemplated that there could be a termination of the leasing absent an Enforcement Event. Indeed, pursuant to Clause 7.3(a) and (h)(i)(B)/7.3(a) and (j)(ii) of the NEO/CEO Loan Facility Agreements, the service of a Termination Notice would itself give rise to an Enforcement Event for the purposes of the Security Assignments (Lessor).

134. Furthermore, as has been seen, the Lessors' Co-Extensive Right to terminate the leasing of the Aircraft under the Head Leases and Sub-Leases was not subject to the requirement of an Enforcement Event, although it was restricted pursuant to the terms of Clauses 3.5 and 3.6: for example, under Clause 3.5.1(b)(i), if the exercise of a Co-Extensive Right *"would adversely affect the value of the Aircraft"*, only the Security Trustee could exercise that right. However, if the Security Trustee could not terminate the leasing of the Aircraft in the absence of an Enforcement Event in circumstances where the Lessor was disabled from exercising its equivalent right, that would create a lacuna in which the leasing of the Aircraft could not be terminated even though the requirements for the exercise of the power to terminate under Clause 19.1(b) of the Leases had been satisfied. As Mr Shah submitted, that lacuna can only be avoided by construing the documents so that the Security Trustees' power to terminate the leasing of the Aircraft under the Leases was not subject to the requirement for an Enforcement Event.

135. Fourthly and lastly in this context, I agree also with Mr Shah when he submitted that, even if the right to terminate the leasing under the Sub-Leases was granted by Clause 7.1 of the Security Assignments (Lessor), it is difficult to see how that right could be effective since, on that basis, it would be a right arising from an agreement between the Security Trustees and the Lessors, neither of which was a party to the Sub-Leases.

136. This brings me to Mr Shah's third core submission, which was that the power to terminate the leasing of the Aircraft was not only exercisable with the consent of the Lessors. VietJet's case is that, if the power that was exercised to terminate the leasing of the Aircraft was not granted by Clause 7.1 of the Security Assignments (Lessor), but was instead an assigned power (as FWA submits and as I have accepted), then, this does not assist FWA because the assignments should be treated as having been merely partial since the Security Assignments (Lessor) entailed only a partial

assignment of the Lessor's rights given that the Excluded Property remained vested in the Lessor. Consequently, Lord Wolfson submitted, the Security Trustee acquired only an equitable interest, not a legal interest, in the Assigned Property. Since an equitable assignee of a contractual right is not entitled to exercise the right against the debtor in its own name (only the assignor can do so), VietJet says that the Termination Notices required the consent of the Lessors.

137. Lord Wolfson cited in this respect ***General Nutrition Investment Co v Holland & Barrett*** [2017] EWHC 746 (Ch). In that case, a trademark licence agreement had been assigned by the original licensor to GNIC, but notice had not been given to the debtor, Holland & Barrett. The assignment therefore took effect in equity only. GNIC purported to terminate the licence agreement for breach. Warren J, following the decision of the Court of Appeal in ***Warner Bros Records Inc v Rollgreen Ltd*** [1976] QB 430, held that, because the assignment was equitable, GNIC had not been entitled to terminate it: see [34], [35], [55], [74], [75], [80] and [84]. The same reasoning, Lord Wolfson submitted, applies here: since the Security Trustee did not acquire the legal right to terminate the Sub-Leases under Clause 3.1 of the Security Assignments (Lessor), there were no circumstances in which it could validly terminate the Sub-Leases other than those expressly provided in Clause 7.1, with the consequence that the Termination Notices were ineffective to terminate the leasing of the Aircraft.

138. I do not agree for three reasons, the first of which is that I do not accept that Lord Wolfson was right when he submitted that in the present case there was merely a partial assignment by reason of the fact that Excluded Property was not also assigned. This is because it *is* possible to assign at law either an entire agreement or a particular present right of claim under that agreement (which includes rights that may mature in future under a presently existing contract), and I do not read ***General Nutrition*** as saying otherwise. ***General Nutrition*** was, in fact, a case, as Mr Shah pointed out, where, the relevant notice not having been served, the equitable assignee was, accordingly, not able to enforce. It is not authority for the proposition that, where notice has been given and so the counterparty is aware, it is able to exercise a contractual right to terminate.

139. That it is possible to assign a right under a contract was made clear in ***Raiffeisen Zentralbank Osterreich AG v Five Star Trading LLC*** [2001] EWCA Civ 68, [2001] 1 QB 825 where Mance LJ (as he then was), whilst deciding that there had not been an absolute assignment for the purposes of s. 136 of the Law of Property of Act 1925 on the facts of the case before him, nonetheless recognised at [75] that *"There may under s.136 be an absolute assignment of a claim or claims, but only of a present claim or claims."*

140. That such a right can be assigned is also supported by what is stated by *Smith & Leslie, The Law of Assignment* (3rd Ed.) at paragraph 5.11, as follows:

"Of course, what constitutes a 'benefit' and what constitutes a 'burden' depends on one's point of view: to the beneficiary of a promise, the promise is a benefit, and to the party obliged it is a burden. Two points follow from this:

(1) It is only the beneficiary of a right under a contract who can assign that right. The party obliged cannot - at least by way of assignment - cause his burden to be transferred.

(2) Since it is not the contract that is the chose, but the right under the contract, it follows that a contract may contain a number of different choses-as many as there are obligations. Each individual chose may be capable of assignment."

In this case, I agree with Mr Shah that the Assigned Property, insofar as it concerned the rights arising under the Head Leases and Sub-Leases, consisted of a package of specific present rights of claim under those agreements that, by definition, did not include the Excluded Property.

141. In any event, secondly, I also agree with Mr Shah that, even if the Security Trustee acquired the power to terminate the leasing under Clause 19.1(b) as an equitable assignee, it was entitled to exercise that power in its own right and the assignor does not need to be joined since, as Etherton LJ (as he then was) made clear in ***Kapoor v National Westminster Bank*** [2011] EWCA Civ 1083, [2012] 1 All ER 1201 [30] at [43], *"the equitable assignee of a debt, and not the equitable assignor, has the substantive legal right to sue for the assigned debt"* so as to mean that it is the equitable assignee who is *"entitled in its own right and name to bring proceedings for the debt"*. Although the assignee will usually be required to join the assignor to the proceedings to ensure that the debtor is not exposed to double recovery, that is *"a purely procedural requirement"*, not a substantive one, and it can be dispensed with by the Court.

142. Thirdly, the objection taken by VietJet is, in any event, in the present case particularly unmeritorious given that the Security Trustee clearly did have the consent of the assignors (i.e. the Lessors) and/or the Operative Documents expressly permitted the exercise of the power by the Security Trustees, which VietJet accepts is sufficient. The Lessors, after all, executed the Security Assignments (Lessor), and those agreements describe the particular power to terminate the leasing. Thus, as will be appreciated from what has previously been stated concerning the Co-Extensive Rights regime, the Lessors would have known that there was an express power to terminate in that context and, furthermore, that the Security Trustee was able to exercise that power. Clause 14.2, indeed, stated that the Security Trustee was *"entitled and authorised to exercise all such rights, powers, authorities and discretions in relation to the Assigned Property as if the Security Trustee were solely entitled thereto"*.

143. For these various reasons, there is no merit in VietJet's objection that consent was required for the Termination Notices to be served. It follows that the answer to Question 1 is 'yes'.

2. Were the Mandatory Prepayment Notices valid and effective to terminate the leasing?

144. In view of the answer to Question 1, it is strictly speaking unnecessary to consider Question 2. However, for completeness and in case it is later decided that the answer to Question 1 ought to have been 'no', I come on now to consider Question 2 – a question which is again common to both the NEO Aircraft and the CEO Aircraft, although the consequence of the question being answered 'yes' in the case of the CEO Aircraft differs from the position in relation to the NEO Aircraft.

145. FWA's alternative case is that, even if the leasing of the Aircraft did not terminate as a result of service of the Termination Notices, the leasing, nonetheless, terminated as a result of the Mandatory Prepayment Notices which were sent to the Borrowers by

the respective Facility Agents at around the same time as the Termination Notices were served.

146. The contractual provisions that are relevant to the validity and effectiveness of those Notices are Clause 7 of the Loan Facility Agreements and Clause 8 of the Sub-Leases. In particular:

(1) Where there has been an Event of Default (here, materially, non-payment of rent) under the Head Leases and/or Sub-Leases, the Facility Agents could declare to the Lessors that the Loans were due and payable: Clauses 7.3(g) and (h)(ii)/7.3(h) and (k) of the Loan Facility Agreements.

(2) Where a valid Termination Notice has been served by the Security Trustees, the Loans accelerated automatically: Clauses 7.3(a) and 7.3(h)(i)(B)/7.3(j)(ii) of the Loan Facility Agreements.

(3) In either event, the Sub-Leases would terminate: Clause 8.1(c)/8.1.3 of the Sub-Leases.

147. The Mandatory Prepayment Notices served by the Facility Agents relied upon both (1) and (2). Given what I have decided in relation to Question 1, Question 2 is only relevant, and anyway only significant, inasmuch as the Mandatory Prepayment Notices relied upon (1), not also (2).

148. In this context, VietJet's objection is that the Mandatory Prepayment Notices failed to comply with the formality requirements of Clause 7.5(a) of the Loan Facility Agreements, which provides that:

"Any notice of cancellation or prepayment notice given by any Party under this Clause 7 shall be irrevocable and, unless a contrary indication appears in this Agreement, shall specify the date or dates upon which the relevant cancellation or prepayment is to be made (which date shall not be earlier than five (5) Business Days after the date of the notice) and the amount of that cancellation or prepayment."

149. As Foxton J explained in ***Macquarie Bank Ltd v Phelan Energy Group Ltd*** [2022] EWHC 2616 (Comm), [2022] Bus LR 1263 at [19], determining whether a contractual notice is valid and effective involves *"a matter of construction of two documents"*:

"i) First, of the contractual provision providing for the notice to be served, in order to identify what Lord Goff referred to in ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*** *[1997] AC 749, 755 as 'the specification in the clause'. ...*

ii) Second, of the notice, to ascertain whether, properly construed in context, it meets the requirement of that specification (or, picking up the language of Lord Goff at p.755 of ***Mannai****), whether the key represented by the notice fits the lock constituted by the contractual provision requiring the service of a notice to achieve a particular legal effect. That involves the construction of the notice, by reference to the principles identified by Lord Steyn and endorsed by the majority in* ***Mannai****."*

150. Lord Wolfson's submission was that Clause 7.5(a) is clear and unambiguous and gives rise to no difficulties of interpretation. He highlighted, in particular, the words *"shall"* coming before the reference to the notice specifying *"the date or dates upon which the relevant cancellation or prepayment is to be made (which date shall not be earlier than five (5) Business Days after the date of the notice)"* and, then, again before *"the amount of that cancellation or prepayment"*.

151. He submitted that the Mandatory Prepayment Notices *"self-evidently"* failed to comply with these requirements, in that they failed to specify any date on which the prepayment was to be made and they failed to specify the amount of the prepayment. I agree with Lord Wolfson about this, notwithstanding Mr Shah's submissions to the contrary effect.

152. Specifically, Mr Shah drew attention to the fact that Clause 7.5(a) expressly provided that its requirements apply *"unless a contrary indication appears in this Agreement"*, before going on to submit that, since under Clause 7.3(h)(ii)/7.3(k) of the Loan Facility Agreements, in the case of a Mandatory Prepayment Notice reliant upon a Lease Default *"the Loan and accrued interest shall become due and payable ... on the date specified in such notice"*. In other words, he suggested, Clause 7.3(h)(ii)/7.3(k) represents a *"contrary indication"* to the five Business Days contemplated by Clause 7.5(a) as the date upon which prepayment was to be made, meaning that it was appropriate that Mandatory Prepayment Notices specified dates specified in the notices which did not necessarily need to be later than five Business Days after the date of the notices. In the case of the Mandatory Prepayment Notices, those dates, Mr Shah suggested, were the dates of those notices.

153. The difficulty with this, however, is twofold. First, Clauses 7.3(h)(ii)/7.3(k) and 7.5(a) are not contrary to one another; rather, they are complementary since the effect of the two clauses is that the Loan is repayable on the date specified in the notice, which must be not less than 5 Business Days later. That is the only sensible reading of the provisions, and it is a reading which entails no conflict at all.

154. In any event, secondly, Mr Shah's submission, even if it were right, goes nowhere given that the Mandatory Prepayment Notices did not specify any date for repayment, whether after 5 Business Days or not. Mr Shah submitted that the Mandatory Prepayment Notices should be construed as having required payment five Business Days after the date of the Notices in each case. The nomination of the date of the Notices, even if an error, was still sufficiently clear and unambiguous so as to leave a reasonable recipient in no reasonable doubt as to when the prepayment was being sought, which was at the earliest possible date. That construction, Mr Shah suggested, is supported by the fact that, if VietJet is correct that a date not earlier than five Business Days needed to have been specified, then, the date nominated was necessarily mistaken as it was impossible validly to nominate that date. Again, however, this is a submission which is met by the simple fact that the Mandatory Prepayment Notices did not specify a date.

155. As to the requirement for the amount of the prepayment to be stipulated, the Mandatory Prepayment Notices demanded payment of (in each case) *"the Loan, accrued Interest on the Loan, together with all sums owing by the Borrower to any Financing Party under any Operative Document"*; they did not specify a particular amount.

156. FWA's position, nonetheless, is that the formula used in the Mandatory Prepayment Notices was sufficient to mean that what was required to be paid could be ascertained, and that is what matters.

157. In support of that position, Mr Shah referred to ***Awal Bank v Al Sanea*** [2011] EWHC 1354 (Comm) at [13](ii) where Burton J considered a notice exercising a put option which was required to specify *"the amount payable at the Put Option Closing"*, deciding that it would not have been invalid for a failure to state a specific amount that would inform the recipient of *"what he would already know"*. Accordingly, Mr Shah submitted, since the Lessors (as Borrowers) were able to establish what they were required to pay, there is no difficulty with the formula adopted by the Notices. However, the present case differs from ***Awal Bank***, where it should be noted that it was impossible to specify a price. As Burton J put it, he *"would not find the Notice invalid by the inability to do the impossible"*. In the present case, it was not impossible to specify.

158. Furthermore, as Lord Wolfson observed, the calculations required, including interest calculations, are complex and capable of giving rise to disputes. That is, of course, why there is the requirement to state the amount: so as to reduce the scope for such disputes and, critically, to enable the Borrower to make the required payment by the specified date without difficulty. It was, accordingly, for the Lenders to calculate the relevant amounts before the Mandatory Prepayment Notices were served. To expect that the Borrower would have to undertake the calculations itself was simply not realistic. The more so, given the short period (whatever in this case that was) in which it had to pay.

159. I am clear, in the circumstances, that the Mandatory Prepayment Notices in this case were non-compliant. The next question is whether FWA is right when it contends that it was not a condition precedent to the validity of a notice served pursuant to Clause 7.3 of the Loan Agreements that it needed to comply with Clause 7.5(a).

160. In this respect, Mr Shah highlighted, first, how Clause 7.5(a) was neither stated to be a condition precedent, and nor did it state that non-compliance would invalidate any declaration made pursuant to Clause 7.3 of the Loan Facility Agreements. Clearly, this is not fatal; it is merely a factor to be taken into account.

161. Secondly, noting that the Loan Facility Agreements were complex and professionally drafted documents, Mr Shah submitted that, had the intention been that Clause 7.5(a) was to be a condition precedent, that would (and could) have been stated in terms. In this regard, Mr Shah observed how other clauses were expressed to be conditions precedent, pointing, by way of example, to Clause 4.1 which provided that the Borrower may not deliver a Utilisation Request *"unless the Facility Agent has received"* a certain notice. Again, this is merely a factor to be taken into account.

162. Thirdly, Mr Shah suggested that the fact that Clause 7.5(a) provided that a notice *"shall"* include various matters is not determinative as it does not say or imply anything about what the consequence was intended to be of failing to do so. In this context ***Scottish Power UK Plc v BP Exploration Operating Co Ltd*** [2015] EWHC 2658 (Comm), a case heavily relied upon by Mr Shah in a context addressed in a moment, is, however, instructive. In that case the issue was whether service of a *force*

majeure notice which did not comply with Art. 15.4 meant that *force majeure* could not be claimed under Art. 15.2.

163. Art. 15.2 was in these terms:

"The Parties shall, except where otherwise specified in this Agreement, be relieved from liability under this Agreement:

(1) In the case of the Seller, to the extent that owing to Force Majeure it has not delivered the quantities of Natural Gas which it should have delivered under this Agreement or has not performed any one or more of its obligations under this Agreement ... ."

164. As for Art. 15.4, that provided as follows:

"A Party, when claiming relief under Clause 15.2 shall:

(1) within ten (10) Days of the failure or inability to fulfil in [sic] obligation hereunder for which relief is sought, notify the other Party thereof and shall within five (5) Working Days of such notification provide an interim report which shall furnish such relevant information as is available appertaining to the event including the place thereof, the reasons for the failure and the reasons why obligations under this Agreement were affected, and give an estimate of the period of time required to remedy the failure;

(2) within twenty (20) Working Days of such notification, if requested, provide a detailed report which shall amplify the information contained in the interim report and contain such further explanation and information relevant to the event causing the failure as may be reasonable [sic] required;

(3) upon request, as soon as is reasonably practicable, give or procure access at the risk of the Party seeking access, for a reasonable number of representatives of the other Party to examine the scene of the vent causing the failure and/or the installation, machinery or equipment which has failed, provided that the reasonable costs of transportation to the scene shall be at the expense of the Party seeking access, if such event is agreed or adjudged to give rise to relief from liability under Clause 15.2, and shall otherwise be at the expense of the Party seeking relief;

(4) subject in the case where the Seller or the Buyer is seeking relief under Clause 15.2(1) or Clause 15.2(2) (as the case may be) to the provisions of Article 7, take as soon as reasonably practicable all reasonable steps to rectify the cause of the failure and to recommence performance of its obligations under this Agreement ...;

(5) keep the other Party informed, on an ongoing basis, of the actions being taken under Clause 15.4(4)."

165. Leggatt J (as he then was) said this at [207]:

"Counsel for Scottish Power submitted that, even though Article 15.4 does not say in terms that compliance with its requirements is a condition precedent to a successful

claim for relief, this is implied by the imperative force of the word 'shall'. The clause says that a party 'when claiming relief under Clause 15.2 shall' do the various things then set out (my emphasis). Mr McCaughran QC and Mr Emmett argued that the clear implication of the imperative is that, if a party does not comply, it cannot claim relief under Article 15.2. I do not accept that this is the implication of the word 'shall'. The use of that word signifies that the requirements of the clause are mandatory: they are contractual obligations. But the word 'shall' does not say or imply anything about what the consequence is intended to be of failing to perform those obligations. Certainly, if compliance with Article 15.4 was not obligatory – if, for example, the clause had used the word 'may' rather than 'shall' – it would be impossible to argue that compliance was a condition precedent to a claim for Force Majeure relief. But the inverse proposition does not follow. The fact that Article 15.4 imposes contractual obligations does not dictate or indicate what is to happen if there is a breach of any of the relevant obligations. It is simply the starting point for that discussion – a feature of the contract which must exist in order for the question to arise."

I agree with these observations, but again this is just one factor to be taken into account when considering the condition precedent issue.

166. Fourthly and specifically in relation to the timing aspect of Clause 7.5(a), Leggatt J went on to say this at [211]:

"Counsel for Scottish Power emphasised that Article 15.4(2) specifies a set number of days within which the detailed report must be provided rather than using a less precise phrase such as 'without delay'. There seems to me, however, to be considerable room for uncertainty about whether the clause has been complied with. For example, although the obligation to provide a detailed report arises only if such a report is requested, the clause does not specify when any such request must be made. It cannot sensibly be made until an interim report has been provided, which under Article 15.4(1) must be within five working days of notification of the failure or inability to fulfil an obligation for which Force Majeure relief is sought. But what if the request for a detailed report is not made for, say, another 12 working days? As the 20 day time period for providing a detailed report runs from the original notification and not from receipt of the request for the report, this could leave the party claiming relief a very short time in which to have to produce the detailed report. It might be argued that there is an implied requirement to make the request promptly upon receipt of the interim report; but the existence and scope of any such requirement and whether it has been satisfied in any given case are themselves areas of uncertainty. There is also potentially significant scope for argument about what degree of detail and amplification of the interim report is necessary in order to satisfy the clause. In addition, the detailed report must contain 'such further explanation and information relevant to the event causing the failure as may be reasonably required', and there is again potential uncertainty about whether an explanation or information provided satisfies what was required and/or whether what was required was reasonable. All these points seem to me to tell against the notion that a failure to comply with Article 15.4(2) is intended to disqualify a party from claiming Force Majeure relief."

167. Mr Shah submitted that, similarly, in the present case, since what was provided for was a very broad range of dates for when prepayment might be stipulated (i.e. any

date later than 5 Business Days after the date of the notice), the requirement ought not to be regarded as a condition precedent.

168. I do not agree. On the contrary, I consider that Lord Wolfson was right when he submitted that what Leggatt J was addressing was whether, if a defective notice has been served, it is nonetheless open to the seller in that case still to claim *force majeure*; in other words, whether a contractually compliant notice was required in order that *force majeure* can be claimed. In the present case, the situation is different since the relevant notices, the Mandatory Prepayment Notices, automatically altered or terminated the parties' contractual rights without any need for further action akin to the claim for *force majeure* that came to be made in ***Scottish Power***. This is why in the present case the Mandatory Prepayment Notices need, as Lord Wolfson put it, to be *"bang on"*. The fact that Clause 7.5(a) is not stated, in terms, to be a condition precedent is, in the circumstances, neither here nor there; it obviously is.

169. It follows that the answer to Question 2 is 'no' inasmuch as the Mandatory Prepayment Notices relied upon non-payment of rent under the Head Leases.

3. Was there a binding agreement with Natixis, such that VietJet was not in default when the Termination Notices were issued?

170. This concerns only the NEO Aircraft. VietJet's case is that by 6 October 2021 VietJet and Natixis were *ad idem* on the terms of the deferral of rent under the NEO Sub-Leases, as set out in Mr Ahn's 20 September 2021 email: an agreement reached between Mr Ta of VietJet and Mr Ahn of Natixis (representing the Lenders and Lessors) whereby VietJet would repay the unpaid rent by 30 June 2022, with interest paid quarterly at 1% above the contractual rate.

171. There is no suggestion, in particular, Lord Wolfson submitted, that those terms were withdrawn by Natixis at any point before VietJet indicated it agreed to them; and they were complete in the sense that the proposal identified what payments were to be deferred, for how long, and at what interest rate. It follows, Lord Wolfson suggested, that the purported termination of the NEO Sub-Leases was also invalid for the further reason that it was contrary to the agreement alleged.

172. As Lord Wolfson recognised, whether this is correct depends primarily on the proper construction of the emails containing the respective offer and acceptance, namely Mr Ahn's 20 September 2021 email and Mr Ta's email on 7 October 2021 purporting to accept what had been offered. The latter, Lord Wolfson added, was sent following a call on 6 October 2021, when Natixis is said to have made it clear that the terms they proposed on 20 September 2021 were still available for acceptance.

173. In Lord Wolfson's submission there is nothing in FWA's objection that the agreement (if there was one) was, in effect, 'subject to contract', so as to mean that it could not become binding until a formal document embodying it was drawn up.

174. In this respect, Lord Wolfson referred to ***In Von Hatzfeldt-Wildenburg v Alexander*** [1912] 1 Ch 284, in which Parker J (as he then was) stated at pages 288-289 as follows:

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Lord Wolfson submitted that the emails between the parties, properly interpreted in their context, do not support FWA's case that no agreement would be reached until some condition, such as the execution of a formal document, had been fulfilled.

175. There are, however, a number of difficulties with this submission and with VietJet's case in this respect.

176. First, in the email sent on 20 September 2021, Natixis indicated that the NEO Lenders and Lessors would not be able to accept a deferral of unpaid rental beyond 30 June 2022, and that it would be a condition of any deferral agreement that VietJet must pay default interest on the overdue rental at 1% above the contractual rate. The email went on to state, with underlining and in bold, that *"the lender group needs to begin processing this internal deferral waiver process as soon as possible (and have the approval obtained by the end of September – and it takes at least a week to be processed)"*.

177. Furthermore, the email explained, in terms, that there would be an Event of Default under the Loan Agreements *"if the waiver approval is not obtained"*. It follows that it was being made abundantly clear by Natixis that any acceptance of Natixis' proposal would not prevent an Event of Default since that could only be avoided if the proposal had passed the approval process.

178. That process was not, however, completed prior to VietJet's purported acceptance. The fact that, as Lord Wolfson noted, Mr Ahn's proposal on 20 September 2021 that there would need to be a *"waiver deferral process"* was one which was made on behalf of the whole *"lender/lessor group"* and Natixis was itself the majority lender does not mean that the *"waiver deferral process"* could be treated as though it had already been done or as though it was not required. If that were the case, then there would have been no need for Mr Ahn to refer to the process being required. Indeed, it would have made absolutely no sense for him to have made reference to it at all.

179. Secondly, not only did Mr Ta of VietJet respond to the proposal by seeking the deferral of unpaid rental until June 2025, something which was rejected by Natixis and which prompted VietJet, on 30 September 2021, to counter again by agreeing to a 30 June 2022 deferral and requesting *"the option for further extension of 12 months if the covid wave happen again at the time of repayment"*, but when Mr Ta ultimately came to send his email on 7 October 2021 purporting to accept Natixis's offer of 20 September 2021, he himself did so clearly contemplating that Natixis would need to revert after the internal deferral process had been undertaken since he said this:

"… We expect to receive your counter agreement soon so we can close the deal and move forward."

180. At the risk of restating what has just been said, Mr Ta (and so VietJet) obviously knew that, even if what was proposed in the 20 September 2021 email was still on offer, nonetheless, his email on 7 October 2021 cannot have concluded a binding agreement since he knew that Natixis' proposal made on 20 September 2021 was expressly stated to be subject to an *"internal deferral waiver process"* by the Lenders. That is why he referred to VietJet receiving a *"counter agreement … so we can close the deal"*.

181. The suggestion made in evidence by Mr Ta that he was merely being polite to somebody (Mr Ahn) whom he regarded as a friend, rather than acknowledging that a deal had not yet been reached, is not one which I accept. The more so, given that on 11 October 2021 Mr Ta chased for Natixis' *"counter agreement"* in order to *"document it for execution soon"* and, in a letter that he had approved and signed which responded to the Termination Notices, there was reference not to a concluded agreement having already been reached but, on the contrary, to *"ongoing commercial negotiations"*. Again, Mr Ta had no satisfactory answer to these points when he was asked about them in cross-examination.

182. It was, indeed, not until almost a year later, on 4 September 2022, that VietJet first suggested to Natixis that an agreement had been reached, something which Natixis denied on 15 September 2022 when stating that *"it is simply not the case that an agreement was reached"*. Had there, in fact, been a concluded agreement, VietJet would have been bound to raise it much earlier. The fact that VietJet did not do so confirms the fact that there was no such agreement.

183. Thirdly, as Mr Shah submitted, the parties cannot have been *ad idem* as to the terms of any deferral of rental given the very many other terms that they would have needed to be *ad idem* about in order to conclude any binding restructuring agreement. For example, as Mr Shah explained, the parties would have needed to have agreed corresponding amendments to both the Head Leases rental and the Loan Facility Agreements repayment obligations, as well as to the Termination Amounts. They did not address these matters, and VietJet does not suggest that they did. Nor, it should not be overlooked, did any of the other necessary parties give their consent to any restructuring agreement.

184. I should explain, lastly, that I do not base my conclusion in relation to this question on the fact that Clause 25.2 of the NEO Sub-Leases provides as follows:

"… The rights, powers and remedies of any party (whether arising under this Agreement, any other Operative Document or provided by law) shall not be capable of being waived or varied otherwise than by an express waiver or variation in writing signed by such party …".

185. Nor do I place any reliance on the fact that Clause 25.7 is in these terms:

"The provisions of this Agreement shall not be amended or modified otherwise than by an instrument in writing executed by the parties hereto. The Sub-Lessor agrees that it will not modify or amend any of the Operative Documents without the prior

written consent of the Sub-Lessee and the Financing Parties. The Sub-Lessee agrees that it will not modify or amend any of the Operative Documents without the prior written consent of the Sub-Lessor, the Lessor and the Financing Parties."

186. The reason that I do not do so is that it may be that Lord Wolfson was right when he submitted that these are provisions which only regulate the dealing between VietJet (as Sub-Lessee) and the Lessees (as Sub-Lessors), rather than also Natixis because Natixis is in very limited contractual privity with VietJet. I prefer not, however, to decide the point. I recognise, indeed, that the contrary argument also has force. This is that, strictly speaking, what is said by VietJet to have been agreed was an amendment to the Sub-Leases, and so the fact that, as a matter of substance, which is how Lord Wolfson put it, VietJet was dealing not with the Lessees (which were within VietJet's own control) but with Natixis, a commercial counterparty, is neither here nor there since the fact is that the Sub-Leases each contain Clause 25.2 and it is, to repeat, the Sub-Leases which are alleged to have been agreed to be amended.

187. That said and admittedly in only a general sense, albeit supported by the fact that the Sub-Leases each contain Clause 25.2, the fact that Mr Ta contemplated that there needed to be a concluded agreement (as he expressly did contemplate in his 7 October 2021 email) is consistent with that being what he expected there should be. That, however, is not a Clause 25.2-specific point, and I do not decide the point on that basis.

188. It follows that the answer to Question 3 is 'no'.

VietJet's options to purchase

189. It is convenient, before coming on to address the next set of questions, to record what appears to be common ground, as reflected by the fact that the flowchart does not identify it as an issue which is in dispute (in fact, under Question 3 on the assumption that the answer is 'no' there is reference at (ii) to the option to purchase having lapsed).

190. This concerns the lapse of VietJet's option to purchase in view of the conclusion which I have reached concerning Question 1.

191. Clauses 19.3 and 8 of the Sub-Leases each granted VietJet an option to purchase the Aircraft from the Sub-Lessors upon the service of the Termination Notices and the Mandatory Prepayment Notices, respectively, provided that the Sub-Lessors had received certain specified amounts. Those provisions were complemented by back-to-back provisions in the Head Leases, which permitted the purchase of the Aircraft by the Sub-Lessors from the Lessors (i.e. the parties with title to the Aircraft) in the same circumstances.

192. In the case of the Termination Notices, the option was expressly only exercisable within 30 days of the Termination Date, whereas in the case of the Mandatory Prepayment Notices it was not so limited expressly. Given that I have decided that the Termination Notices which were served were valid and effective and given the expiry of the 30-day period, it follows that the option under Clause 19.3 of the Sub-Leases is no longer exercisable.

193. In the circumstances, I say nothing concerning the purchase option arising pursuant to Clause 8.1 of the Sub-Leases. That is because this option only arises if the Sub-Leases were terminated pursuant to the Mandatory Prepayment Notices.

B. Did FWC acquire the Lenders' rights under the Loan Facility Agreements?

194. As previously mentioned, between 26 and 29 October 2021 FWC entered into the Loan Assignments with each of the Lenders; in essence, therefore, the outstanding Loans were sold to FWC.

195. What, then, happened is that on 3 November 2021, Natixis and BNP resigned as Security Trustee/Security Agent and FWC was (VietJet would say purportedly) appointed in their place. This was done pursuant to Resignation and Appointment Agreements.

196. A few days later, on 8/9 November 2021, FWC sold the rights under the Sub-Leases to FWA pursuant to the Claims Assignment Agreements. Those sales did not, however, include the Excluded Property, as defined in the Head Leases. However, on 11 January 2022, Basil and Cacao agreed to assign the Excluded Property in respect of the NEO Aircraft to FWA under a Participation and Sale Agreement.

197. Also in January 2022, FWC sold each of the Aircraft to four affiliated companies (the FW Trustees), as evidenced in each case by a Bill of Sale, the FW Trustees holding the Aircraft on trust for FWA, in accordance with a Declaration of Trust dated 23 August 2022.

198. VietJet's case is that the outstanding Loans were not validly assigned to FWC, with the consequence, furthermore, that its appointment as Security Trustee and its subsequent sale of the rights to FWA were similarly invalid since FWC was not in a position to sell any rights to FWA.

199. If VietJet is right about this, then, FWA's claim fails - except for its claim in respect of the Excluded Property, which is not a matter for this trial.

200. The CEO and the NEO Loan Facility Agreements each permitted assignment of the Loans under Clause 17.1, which provides as follows:

> *"Subject to this Clause 17, a Lender (the 'Existing Lender') may:*
>
> *(a) assign any of its rights; or*
>
> *(b) transfer by novation any of its rights and obligations,*
>
> *under the Operative Documents, to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets (the 'New Lender')."*

201. It is not in dispute that FWC was a permitted assignee within the meaning of Clause 17.1.

202. It is, however, in dispute whether, for the purposes of the NEO Loan Facility Agreements, FWC was a Qualifying Lender for the purposes of Clause 17.2(a) and, as such, an assignee to which rights could be assigned without the consent of the Borrowers, given that Clause 17.2(a) is in these terms:

"The consent of the Borrower is not required for any assignment or transfer by a Lender of its rights and/or obligations under the Operative Documents to which it is a party provided that:

(i) such assignment or transfer is to another Lender who is at the time of such assignment or transfer a Qualifying Lender; or

(ii) such assignment or transfer is to a Lender or a New Lender who, upon becoming a Lender, would be a Qualifying Lender; … ."

203. A Qualifying Lender is earlier defined, at Clause 9.1(a), as being:

"… a Lender which is beneficially entitled to interest payable to that Lender in respect of an advance under an Operative Document and is a Lender:

…

(iii) which (x) is a bank or financial institution organised under the laws of any jurisdiction other than Japan, (y) participates in the Facility through a Facility Office outside Japan and (z) benefits from a double tax treaty with Japan so that no withholding tax will be levied in relation to payments of interest (the 'Relevant DTT') being qualified as an entity that can receive such interest free of withholding tax under the Relevant DTT and the relevant regulations and not acting through its branch in Japan, … ."

204. There is no issue in the present case about the Lender being *"beneficially entitled to interest payable to that Lender in respect of an advance under an Operative Document"* (i.e. the Loan Facility Agreements). There is, however, an issue in respect of the NEO Aircraft concerning the definition of Qualifying Lender. This is the subject of Question 4.

205. That is not an issue which arises in respect of the CEO Aircraft because the definition of Qualifying Lender contained in Clause 9.1(a) of the CEO Loan Facility Agreements is different, requiring simply that there be a *"Lender"* which, as defined in Clause 1.1, means *"any bank, financial institution, trust, fund or other person which has become a 'New Lender' in accordance with Clause 17"*. It is common ground that FWC met that definition of Lender.

206. There is, however, an issue as regards the CEO Loan Facility Agreements which does not arise in the context of the NEO Loan Facility Agreements. This arises from the fact that, under Clause 17.2(a)(iii) of the CEO Loan Facility Agreements, the Borrower's consent is not required where there was an Enforcement Event (as defined under the CEO Loan Facility Agreements) which was continuing.

207. In contrast, the equivalent provision in the NEO Loan Facility Agreements permits assignment without the Borrower's consent following *"an Event of Default which is continuing and is not attributable to a Potential Lease Default, an Excepted Reason*

or a Financing Party Excepted Reason", and FWA accepts that that is not the position here. Therefore, an assignment without the Borrower's consent was only permissible in the case of the NEO Loan Facility Agreements if FWC was a Qualifying Lender at the time of transfer or would be a Qualifying Lender upon transfer.

208. This is why Question 3A only concerns the CEO Loan Facility Agreements and why also it is only if the Court were to conclude that there has not been an Enforcement Event under the CEO Loan Facility Agreements that it will become necessary to address Questions 5, 6, 7 and 8 in respect of the CEO Aircraft.

209. As for those other questions, Question 5 concerns whether FWC benefits from an exemption under the applicable tax treaties, such that no withholding tax will be levied in relation to payments of interest. In this case, the applicable provision is Art. 22(5) of the UK-Japan Double Convention 2066 ('DTT'), to which I will return.

210. In the case of the CEO Loan Facility Agreements, Clause 9.1(a)(iii) differs slightly in that it states as follows:

"has a special exemption status with regard to the application of withholding Tax by virtue of any treaty or other similar provision and complies with all relevant requirements with respect to such exemption, such that no withholding tax will be levied in relation to interest (or any other types of payment) that is or may be payable to such Lender … ."

The NEO equivalent, it will be recalled, refers instead to:

"benefits from a double tax treaty with Japan so that no withholding tax will be levied in relation to payments of interest (the 'Relevant DTT') … ."

211. There is, then, an issue concerning Art. 11 of the DTT, which is the subject of Question 6.

212. Lastly, Questions 7 and 8 ask, in the case of the NEO Aircraft (but not the CEO Aircraft), whether the Borrowers consented to the assignments and, if not, whether the assignments were effective nonetheless.

213. With this introduction, I now turn to consider the various questions.

3A. Was there an Enforcement Event under the CEO Loan Facility Agreements?

214. As previously explained, this concerns only the CEO Aircraft.

215. To repeat, under Clause 17.2(a)(iii) of the CEO Loan Facility Agreements, the Borrower's consent is not required where there was an Enforcement Event (as defined under the CEO Loan Facility Agreements) which was continuing.

216. An Enforcement Event is defined in Clause 1.1 as being:

"(a) the occurrence of an Event of Default which is continuing; and/or

(b) the Loan becoming, or being declared, due and payable in full in accordance with the terms of this Agreement and not being paid when due."

217. It is not in dispute that (a) is inapplicable. The issue is whether, as of the date of the assignments, the Loans had become due and payable, by virtue of the Termination Notices, or had been (validly) declared due and payable in the MPNs.

218. In view of my determination in relation to Question 1, it follows that there was, indeed, an Enforcement Event on the former but not the latter basis.

219. It further follows that the answer to Question 3A is 'yes' and so that, in the case of the CEO Aircraft, Questions 5 and 6 (and, indeed, Questions 7 and 8 which FWA does not suggest arise, in any event) do not fall to be addressed.

4. Was FWC a financial institution within the meaning of Clause 9.1(a) of the NEO Loan Facility Agreements, so as to be capable of being a Qualifying Lender?

220. As previously explained, this concerns only the NEO Aircraft.

221. As has been seen, the term Qualifying Lender is defined by Clause 9.1 of the Loan Facility Agreements, which sets out the provisions applicable to grossing up for tax deductions and tax indemnities given to the Borrower.

222. Thus and although this repeats to some extent what has gone before, Clause 9.1 of the NEO Loan Facility Agreements materially provides that a Qualifying Lender means *"a Lender which is beneficially entitled to interest payable to that Lender in respect of an advance under an Operative Document and is a Lender … (iii) which (x) is a bank or financial institution organised under the laws of any jurisdiction other than Japan, (y) participates in the Facility through a Facility Office outside Japan and (z) benefits from a double tax treaty with Japan so that no withholding tax will be levied in relation to payments of interest (the 'Relevant DTT') being qualified as an entity that can receive such interest free of withholding tax under the Relevant DTT and the relevant regulations and not acting through its branch in Japan, …"*.

223. FWA's case is that FWC was a *"financial institution"* within the meaning of Clause 9.1 because it meets the wide definition accorded to that term by the majority of the Court of Appeal in ***Essar Steel Ltd v The Argo Fund Ltd*** [2006] 2 Lloyd's Rep 136. In that case, which was concerned with a transfer, *"Transferee"* was defined as being *"a bank or other financial institution"*.

224. Auld LJ said this at [43]:

"In my judgment, the Judge correctly concluded that the term 'other financial institution' in the expression 'bank or other financial institution' need not be a bank or even akin to a bank. Clearly, the disjunctive form of the contractual expression, 'bank or other financial institution', allowed for a financial institution that was not a bank, certainly not in the narrow conventional sense of lending money and/or accepting deposits for investment. However, given the use of that expression in a loan agreement allowing the transfer of the rights and obligations of the contract loan to a financial institution other than a bank, the assignment of its rights to anyone, and the known existence of a secondary market in such loans, I can see no basis for the

Judge's starting point that one of the characteristics of such an institution was that it had to be a lender, whether in the primary market or otherwise. It is equally beside the point whether a potential transferee is technically a lender as an established trader in loans in the secondary market or, indeed that it would become a lender, if not otherwise qualifying as such, on becoming a transferee under the Agreement."

225. He went on, then, at [51] to say this, after considering the submissions which had been advanced:

"I, therefore, end up with a broader interpretation than did the Judge of the term 'other financial institution' in the expression, 'a bank or other financial institution', in the Agreement. In my view, the Judge, in identifying the nature of the restriction imposed by the Agreement on the meaning of a transferee for the purpose of considering whether a putative transferee was entitled to claim repayment of debts of Essar passed to it, adopted too restrictive a meaning. He should have held that it was satisfied by proof that the putative transferee met the broad fifth criterion he identified in paragraph 38 of his judgement, namely having 'a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation and whose business concerns commercial finance', and whether or not its business included the lending of money on the primary or secondary lending market."

226. If the only wording under consideration were that contained in Clause 9.1 of the NEO Loan Facility Agreements, my understanding is that VietJet would not seek to quibble with FWA's case that FWC comes within the scope of the *"financial institution"* language to be found there.

227. It was Lord Wolfson's submission, however, that it is necessary in this case to look at the terms of the NEO Loan Facility Agreements more generally, and not to import a definition laid down in the context of another contract in a previous case. That this is what is required, Lord Wolfson submitted, is consistent with the approach adopted in ***Grant v WDW 3 Investments*** [2017] EWHC 2807 (Ch), where a loan could be assigned only to *"banks or other financial institutions"*, and both parties accepted that Essar was relevant (as HHJ Pelling KC put it at [17]) *"only by way of analogy"*, the judge explaining at [18] that:

"Neither party was able to point to any provision within the contract itself that supported the construction for which they respectively contended. The phrase is not contractually defined and is ambiguous. There are no provisions within the Facility Agreement that either expressly or inferentially favour one construction over the other. It is difficult to discern any relevant commercial context that could be said to illuminate how the concept of a financial institution would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made."

228. Lord Wolfson submitted that the present case is different because the definition of *"Lender"* in Clause 1.1 refers to *"any bank, financial institution, trust, fund or other person which has become a 'New Lender' in accordance with Clause 17"*, and Clause 17.1 provides that an assignment pursuant to that clause can be *"to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"* (defined as the *"New Lender"*).

229. In Lord Wolfson's submission, this contains a clear indication of what is (or at least what is not) meant by or encompassed within the term *"financial institution"*, with a distinction being drawn (as designated by the use of the second *"to"*) between two categories of permitted assignee: *"another bank or financial institution"* and *"a trust, fund or other entity…"*. This, Lord Wolfson suggested, implies that, for the purposes of the NEO Loan Facility Agreements and irrespective of what was decided in ***Essar***, a *"trust, fund or other entity"* is not to be regarded as a financial institution.

230. That is why, Lord Wolfson went on to submit, that distinction is then reflected in Clause 9.1 - and, indeed, also Clause 21.23(b) which is the subject of Question 9. Thus, in defining a Qualifying Lender capable of taking an assignment without the Borrower's consent, Clause 9.1 describes the assignee as being *"a bank or financial institution"* without reference to a *"trust, fund or other entity"* of the kind mentioned in Clause 17.1; and, under Clause 21.23(b), a Security Trustee may be a *"trust corporation, bank or financial institution"* without any reference to a *"fund"* or any another type of entity.

231. In the circumstances, Lord Wolfson submitted, the parties should be taken to have intended that, of the various types of entity which could in principle take an assignment of the loans, only a more restricted category (or in fact two different restricted categories) would be able to take an assignment without the Borrower's consent (in the case of Clause 9.1) or become the Security Trustee (in the case of Clause 21.23(b)).

232. Furthermore, Lord Wolfson went on to submit, this has a clear commercial logic since, as far as the Qualifying Lender test is concerned, the Japanese investors who owned the Borrowers/Lessors had a legitimate interest in being able to decide whether or not they wished to deal with a fund such as FWC, as opposed to a traditional lending institution such as Natixis.

233. On VietJet's case, therefore, FWC was not a *"financial institution"* for the purposes of Clause 9.1 (and Clause 21.23(b)) of the NEO Loan Facility Agreements, and so not a Qualifying Lender.

234. Mr Shah disputed that this is the position. First, he submitted that parties do not make contracts in a legal vacuum, and so ***Essar*** is a case which they should be taken to have had in mind when entering into the NEO Loan Facility Agreements and, specifically, agreeing the language of Clauses 9.1 and 17.1 (and, indeed, the definition of *"Lender"* in Clause 1.1). Thus, as Clarke LJ (as he then was) put it in ***The 'Kleovoulos of Rhodes'*** [2003] EWCA Civ 12, [2003] 1 Lloyd's Rep 138 at [28]

> *"Where a contract has been professionally drawn, … the draftsman is certain to have in mind decisions of the Courts on earlier editions of the clause. Such decisions are part of the context or background circumstances against which the particular contract falls to be construed. If the draftsman chooses to adopt the same words as previously construed by the Courts, it seems to me to be likely that, other things being equal, he intends that the words should continue to have the same meaning"*.

Accordingly, Mr Shah submitted, when the NEO Loan Facility Agreements were being negotiated in 2018 and 2019, the parties should have had what the Court of

Appeal said some twelve years earlier concerning the meaning of the term *"financial institution"*.

235. Mr Shah was, no doubt, right about this, although only to a degree, since ultimately I agree with Lord Wolfson that what needs to be undertaken here is an analysis that focuses not merely on the wording of Clause 9.1 (*"bank or financial institution"*) but also on other provisions, where relevant, in the NEO Loan Facility Agreements – specifically, in the context of Question 4, Clause 17.1.

236. That said, it is notable that, as explained in the *Encyclopaedia of Banking Law* at paragraph 1902 (under the heading *"Transfers only to financial institutions"*), the wording used in Clause 17.1 represents something of a mirror of the Loan Market Association standard form wording for investment grade borrowing, which permits any assignment of a bank's rights or a transfer by novation of any of its rights and obligations to:

"another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets".

The authors, then, go on to refer to ***Essar***, saying that the lesson of this decision is that:

"the courts favour the marketability of assets and will therefore construe restrictions on transferability very narrowly. If the borrower wishes to limit assignees to commercial banks which are able to lend, it is considered that this would have to be specifically stated."

237. The wording of Clause 17.1 is, therefore, not unique to the NEO Loan Facility Agreements. It is, as such, all the more legitimate to take account of the fact that the people drafting those agreements must have had in mind not only the Loan Market Association wording but also ***Essar***. I repeat, nonetheless, that ultimately what matters in the present case is that Clause 9.1 contains wording which is different in the sense that it is not, at least on its face, as expansive as that contained in Clause 17.1 (and the Loan Market Association wording).

238. This brings me to Mr Shah's second submission, which was that VietJet's construction does not work as a matter of ordinary language. He submitted, in particular, that VietJet's argument is predicated on the assumption that the various entities listed in Clause 17.1 should be construed disjunctively, with each category being treated as mutually exclusive to the others. There is, however, he suggested, nothing in the language of Clause 17.1 which leads to that conclusion, rather that the intention, in referring to the three categories (*"banks"*, *"financial institutions"* and *"trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"*) should be viewed broadly and as, combined, embracing a wide grouping that did not preclude membership of more than one of the categories. It would, indeed, Mr Shah submitted, make no sense, for example, for a *"bank"* not also to be regarded as *"financial institution"*. If that is right, then, there is no reason why *"a trust, fund or other entity"* should not be treated as a *"financial institution"* for the purposes of Clause 17.1. It follows, Mr Shah suggested, that there is, therefore, no reason to

assume that *"financial institution"* in Clause 9.1(1)(iii) should be given the artificially restricted meaning contended for by VietJet.

239. Thirdly, although related to this last point, in Mr Shah's submission, VietJet's argument fails as a matter of commercial common sense since it entails any entity satisfying the definition of *"bank"* or *"financial institution"* not being a Qualifying Lender where it was also *"a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"* in circumstances where most, if not all, banks and financial institutions would also constitute entities *"regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"*. Mr Shah suggested in this respect that it is difficult to see what, if any, entity would be capable of satisfying the definition of *"bank"* or *"financial institution"* without simultaneously being excluded from the definition by virtue of the *"which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"* wording. If that is the position, then, Mr Shah submitted, Clause 9.1(a)(iii) would be deprived of any commercial effect.

240. For these reasons, Mr Shah submitted that the correct construction of Clause 9.1(a)(iii) is that an entity will constitute a *"financial institution"* where it satisfies the ordinary meaning of that term, irrespective of whether it might also constitute a trust, fund or other entity within the scope of Clause 17.1 since such a construction accords with the ordinary language of both Clause 17.1(a) and Clause 9.1(a)(iii), neither of which seeks to restrict the meaning of *"financial institution"* in any way, and is consistent with the legal definition of *"financial institution"*, as well as with business common sense.

241. Although Lord Wolfson characterised the points raised as entailing the putting up of straw men which are no part of VietJet's case, it seems to me that Mr Shah's second and third submissions are right. That is because they demonstrate why what was submitted by Lord Wolfson cannot be right, whether Lord Wolfson advances the points himself or not. There is, however, a further construction point which falls to be made. This is that, as Ms Cleary explained during somewhat *impromptu* submissions in the course of Mr Shah's reply submissions, the word *"to"* coming between *"institution"* and *"trust"* is necessary in order to ensure that the *"trust fund or other entity"* is not merely *any* trust fund or other entity but is one which falls within the broad ambit identified in ***Essar***, namely (as Auld LJ put it at [51]) *"a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation and whose business concerns commercial finance"*.

242. That is achieved by the *"which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"* wording, and it explains the *"to"* between *"institution"* and *"trust"* since, whereas the additional wording was needed to qualify what type of trust or other entity could be a *"New Lender"*, there was no need for that additional wording in the case of a *"bank or financial institution"* in view of what was decided in ***Essar***. Importantly, however, in including the *"to"* and the additional wording, there was no intention to treat banks and financial institutions, on the one hand, and *"trust fund or other entity"*, on the other, as creating, in effect and as Mr Shah put it, *"two separate pots"* which were mutually exclusive to each other. If this is right, then, there is no reason to

regard Clause 9.1's reference to only *"a bank or financial institution"* as not also covering *"a trust fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"* despite the fact that there was no reference to the latter.

243. I have concluded that, in effect, the reference was shorthand. It would obviously have been better if the reference had explicitly also referred to *"a trust fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets"*, but the fact that it did not does not seem to me to preclude the view that the reference should be taken as covering the categories identified in Clause 17.1.

244. FWA's position is supported by the fact that, earlier in Clause 9.1, before (iii) refers to *"a bank or financial institution"*, it is stated that a *"'Qualifying Lender' means a Lender …"*, and a *"Lender"* is described in Clause 1.1 as meaning *"any bank, financial institution, trust, fund or other person which has become a 'New Lender' in accordance with Clause 17 …"*. That definition of *"Lender"*, accordingly, specifically looks to Clause 17.1 and its definition of *"New Lender"*, which, but for the reference to *"another bank or institution"* being accompanied by the "*trust fund or other entity …"* wording, would have been entirely consistent with Clause 9.1, so as to mean that FWC clearly came within Clause 9.1. It is difficult to see why, in such circumstances, it should be the case (as VietJet would have it) that, because Clause 17.1 contains the additional wording that it does, FWC should be treated as no longer coming within Clause 9.1.

245. Lastly, given the approach to construction which I favour, as to Lord Wolfson's suggestion that there is a clear commercial logic to VietJet's position, the difficulty with this is that, since it is common ground that, but for the fact that Clause 17.1 contained the additional wording which it did, FWC would have come within the ambit of the *"financial institution"* wording, this objection falls away because the additional wording embracing *"a trust fund or other entity"* is wording that achieves for the Japanese investors who owned the Borrowers/Lessors the same protection as they would have had had the assignment been not to FWC but to another (in Lord Wolfson's language) traditional lending institution such as Natixis.

246. The question in each case, as described in ***Essar***, is whether the assignee is *"a legally recognised form or being, which carries on its business in accordance with the laws of its place of creation and whose business concerns commercial finance"*. Given that FWC would have met this description had Clause 17.1 only referred to a *"bank or financial institution"* and given that the additional wording is essentially to the same effect, it follows that Lord Wolfson's commercial logic objection is unsustainable.

247. In the circumstances, the answer to Question 4 is 'yes'.

5. Was FWC carrying on a business other than the business of making or managing investments on its own account, within Art 22(5) of the DTT?

248. Although this concerns both the NEO and the CEO Aircraft, in the light of how Question 3A has been answered, Question 5 does not arise as regards the CEO Aircraft – although, were it do so, the answer would be the same both as regards the NEO and the CEO Aircraft.

249. VietJet's case is that FWC was also not a Qualifying Lender under any of the Loan Agreements for the further reason that it did not *"benefit from"* the DTT (for the purposes of the NEO Loan Facility Agreements) or have a *"special exemption status"* thereunder (for the purposes of the CEO Loan Facility Agreements).

250. Art. 11(1) of the DTT provides that:

> *"Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other Contracting State."*

251. Art. 22(1), then, provides that only a *"qualified person"*, as defined in Art. 22(2), is entitled to the benefits afforded by Art. 11(1).

252. It is common ground that FWC is not a qualified person. FWC, therefore, needs to fall back on Art. 22(5), which provides that a person shall be entitled to an exemption under the DTT:

> *"if the resident is carrying on business in the first-mentioned Contracting State (other than the business of making or managing investments for the resident's own account, unless the business is banking, insurance or securities business carried on by a bank, insurance company or securities dealer), the income, profits or gains derived from the other Contracting State is derived in connection with, or is incidental to, that business and that resident satisfies any other specified conditions in those paragraphs or Articles for the obtaining of such benefits."*

253. Accordingly, in order to satisfy the Art. 22(5) Requirement FWA must show that: FWC was carrying on business in the UK; that the business carried on by FWC was not making or managing investments on its own account; and that the exclusion does not apply where the business is that of a bank, insurance company or securities dealer. There is no issue as to the first of these requirements, whilst the third is not applicable in this case. The issue, therefore, is as to the middle aspect: whether FWC was carrying on a business of making or managing investments on its own account.

254. This is a question of either Japanese law or of English law: see the DTT at Art. 3(2). However, neither party adduced evidence of Japanese law, and so the Court proceeds on the basis that that law is the same as English law for relevant purposes. There is, in any event, as Mr Shah noted, likely to be something of an overlap between the concepts engaged by Art. 22(5) and those which apply under UK domestic tax law given that the DTT is a bilateral treaty which was to apply in the UK as well as in Japan.

255. Ultimately it might not matter because the issue that needs to be determined is a matter for the Court. However, I agree with Lord Wolfson when he observed that it does not appear that FitzWalter gave any real consideration to whether or not it could satisfy the DTT requirements before making its investment. Mr Adam Weinstock, a one-time partner in FWC, stated in his witness statement that FitzWalter had carried out its *"own assessments"* of whether FWC met the Qualifying Lender criteria. However, in his oral evidence he claimed that these *"assessments"* were not committed to writing and consisted of just *"one or two"* conversations between himself and his superiors, Mr Gray and Mr Brazil. It does not seem to be the case, nonetheless, that this entailed giving thought to whether the business carried on by

FWC was not making or managing investments on its own account since Mr Weinstock merely observed in cross-examination as follows:

"I don't think it was complicated. I think we were [a] financial institution and that was the end of the question. Did we need to be a Japanese fronting bank? No. And that was the end of it."

Indeed, in his witness statement, when listing what he understood to be the relevant requirements of the DTT and the reasons why he believed, at the date of his statement, that FWC satisfied the requirements, Mr Weinstock made no mention of Art. 22(5).

256. As to the meaning of *"making or managing investments on its own account"*, the notes to the application form relief under the DTT published by the Japanese tax authority, at Note 15, state that:

"*Making or managing investments for the resident's own account … refers to a business which has the nature of investment such as a business merely acquiring and managing shares in order to obtain dividends or other benefits in the resident's own account*."

As Mr Shah observed, that guidance is consistent with the distinction in English law between income derived from *"an adventure or concern in the nature of a trade"* and *"investment business"*, namely the holding or managing investments: see *Bramwell, Taxation of Companies and Company Reconstructions* at paragraph A.8.1.3.

257. This distinction is borne out by relevant OECD Guidance, which it is appropriate to take into account when interpreting a treaty: see ***HMRC v Burlington Loan Management DAC*** [2024] UKUT 00152 (TCC) at [44]. That guidance has the following to say:

"The business of making or managing investments for the resident's own account will be considered to be a business only when the relevant activities are part of banking, insurance or securities activities conducted by a bank or financial institution that the Contracting States would consider to be similar to a bank (such as a credit union or building society), an insurance enterprise or a registered securities earlier respectively. Such activities conducted by a person other than a bank (or financial institution agreed to by the Contracting States), insurance enterprise or registered securities dealer will not be considered to be the active conduct of a business … ."

258. As Mr Shah explained, there are no decided authorities on the DTT by the English courts. However, with Art. 3(2) in mind and considering the meaning given to the relevant concepts under English tax law, the relevant distinction is between income derived from *"any venture in the nature of a trade"* and investment income.

259. In ***Degorce v Revenue and Customs Commissioners*** [2017] EWCA Civ 1427; [2018] 4 WLR 79, Henderson LJ noted at [45] that *"No definition of 'trade' has ever been provided in UK tax legislation"*, but what constitutes a trade within the meaning of income tax legislation and principles were addressed in ***Eclipse Film Partners (No 35) LLP v Revenue and Customs Comrs*** [2015] EWCA Civ 95, [2015] STC 1429

and in ***Samarkand Film Partnership No 3 v Revenue and Customs Comrs*** [2017] EWCA Civ 77, [2017] STC 926.

260. Thus, in ***Eclipse***, Sir Terence Etherton C (as he then was) explained at [112] that:

> *"As an ordinary word in the English language 'trade' has or has had a variety of meanings or shades of meaning. Its meaning in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal."*

261. In ***Samarkand*** at [59], Henderson LJ stated as follows:

> *"… At the most basic level, it is now clear from* ***Eclipse****, if it was not clear before, that the question whether what the taxpayer actually did constitutes a trade has to be answered by standing back and looking at the whole picture: see [111]. Although it is a matter of law whether a particular activity is capable of constituting a trade, whether or not it does so in any given case 'depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles': see [112]. It follows that it can never be appropriate to extract certain elements from the overall picture and treat them, viewed in isolation, as determinative of the issue. … The exercise which the FTT has to undertake is one of multi-factorial evaluation … ."*

262. I bear these principles in mind when considering the present issue.

263. Lord Wolfson submitted that it is plain that FitzWalter did not come within Art. 22(5). He observed, first, that it is (as he put it) *"at least very debatable"* whether or not FWC, as a newly incorporated company which had not previously entered into any transactions at all, can be said to have bought the VietJet loans in the course of a *"business"* within the meaning of Art. 22(5). Recognising, however, at least implicitly (and, in my view, rightly) that this might not represent a complete answer, Lord Wolfson went on to submit that, even assuming in FWA's favour that it was carrying on a business in the relevant sense, that business plainly consisted of *"making or managing investments for [its] own account"*, in circumstances where FWC made the investment on its own initiative, with its own funds, and the debt arising from the investment was shown as an asset on FWC's balance sheet. Indeed, Lord Wolfson commented, FWA's own pleaded case makes no suggestion that FWC purchased the loans on behalf of anyone other than itself. Nor, he added, did Mr Weinstock really dispute this, merely expressing uncertainty as to the meaning of *"on its own account"* in circumstances where FWC bought and held the JOLCO assets as a subsidiary of a fund. However, Lord Wolfson suggested, the fact that FWC was a subsidiary of a fund does not mean that it did not make the investments on its own account. Moreover, he went on to submit, even if FWC could be regarded as having made the investment on behalf of the fund, as opposed to on its own account, that

would not avail FWA because it would then not be *"beneficially entitled"* to the interest deriving from the loans in the first place, so as to qualify for benefits under Art. 11(1).

264. I do not accept these submissions. On the contrary, I agree with Mr Shah that the relevant exemption reflects that the entities in question (bank, insurance company, or securities dealer) will, in certain circumstances, make or manage investments on their own account. For example, an insurance company will be engaged in a trade (the provision of insurance) but may also hold investments as collateral in order to support its potential exposure under its insurance trade. Likewise, a bank may provide banking services such as mortgage loans and bank accounts (trade) but also hold (for example) investment securities as lending collateral or part of its hedging strategy. It does not undermine the distinction that applies as a matter of generality under UK tax legislation and the specific reference to these types of entity in Art. 22(5) should not be taken as doing anything other than putting the position beyond doubt where the complex nature of such a business may cause doubt to exist.

265. I am clear that the business of FWC should be regarded as being in the nature of a trade, and so that that business should not be regarded as a business of making or managing investments for its own account. As Mr Weinstock explained (and on which he was not challenged), FWA did not buy loans in order to obtain a return on the loans themselves but rather to gain an *"upside"* from taking ownership of the underlying collateral. Furthermore, he went on to confirm that FWC generally tries actively to realise its position in the financial assets that it acquires and does not look to hold them to term. That, indeed, is consistent with what happened in the present case: enforcing the security and disposing of the value within the Loans through the sale of the claims under the leasing arrangements and the separate sales of the Aircraft. That, I agree with Mr Shah, constitutes trading activity.

266. It follows that the answer to Question 5 is 'yes'.

6. Was it the main purpose, or one of them, of any person concerned with the creation or assignment of the Loans to take advantage of Art. 11 of the DTT?

267. Although this concerns both the NEO and the CEO Aircraft, in the light of how Question 3A has been answered, Question 5 does not arise in relation to the latter – although, were it to do so, the answer would be the same both as regards the NEO and the CEO Aircraft.

268. Art. 11(7) of the DTT states that:

> *"No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the creation or assignment of the debt-claim in respect of which the interest is paid to take advantage of this Article by means of that creation or assignment."*

269. VietJet's case is that FWC having been incorporated in the UK on 24 September 2021 specifically for the purposes of the VietJet transaction, Art. 11(7) should be regarded as applicable, so as to mean that Art. 11(1) is inapplicable – and so that the *"Qualifying Lender"* definition is not met.

270. It would appear to be appropriate, when ascertaining purpose, to adopt the approach described by Falk LJ, albeit in a domestic tax statute context, in ***Blackrock Holdco 5, LLC v HMRC*** [2024] EWHC Civ 330 at [124], as follows:

> *"a) Save in 'obvious' cases, ascertaining the object or purpose of something involves an inquiry into the subjective intentions of the relevant actor.*
>
> *b) Object or purpose must be distinguished from effect. Effects or consequences, even if inevitable, are not necessarily the same as objects or purposes.*
>
> *c) Subjective intentions are not limited to conscious motives.*
>
> *d) Further, motives are not necessarily the same as objects or purposes.*
>
> *e) 'Some' results or consequences are 'so inevitably and inextricably involved' in an activity that, unless they are merely incidental, they must be a purpose for it.*
>
> *f) It is for the fact finding tribunal to determine the object or purpose sought to be achieved, and that question is not answered simply by asking the decision maker."*

271. As for the words *"take advantage"*, these are to be read neutrally and are not limited to transactions that involve artificial steps or arrangements. Thus, in ***HMRC v Burlington Loan Management DAC*** [2024] UKUT 00152 at [59]-[60], where similarly worded language was under consideration, this was stated at [67]:

> *"We accept that a tribunal of fact considering Article 12(5) may well consider it relevant to determine the extent of a person's knowledge of the treaty, including whether a party has taken steps to disguise their knowledge or avoid obtaining specific knowledge of its provisions. But those matters would simply form part of the factual enquiry to determine whether a person concerned in the creation or assignment of a debt claim has a main purpose of improperly taking advantage of the Article 12(1) of the UK-Ireland treaty. We respectfully consider that the FTT went too far in saying, at [150], that a necessary condition for Article 12(5) to apply was that SICL knew that the purchaser of the SAAD Claim would be relying on Article 12(1) specifically. We consider that to be an unjustified gloss on the actual words chosen by the contracting States in concluding the treaty."*

272. Furthermore, the OECD Guidance makes it clear that it should not be lightly assumed that obtaining a benefit under a tax treaty was one of the principal purposes of an arrangement or transaction and merely reviewing the effects of an arrangement will not usually enable a conclusion to be drawn about its purposes. That said:

> *"Where, however, an arrangement can only be reasonably explained by a benefit that arises under a treaty, it may be concluded that one of the principal purposes of that arrangement was to obtain the benefit."*

273. Lord Wolfson observed that FWA has not provided the Court with the evidence it would need to reach a definite finding as to the reasons why FWC was incorporated in the UK. He drew attention also to the fact that in his witness statement Mr Weinstock stated that he did *"not recall any discussion that suggested that FWC was motivated in any sense by the availability of the exemption of withholding tax that would be*

available to it under the double taxation treaty", only for it to emerge in his cross-examination that he was not the right person to be giving evidence on this subject since he had no knowledge as to why FWC had been chosen to enter into the assignments.

274. He complained in this respect that the people who were involved in that decision, including Mr Weinstock's colleague, Andrew Gray, had not been called to give evidence. In such circumstances, Lord Wolfson submitted, the Court should draw an adverse inference against FWA for failing to adduce such evidence, highlighting what Lord Leggatt had to say in ***Efobi v Royal Mail Group Ltd*** [2021] 1 WLR 3863 at [41], as follows:

"Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole."

275. In this case, Lord Wolfson observed, Mr Gray and the other relevant individuals all work at FitzWalter's offices in Mayfair and there is no reason why they could not have been called. He suggested that, in the circumstances, there being no apparent reason why they could not give evidence, it should be inferred that, had they given evidence, they would have supported VietJet's case that FWC was incorporated in the UK and made a party to the assignments at least largely so that it would qualify for benefits under Art. 11(1) of the DTT.

276. Lord Wolfson went on to submit that it is, in any event, *"overwhelmingly likely"* that the main purpose, or at least one of the main purposes, of incorporating FWC and having it (as opposed to another FitzWalter entity) acquire the loans was to benefit from the DTT. FitzWalter knew that it was necessary to qualify for benefits under the DTT in order to be a Qualifying Lender. Mr Weinstock agreed, Lord Wolfson noted, that FitzWalter could have *"set up a company in more or less any jurisdiction that it want[ed] to if that [was] the most advantageous way of structuring a transaction"*, and that it would be *"almost unthinkable"* to plan a major transaction without taking into account the tax consequences. Indeed, in the context of the JOLCO transaction, FitzWalter set up companies in Jersey to own the aircraft, presumably for tax reasons given that Jersey has no corporation tax. Lord Wolfson suggested that, compared to the likes of Jersey, there was no obvious reason to choose the UK as the place of FWC's incorporation, and Mr Weinstock could not think of any. The only sensible inference, therefore, he submitted, is that FWC was chosen because it needed to be a Qualifying Lender, and it could only be a Qualifying Lender if it stood to benefit from the DTT, which a company incorporated in somewhere such as Jersey would not be able to do.

277. I do not agree with Lord Wolfson on this issue. Art. 11 is concerned with tax relief in respect of *"interest arising in a Contracting State"*, which in the present case is Japan, yet by the time that FWC entered into the Loan Assignments, the leasing had been terminated and the Loans accelerated. There was, in those circumstances, no

prospect of interest arising under the Loan Facility Agreements so as to engage Art. 11.

278. Furthermore, the mere fact that, as Lord Wolfson submitted and as was put to Mr Weinstock, FitzWalter sought to structure its affairs in a tax efficient manner does not, in my view, bring Art. 11(7) into play whose focus is *"the main purpose or one of the main purposes"* (my emphasis) of the party concerned with the creation or assignment of the debt-claim in respect of which the interest is paid. That, in my view, has not been established, and nor do I consider that it can safely be concluded that Mr Gray or any other uncalled witness would have given evidence which would have enabled it to be established.

279. It follows that Question 6 is answered 'no'.

7. Did the Borrowers consent to the Loan Assignments by continuing to deal with FWC as both Lender and as Security Trustee in entering into the Sale and Participation Agreement and Strict Foreclosure Agreements?

280. This concerns only the NEO Aircraft – at least as Mr Shah framed the flowchart in his revised version.

281. As has been seen, if FWC was not a Qualifying Lender, then, under Clause 17.2(a) of the NEO Loan Facility Agreements, it was necessary to obtain the consent of the Borrowers to the assignments.

282. Given the answers to Questions 4, 5 and 6, Question 7 does not arise. However, I propose to deal with it, in any event.

283. FWA's case is that consent was provided by the NEO Borrowers in continuing to deal with FWC as sole Lender and as Security Trustee, including in entering into the Sale and Participation Agreement and the Strict Foreclosure Agreements respectively.

284. Mr Shah submitted that consent (including to a transfer of rights under an agreement) can be provided expressly or can be inferred from conduct, the question being one of fact: see ***Musst Holdings Ltd v Astra Asset Management UK Ltd*** [2023] EWCA Civ 128 at [55]-[56] per Falk LJ.

285. Mr Shah added that a breach of a provision requiring prior consent to a transfer is capable of waiver by the other contracting party, in the form of retrospective consent: see, again, ***Musst*** at [86].

286. Furthermore, Mr Shah noted, in contrast with other provisions of the Loan Facility Agreements, Clause 17.2(a) did not require the prior consent of the Borrowers, nor did it require that consent be provided in writing.

287. Mr Shah's submission, in the circumstances, was that, since the Borrowers entered into the Sale and Participation and the Strict Foreclosure Agreements on the basis not only that FWC had been validly appointed as sole Lender and also on the basis that FWC had been appointed as Security Trustee and was entitled to exercise the enforcement rights raising under the relevant security documents in that capacity, so the Borrowers' conduct ought to be regarded as consistent with, and only explicable

by, the Borrowers having consented to the assignment of the Loans or having waived the requirement for its consent.

288. This is not a submission that I can accept. As Lord Wolfson observed, it runs entirely counter to the case that FWA has sought to advance. That case has entailed FWA saying that FWC was a Qualified Lender. It runs counter to the evidence of Mr Weinstock, which was to the same effect. It was plainly never thought that the way forward was to obtain the Borrowers' consent. Accordingly, to say now that the Borrowers gave their consent is simply not tenable. Lord Wolfson might even have been right when he characterised FWA as in this respect engaging in so complete a U-turn that *"you can see the forensic tyre marks on the road"*.

289. More substantively, the waiver basis put forward by Mr Shah cannot succeed in circumstances where there is no evidence at all that the Borrowers knew that FWC was not a Qualifying Lender: for a party to waive, it must know what it is waiving. Furthermore, there is, in any event, a no-waiver provision in the NEO Loan Facility Agreements, namely Clause 30, as follows:

"No failure to exercise, nor any delay in exercising, on the part of any Party, any right or remedy under the Operative Documents shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Agreement are cumulative and not exclusive of any rights or remedies provided by law."

This makes the waiver case impossible.

290. As for the implied consent submission advanced by Mr Shah, the case relied upon, ***Musst***, is actually a novation case rather than a case dealing with assignment, and Falk LJ went on to say this at [57]:

"However, a novation will only be inferred from conduct if that inference is required to give business efficacy to what happened. As Lightman J explained in ***Evans v SMG Television Ltd*** *[2003] EWHC 1423 (Ch) at [181]:*

'The proper approach to deciding whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened (compare ***Miles v Clarke*** *[1953] 1 WLR 537 at 540). The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct.'"*

291. There is nothing in the present case from which it can be inferred that the Borrowers gave the consent that is now suggested, and certainly nothing which makes it necessary to infer that they consented. Their entry into the agreements identified does not necessarily show that they thereby intended retrospectively to consent to what had hitherto been non-permitted assignments. On the contrary, the fact that there had been assignments without their consent would indicate to the Borrowers that consent was not needed. Put differently, it is difficult to see why the Borrowers would assume that FitzWalter had gone ahead and assigned without consent when consent was needed. The assumption would, instead, be that consent was not required because FWC was a Qualified Lender. Indeed, FitzWalter had told the Borrowers, in terms, that FWC was

a Qualified Lender – as required by Clause 17.5(e) of the Loan Facility Agreements, which provides as follows:

"The Facility Agent shall, as soon as reasonably practicable after it has executed an Assignment Agreement, send to the Borrower a copy of that Assignment Agreement."

292. The answer to Question 7 is, accordingly, 'no'.

8. Were the assignments of the Loans effective even if Borrower consent was not obtained?

293. As with Question 7, this concerns only the NEO Aircraft. However, the answer as regards the CEO Aircraft, were the issue to arise, would be the same as is the case concerning the NEO Aircraft. It raises an issue which it is sensible to address given that I have dealt with Question 7, even though, in the light of the answer to Question 7 (and, indeed, Questions 4, 5 and 6), it will be appreciated that Question 8 does not, strictly speaking, arise.

294. Lord Wolfson's submission was straightforward. It was that Clause 17.2(a) of the NEO and CEO Loan Facility Agreements identify the circumstances in which the consent of the Borrower for an assignment by a Lender is not required. The obvious corollary of this, he submitted, is that, in any other situation, an assignment without the Borrower's consent is not permitted (as is plainly the case under Clause 17.2(a)), and so that it is not open to FWA to bring claims against VietJet which, on this basis, FWC (and, in turn, FWA) never acquired.

295. Mr Shah did not accept this, submitting that Clause 17.2(a) does not provide that non-compliance with its terms renders any assignment ineffective.

296. In this respect, Mr Shah highlighted how Clause 17.2(c) provides as follows:

"An assignment will only be effective on:

(i) receipt by the Facility Agent and the Borrower of a duly executed Assignment Agreement in substantially the same form as Schedule 4, Part B of this Agreement which includes written confirmation from the New Lender that the New Lender will assume the same obligations to the other Financing Parties and the Borrower as it would have been under if it was an Original Lender;

(ii) performance by the Facility Agent of all necessary "Know Your Customer" or other similar checks under all applicable laws and regulations in relation to such assignment to a New Lender; and

(iii) *without prejudice to the other provisions of this Agreement, it shall be a condition of any assignment and/or transfer referred to in this Clause 17 that the relevant assignor or Existing Lender or assignee or New Lender shall have provided to the Borrower at no cost to the Borrower all information which the Borrower may reasonably request relating to the relevant assignee or transferee as may be necessary to enable the Borrower to make any filings, reports or notifications required to be made by applicable law with Japanese governmental and taxation authorities."*

Mr Shah noted that this provision applies to assignments and provides that an assignment *"will only be effective on"* compliance with its requirements, and that those requirements do not include compliance with Clause 17.2(a) or require Borrower consent.

297. By contrast, Mr Shah noted, Clause 17.2(d) (which applies to transfers) provides that a transfer *"will only be effective if the procedure in this Clause 17.2 and Clause 17.4 …are complied with"*, meaning that in the case of a transfer (but not an assignment) Clause 17.2(d) expressly required compliance with Clause 17.2 in its entirety, so including Clause 17.2(a). Accordingly, Mr Shah submitted, compliance with Clause 17.2(a) was excluded as a pre-condition for the effectiveness of an assignment, such that non-compliance with Clause 17.2(a) does not render ineffective an assignment made without Borrower consent.

298. I disagree with Mr Shah about this. On the contrary, I agree with Lord Wolfson when he submitted that Clauses 17.2(c)-(d) point in the other direction given that they lay down procedural requirements which must be complied with even if a permitted assignment is to be *"effective"*. In other words, they provide that a permitted assignment which fails to comply with a procedural requirement of this kind is ineffective. Clause 17.2(a), in contrast, is addressing something different: whether the assignment is permitted at all. As Lord Wolfson observed, it would, indeed, be *"bizarre"* if an assignment which was prohibited from the outset could nonetheless be effective to transfer rights to the assignee, yet a permitted assignment were not because of a failure to meet procedural requirements.

299. I am clear that Lord Wolfson was also right when he referred to there being a strong presumption that a restriction on assignment renders any non-permitted assignment invalid and ineffective to transfer any rights. Lord Wolfson went on to refer to it being theoretically possible for a restriction to be a mere contractual promise, the breach of which sounds in damages. That, however, is *"very unlikely to occur"*, as Lord Browne-Wilkinson put it in ***Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*** [1994] 1 AC 85 at pages 108 to 109, as follows:

"It was submitted that, even though the assignments were in breach of clause 17, they were effective to vest the causes of action in the assignees, i.e. Professor Goode's category (1). This argument was founded on two bases: first, the decision in ***Tom Shaw and Co. v. Moss Empires Ltd.*** *(1908) 25 T.L.R. 190 ; second, the fact that an assignment of a leasehold term in breach of a covenant against assignment is effective to vest the term in the assignee.*

In the Tom Shaw case an actor, B., was engaged by Moss Empires under a contract which prohibited the assignment of his salary. B. assigned 10 per cent. of his salary to his agent, Tom Shaw. Tom Shaw sued Moss Empires for 10 per cent. of the salary joining B. as second defendant. Moss Empires agreed to pay the 10 per cent. of the salary to Tom Shaw or B. as the court might decide i.e. in effect it interpleaded. Darling J. held, at p. 191, that the prohibition on assignment was ineffective: it could 'no more operate to invalidate the assignment than it could to interfere with the laws of gravitation.' He gave judgment for the plaintiffs against both B. and Moss Empires, ordering B. to pay the costs but making no order for costs against Moss Empires.

The case is inadequately reported and it is hard to discover exactly what it decides. Given that both B. and Moss Empires were parties and Moss Empires was in effect interpleading, it may be that the words I have quoted merely indicate that as between the assignor, B., and the assignee Tom Shaw, the prohibition contained in the contract between B. and Moss Empires could not invalidate B.'s liability to account to Tom Shaw for the moneys when received and that, since B. was a party, payment direct to Tom Shaw was ordered. This view is supported by the fact that no order for costs was made against Moss Empires. If this is the right view of the case, it is unexceptionable: a prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and the assignee and even then it may be ineffective on the grounds of public policy. If on the other hand Darling J. purported to hold that the contractual prohibition was ineffective to prevent B.'s contractual rights against Moss Empires being transferred to Tom Shaw, it is inconsistent with authority and was wrongly decided.

In the ***Helstan Securities*** *case [1978] 3 All E.R. 262 Croom-Johnson J. did not follow the Tom Shaw case and held that the purported assignment in breach of the contractual provision was ineffective to vest the cause of action in the assignee. That decision was followed and applied by the Court of Appeal in the* ***Reed Publishing Holdings*** *case, 25 May 1983 : see also* ***In Re Turcan*** *, 40 Ch.D. 5.*

Therefore the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights. I regard the law as being satisfactorily settled in that sense. If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz., to ensure that the original parties to the contract are not brought into direct contractual relations with third parties."

300. Lord Wolfson submitted that there is nothing in Clause 17.2(a) to suggest that it was only intended to amount to a personal covenant not to assign as opposed to a restriction on assignment in the typical sense.

301. Mr Shah disagreed. He submitted that VietJet's reliance on ***Linden Gardens*** is misplaced since the issue in that case was whether the assignment was effective against the debtor and whether it was under any obligation to recognise the title of the assignee. In those circumstances, Mr Shah suggested, Lord Browne-Wilkinson's analysis was expressly confined to the effect of the assignment as between the parties to the underlying contract. Thus, Mr Shah submitted, there is nothing in ***Linden Gardens*** that prevents the alienability of the contract rights or invalidates the proprietary effects of the assignment as between assignor and assignee.

302. In this respect, Mr Shah took the Court to Professor Sir Roy Goode's post-***Linden Gardens*** article, *Contractual Prohibitions Against Assignment* (2009) LMCLQ 300, specifically pages 308-309, as follows:

"It will be observed that all these effects are limited to relations with the debtor or, in case (4), notice to the debtor. The underlying principle is that the debtor cannot be affected by notice of a prohibited assignment, but that is as far as the principle goes. The prohibition against assignment is for the benefit of the debtor alone, not for the

benefit of the assignor, its trustee or liquidator or a competing assignee under a permitted assignment. For the reasons given earlier, the prohibition cannot operate to prevent the assignment from transferring ownership of the debt to the assignee. English courts have yet to rule firmly on the point, but all the indications are that they are moving in that direction."

303. This article was also cited before the Court of Appeal in ***First Abu Dhabi Bank PJSC v BP Oil International Ltd*** [2018] EWCA Civ 14. Gloster LJ had this to say at [28]:

"... Speaking for myself, and if this Court were not constrained by authority, I can see strong arguments in favour of Professor Goode's proposition that 'it is necessary to keep in mind the central principle: bars to assignment or other dealing are relevant only to the relationship with the debtor, not to the relationship between the parties to the dealing in question'; and that, accordingly, it is not competent for the debtor to exclude by contract the proprietary effects of an assignment as between assignor and assignee, or the creation of a trust as between trustee and beneficiary; and that "all he can do is to insist that he will not recognise the title of the beneficiary or the ability of the beneficiary to bring proceedings in his own right."

304. She went on to say this at [29]:

"However, although we were referred to this article, perhaps unsurprisingly, Mr Thanki did not seek to persuade this Court to allow the appeal based on what is logically the first building block of a full analysis (before one considers the construction of the purchase letter) – namely the argument that, as a matter of law, section 34 could not take effect so as to invalidate an equitable assignment, as between BPOI and NBAD. Such an argument would inevitably involve consideration of the House of Lords' decision in ***Linden Gardens*** *...".*

305. She concluded by saying this:

"Whether or not the decision in ***Linden Gardens*** *..., which is binding on us, can be characterised, or distinguished, in the way Professor Goode suggests, as a case where the issue was whether the assignment was effective against the debtor and whether it was under any obligation to recognize the title of the assignee, was not put in play before us. Accordingly, and with a considerable degree of intellectual disappointment, I move to consider the construction arguments on the assumption that any purported equitable assignment without SAMIR's prior consent was ineffective to amount to an equitable assignment of BPOI's contractual rights under the contract ... ."*

306. Gloster LJ was here recognising that ***Linden Gardens*** is binding authority. That is certainly the case. It is also clear: no rights are vested in or transferred to an assignee if the assignment is not permitted. As *Smith & Leslie* put it at paragraph 25.04, when addressing the possibility that a contractual restriction represents merely a personal undertaking not to transfer a chose:

"Such a term does not affect third parties, in that if the term is breached, the assignment of the chose is not ineffective. Breach merely exposes the assignor to a claim for damages, which damages—it can confidently be anticipated-will be difficult

to assess. Perhaps for this reason, the English courts have been slow to construe anti-assignment clauses as mere contractual promises that have no effect on the validity of the attempted assignment itself."

307. Furthermore, I tend to agree with Lord Wolfson when he also submitted that, even if Professor Goode were right, it is not clear how that would allow a claim to be brought in the present situation where the issue is whether an assignee can assert claims not against the assignor but against a third party against which the assigned rights are said to exist.

308. I should, lastly, deal with a further point that was raised by Mr Shah. As touched on previously, Mr Shah submitted that a corollary of the fact that a no-assignment clause is a contractual provision that operates as between the assignor and the debtor is that it is for the benefit of the debtor alone, meaning that only the debtor can invoke a prohibition against assignment. It follows that, Mr Shah submitted, even if Clause 17.2(a) purports to invalidate any assignment by the Lenders of their rights to an assignee unless it is complied with, VietJet is not entitled to rely upon Clause 17.2(a) and to assert that this was its effect. Contractual certainty and respect for the doctrine of privity are, Mr Shah suggested, of critical importance to multi-party finance arrangements.

309. Mr Shah went on to suggest, indeed, that for a non-party to assume an entitlement to challenge the exercise of rights to which it is not a party would have serious repercussions for the market standard terms adopted in multi-party lending arrangements. In this case, the NEO Borrowers had not only proceeded on the basis that the transfers were valid, but also entered into the Sale and Participation Agreement and Strict Foreclosure Agreements on that basis.

310. Again, I do not agree with Mr Shah about this. As Lord Wolfson submitted, even if there was a common understanding of the type to which Mr Shah referred, that could not bind VietJet unless VietJet was itself a party to it and an estoppel arose. That is not the position here. Nor, in fact, does FWA put its case on such a basis.

311. The answer to Question 8 is, accordingly, 'no'.

C. Was FWC validly appointed as Security Trustee/Security Agent?

9. Was FWC a financial institution for the purpose of Clause 21.23(b) of the NEO Loan Agreements and Clause 21.21 of the CEO Loan Facility Agreements?

312. As will be apparent, Question 9 applies to both the NEO and the CEO Loan Facility Agreements.

313. It raises an issue which arises because, after taking the assignments of the Loans, on 3 November 2021 FWC sought to appoint itself Security Trustee/Security Agent, pursuant to four Resignation and Appointment Agreements.

314. Under clause 21.23(b) of the NEO Loan Facility Agreements and Clause 21.21 of the CEO Facility Loan Agreements, FWC was only eligible to be appointed as Security Trustee/Security Agent if it was a *"trust corporation, bank or financial institution"*.

315. Both Mr Shah and Lord Wolfson were agreed that the answer to Question 9 will follow the answer to Question 4.

316. It follows that the answer to Question 9 (as with Question 4) is 'yes'. As previously mentioned, whether FWA's conversion case, accordingly, succeeds is a matter to be addressed subsequently.

9A. Were the Security Trustee's rights assigned to FWC pursuant to Clause 3(a) of the Resignation and Appointment Agreements?

317. This question is common to both the NEO Aircraft and the CEO Aircraft. However, as previously indicated, I do not propose to answer it since it does not arise in the light of how I have answered Question 9.

9B. Did FWA acquire the Lessors' rights pursuant to the Sale and Participation Agreement?

318. This concerns only the NEO Aircraft. Again, however, given the answer to Question 9, Question 9B does not arise.

D. Sale of the Aircraft

9C. Did the sale of the NEO Aircraft/CEO Aircraft extinguish any interest which VietJet as a sub-lessee had held in the Aircraft at common law and/or under the Cape Town Regulation?

319. This question applies to both the NEO Aircraft and the CEO Aircraft. However, it is not a question which arises given the answers to Questions 8 and 9. Accordingly, I do not address it.

E. Relief from forfeiture

320. I come on, lastly, to deal with relief from forfeiture. Given the position reached, this is a live issue, VietJet's case being that the Court can, and should, grant it relief from forfeiture – in relation to both the NEO and the CEO Aircraft.

321. Although the typical example of the Court's jurisdiction is the protection of a lessee from the exercise of a power to terminate a lease following the non-payment of rent, VietJet's position is that it would be appropriate were relief to be granted in the present case since it is open to the Court to grant relief in any case where party A seeks to prevent party B from exercising a legal entitlement to forfeit party B's rights, where the purpose of that entitlement is to secure party A's performance of a condition.

322. That relief is, in principle, available in non-real property contexts was confirmed by the Privy Council in ***Çukurova Finance International Ltd v Alfa Telecom Turkey Ltd*** [2013] UKPC 2 at [92]-[94]:

> *"92. It follows that, unless it can be said that the jurisdiction to give relief in the case of a mortgage is limited to mortgages of real property, no convincing reason has been identified why there should not be jurisdiction here. On the contrary it is a classic case for the exercise of the jurisdiction. The Board has reached the*

clear conclusion that there is no principled basis upon which the jurisdiction can be limited to real property. Nor is there any authority for such a distinction.

93. The issue was addressed in ***BICC Plc v Burndy Corporation*** *[1985] Ch 232, 252A-C, where Dillon LJ said this:*

'There is no clear authority, but for my part I find it difficult to see why the jurisdiction of equity to grant relief from forfeiture should only be available where what is liable to forfeiture is an interest in land and not an interest in personal property. Relief is only available where what is in question is forfeiture of proprietary or possessory rights, but I see no reason in principle for drawing a distinction as to the type of property in which the rights subsist. The fact that the right to forfeiture arises under a commercial agreement is highly relevant to the question whether relief from forfeiture should be granted, but I do not see that it can preclude the existence of the jurisdiction to grant relief, if forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, is in question. I hold, therefore, that the court has jurisdiction to grant Burndy relief.'

Kerr LJ agreed with that part of Dillon LJ's judgment, and Ackner LJ agreed with the whole of it at 253C and 260A respectively.

94. That reasoning, with which the Board agrees, supports the conclusion that relief from forfeiture is available in principle where what is in question is forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, regardless of the type of property concerned."

323. As Questions 10 and 11 demonstrate, two jurisdictional issues, nonetheless, arise, before Question 12 (whether relief from forfeiture should be granted in the circumstances) falls to be considered. Question 12, then, assumes that there is jurisdiction. It is, therefore, strictly speaking unnecessary to address Questions 10 and 11. They raise points of some complexity which, in view of my conclusion in relation to Question 12, do not arise for decision. Indeed, in the case of Question 10 insofar as it is concerned with the Convention, to deal with that would require having to grapple with complex, wide-ranging and potentially far-reaching issues which are better left for a case where those issues need to be decided.

324. In this respect, I adopt the same position as was adopted by Sir William Blair in ***SY Roro 1 PTE Ltd v Onorato Armatore Srl*** [2024] EWHC 611 (Comm) at [135]. In the circumstances, whilst I propose to deal with Question 10 in one respect, I will not address the Convention-related aspect of Question 10, and nor will I determine Question 11. I will, however, address Question 12.

10. Does the Court have jurisdiction to grant relief from forfeiture in principle?

325. As just mentioned, there are two aspects to Question 10 that need to be addressed. The first is whether FWA is right when it says that there is no jurisdiction to grant relief from forfeiture because of the nature of VietJet's former rights in respect of the Aircraft. The second is whether FWA is right when it says that the Convention precludes relief from forfeiture. As I say, I propose only to address the first of these aspects.

326. Mr Shah noted that, as explained by Lord Briggs in ***Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd*** [2019] UKSC 46, [2020] AC 1161 at [25], albeit in passing, and by the Privy Council in ***Çukurova Finance*** (see above), the Court only has jurisdiction to grant relief from forfeiture in respect of rights that are proprietary or possessory in nature. He noted, furthermore, that in ***On Demand Information plc v Michael Gerson (Finance) plc*** [2002] UKHL 13, [2003] 1 AC 368 at [29] Lord Millett referred with approval to the proposition that where the relevant rights are possessory and concern chattels or other species of personal property, those rights must be indefinite, rather than time limited to a period shorter than the full economic life of the asset (although, as Lord Wolfson pointed out, Lord Briggs sounded some caution in this respect in ***Vauxhall Motors*** at [51]).

327. Mr Shah's submission was that the characterisation of the Sub-Leases as either operating or finance leases is indicative of whether there is jurisdiction to grant relief from forfeiture, in the sense that a finance lease will typically involve payment by a lessee to a lessor of the full cost of the asset, such that all of the risks and rewards associated with ownership of the asset are held by the lessee, whereas that is not typically the case where an operating lease is concerned. Thus, Mr Shah observed, in ***On Demand***, which involved a finance lease, there was jurisdiction to grant relief from forfeiture, yet in ***Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd*** [2010] EWHC 185 (Comm) Hamblen J (as he then was), applying the approach described by him at [51]-[55], determined that there was no jurisdiction to grant relief from forfeiture in respect of aircraft operating leases with a lease period of eight years, especially in circumstances where the aircraft had a substantial expected operational life after termination.

328. Accordingly, Mr Shah submitted, had it not been for the options to purchase the Aircraft contained in the Leases in the present case, it would be beyond argument that, as in ***Celestial Aviation***, relief would not be available. He highlighted, in particular, the fact that lease periods only endured for a portion of the economic life of the Aircraft, namely 10.5 years, as against a typical economic life (according to Mr Chrun) of a larger new generation single aisle aircraft of 25 years; the fact that ownership of the Aircraft was not to be automatically transferred to VietJet upon the expiry of the lease periods; the fact that VietJet's rights to possession were conditional upon no Event of Default having occurred; and the fact that the Sub-Leases addressed in considerable detail the terms governing the procedures and operating condition of the Aircraft at redelivery, in addition to the parties' respective obligations, the time for performance of obligations, what constituted an Event of Default and what an Event of Default entitled the Sub-Lessor to do.

329. Ultimately, as Mr Shah and Lord Wolfson both recognised, the question that arises turns on what effect in this case the options to purchase have: Mr Shah's submission was that they do not mean that relief is available, whereas Lord Wolfson submitted the contrary.

330. Mr Shah observed, first, that there is no option to purchase the Aircraft in the CEO Sub-Leases other than upon the early termination of the leasing. Secondly, as to the NEO Aircraft, Mr Shah submitted that VietJet's option does not confer jurisdiction to grant relief from forfeiture in circumstances where, pursuant to Clause 21 of the NEO Sub-Leases, VietJet's option to purchase was not mandatory and, furthermore, entailed VietJet having to pay a substantial price, namely US$28 million. This meant,

Mr Shah submitted, that, if the NEO Sub-Leases ran their course, then, at least on the face of things, the NEO Aircraft would be returned to the NEO Lessors, who had never parted with their title.

331. This is not the position, Mr Shah observed, with a typical finance lease, where the lessee airline, which has funded the cost of the aircraft through the payment of rental, finds that, at the maturity of the lease, title automatically passes to it, perhaps on payment of a nominal amount. More specifically, Mr Shah highlighted how in the present case the purchase of the Aircraft was financed by both equity investment funded by Japanese third-party investors through the Lessors and the Loans funded by the Lenders, with the equity contribution of the investors constituting a not inconsiderable 25% of the Aircraft purchase price, meaning that the purchase of the Aircraft cannot be viewed as having been funded solely by rental payments which thereby funded repayments pursuant to the Loan Facility Agreements. In addition, Mr Shah highlighted how the CEO Sub-Leases did not provide for an option to purchase in a non-default scenario and how the purchase option stipulated in the NEO Sub-Leases entailed payment of a purchase price which was some 50% of the sum paid by the Lessor to acquire the Aircraft.

332. In such circumstances, Mr Shah submitted that the various authorities relied upon by VietJet do not assist since they entail somewhat different facts. Thus, in ***Transag Haulage Ltd (IAR) v Leyland DAF Finance*** [1994] 1 WLUK 409, it was held that there was jurisdiction to grant relief from forfeiture in respect of hire-purchase agreements where the agreements also provided that once all the instalments were paid, Transag could purchase the vehicles. At page 365E, Knox J noted in respect of the option to buy that:

"... although that right was then subject to [a contingency], it can nevertheless be truthfully said that there was a forfeiture of proprietary or possessory rights and not merely contractual rights. Even a contingent right to exercise an option appears to me to be properly described as a 'proprietary right'."

333. This was a case, however, as Mr Shah pointed out, which concerned three hire-purchase agreements for lorries, pursuant to which a substantial deposit was paid at the outset followed by 36 monthly instalments of £1,000. Once all of the instalments had been paid, the hirer could purchase the lorries for £5. As previously noted, by contrast with the present case, the instalments were contributions to the purchase price and the option was exercisable upon the payment of only nominal consideration.

334. As for ***On Demand***, in which video equipment was leased under the condition that, upon termination, the lessees could sell the equipment and retain some of the proceeds, at first instance, referring to ***Transag***, Robert Walker LJ (as he then was) stated as follows:

"Knox J had already referred ... to the receivers' evidence that the continued possession and use of the three lorries was essential to the conduct of Transag's business ... I think that Knox J could have based his decision on Transag's possessory rights during the currency of each of the hire-purchase agreements, as well as on its option to purchase."

The House of Lords adopted the reasoning of the Court of Appeal, which rejected the argument that the leases were purely contractual as:

"contractual rights which entitle the hirer to indefinite possession of chattels so long as the hire payments are duly made, and which qualify and limit the owners general property in the chattels, cannot aptly be described as purely contractual rights."

335. However, as Mr Shah noted, in this case the leases were for such a rent that, by the end of the lease period, the lessor had recouped the cost of the equipment with interest, costs and profit. Also, after that initial lease period the lessee could continue to rent the equipment for 12 months for a single modest payment and, if the lessee sold the equipment at the end of the term, it could retain 95% of the proceeds. Accordingly, the leases were finance leases involving a transfer of substantially all of the risks and ownership interests in the property.

336. Lord Wolfson also cited ***More OG Romsdal Fylkesbatar AS v The Demise Charterers of the Ship 'Jotunheim'*** [2004] EWHC 671, in which Cooke J held that the court had jurisdiction to grant relief in the context of a bareboat charter which included a hire-purchase agreement, at [50]-[51], on the basis that:

"... in a bareboat charter which is also a hire/purchase agreement, the owners provide the ship in anticipation that they will do nothing further after delivery. They receive the charterers' payments and, if all goes well, transfer the vessel to the charterers on receipt of the final instalment ... The demise charterers are given contractual and possessory rights in relation to the vessel ...[they] have the right to have ownership transferred to them at the end of the charter period, if there has been compliance with the conditions of the charter."

337. This case was considered in ***OCM Maritime Nile LLC v Courage Shipping Co (The 'Courage')*** [2022] EWHC 452 (Comm), in which the charterparty provided an option for the charterer to purchase the vessel if no event of default had occurred. Sir Andrew Smith concluded that the Court had jurisdiction to grant relief from forfeiture as, in line with Cooke J's reasoning, the chartering arrangement was such that *"if the arrangements went to plan, the Defendants were to possess the vessels until they bought them from the Claimants"*. However, again as Mr Shah pointed out, it is doubtful that these authorities support VietJet's position. That is because in ***The Jotunheim*** the charter was on terms that following the payment of the final instalment *"the vessel would then belong to the demise charterers"*, whereas in OCM the option to purchase clause provided that, if the ship had not been purchased prior to the Final Option Date, the charterers *"must purchase the vessel"*. In other words, in both cases title to the chattel would necessarily pass if the parties complied with their contractual obligations.

338. Lord Wolfson also referred to ***Hush Brasseries Ltd v RLUKREF Nominees (UK) One Ltd*** [2022] EWHC 3018 (Ch), where relief from forfeiture was granted in respect of an option agreement granting the tenant the right to call for its landlord to grant it a new lease of the premises, HHJ Klein explaining at [62] that the enforceable option to purchase the land *"creates an immediate equitable interest in land, even before the option holder exercises it"*, despite the fact that the exercise of the option was conditional. Mr Shah pointed out, however, that VietJet does not suggest that there is an equivalent principle in respect of options to purchase chattels.

339. This brings me to ***Celestial Aviation***. Lord Wolfson's submission in relation to this case was that, in saying that *"for the relief jurisdiction to apply to contracts transferring a bare possessory right for only a proportion of the economic life of the chattel would represent a major extension of existing authority"* at [57], Hamblen J was not dealing with a lease with a hire-purchase element to it but, as he put it at [56], leases that involved *"the retention by Celestial [the lessor] of most of the risks and rewards of ownership"*. The present case, Lord Wolfson submitted, is very different in that the parties sought to shift as much of the risk and reward of ownership as they could on to the lessee, consistent with maintaining the Japanese tax advantages driving the structure.

340. I agree with Lord Wolfson about this. The lease in ***Celestial Aviation*** was not like those in the present case. Mr Chrun, FWA's own expert, confirmed that the purpose of the termination provisions in a JOLCO is to secure payment of rent. He had earlier also confirmed that the expectation is that title would ultimately pass to VietJet; he had never before experienced the call option not being exercised. Indeed, the purchase option pricing is structured to disincentivise return: if the option is not exercised and the return conditions take effect, VietJet would have had to pay in the region of an additional US$8 million in costs of return. These were described as *"damaging"* by Mr Chrun.

341. Furthermore, Mr Chrun explained that the reason why the call option is inserted is because it is required for tax purposes, but the objective of the transaction structure is to make it very improbable that it will not be exercised. Thus, the JOLCO replaced a 'Japanese Leveraged Lease' arrangement, under which title to aircraft inevitably passed. That arrangement could no longer be used due to changes in the tax rules. The fact that JOLCOs are not finance leases for Japanese tax purposes is not conclusive. On the contrary, as Mr Chrun confirmed, for accounting purposes some airlines treat them as finance leases or even as outright-owned aircraft.

342. There is, Mr Chrun agreed, something of a spectrum between, at one end, a pure operating lease and, at the other end, a pure finance lease. He agreed that JOLCOs came very close to the finance end of that spectrum.

343. My conclusion, in the circumstances, having regard to the particular nature of JOLCOs and the Leases in this case, is that relief from forfeiture is, in principle, applicable. The answer to Question 10, accordingly, is 'yes' insofar as it is concerned with whether there is jurisdiction to grant relief from forfeiture because of the nature of VietJet's former rights in respect of the Aircraft. As to the second (Convention-related) aspect, Question 10 should be regarded as not having been answered.

11. Has the jurisdiction ceased to exist as a result of the sales of the Aircraft?

344. The next question, Question 11, is whether, following the sale of the Aircraft and the unwinding of the JOLCO structures, it is possible to grant relief from forfeiture.

345. The factual position in the present case, Mr Shah reminded the Court, is that the leasing of the Aircraft pursuant to both the Head Leases and the Sub-Leases, both contracts to which FWA was never a party, has terminated; the Aircraft have been sold to the Trustee Owners for approximately US$150 million, meaning that the original Lessors, which thereby no longer have title to the Aircraft, have dropped out

of the picture; the Aircraft have been de-registered from the Vietnamese registry and have been re-registered in Guernsey; and VietJet no longer has possession of the Aircraft.

346. In such circumstances, in Mr Shah's submission, it is now not possible to restore the *status quo* in light of that current position for two principal reasons: first, Mr Shah submitted, because the Aircraft have been sold; and, secondly, because VietJet was always a sub-lessee and the other parties within the original structure that VietJet seeks to reconstitute are not parties to the claim, so as to mean that, if relief is to be granted, new contracts would have to be drawn up.

347. However, as I have explained, I do not propose to address either of these issues. As to the latter, in particular, I agree with what Sir William Blair said in ***SY RoRo 1*** at [136]-[138]:

> *"136. There is a caveat, however, concerning one point as to the terms of any relief which is raised by the Defendants (and which did not arise in the arbitration). In the landlord and tenant context, the Defendants point out that the court has long had a jurisdiction to grant relief from forfeiture to underlessees of land on conditions as to the execution of a new deed or other document between the lessor and the under-lessee as the court in the circumstances of each case may think fit. This has been extended to leases of chattels by cases such as* ***BICC plc v Burndy Corpn*** *[1985] Ch. 232. On this basis, it is submitted that the court has inherent equitable jurisdiction to grant relief from forfeiture to the Sub-Charterers and Sub-Sub-Charterers and, if relief is granted, to instate a new bareboat charter with the Owners on such terms as the court in the circumstances thinks fit. The new charter would be on materially the same terms as the Head Charters (including as to term and rate of hire but without the purchase right at the end of the charter term). That, it is submitted, will put the Owners in no worse position and in some respects a better position because they will get the Vessels back at the end of the 12-year term.*
>
> *137. The Owners submit there is no such jurisdiction in the court, and to grant it would entail the court rewriting the parties' contract. In this respect, they rely on well-known authority emphasising the need for certainty in commercial transactions: e.g.,* ***Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)*** *[1983] 1 QB 529 at 540.*
>
> *138. The Defendants did not cite any authority in support of its case in this respect, or indeed any other material which suggested that the court had adopted this course before. This is not surprising. In my view, cases contemplating the execution of a new deed or other document between the lessor and the under-lessee in the case of underleases of land (or chattels) should be considered with caution in cases involving a series of ship charters where the law must operate in a very different commercial context. In a sense, relief against forfeiture involves in its nature the adjustment of contractual rights by the court. But the interposition by the court of a new charter between Owners and Sub-Charterers or Sub-Sub-Charterers raises some difficult questions and is, in my view, unlikely to be ordered whatever view is taken as to the grant of relief."*

348. I return to this aspect shortly when considering Question 12.

12. Should relief from forfeiture be granted in the circumstances?

349. VietJet's case is that the Court should grant it relief from forfeiture on the basis that it would be unconscionable for FWA to insist upon the enforcement of the termination rights under the Sub-Leases: see *Snell's Equity* (34th Ed.) at paragraph 13-031.

350. The main focus of VietJet's submissions in this respect was the suggestion made by FWA that VietJet's conduct in Vietnam, as outlined earlier, was such as to make it inappropriate that relief be granted. As will appear, there are other particular aspects that fall in this context to be considered.

Windfall

351. First, however, I should say something about why VietJet says that relief should be granted and, specifically, what it says about windfall. Its case is that the position is simple.

352. VietJet relies upon what Lewison LJ had to say in ***Manchester Ship Canal*** (in the Court of Appeal) [2018] EWCA Civ 1100, [2018] Ch 331 at [73]:

> *"The general approach of a court of equity, where the default in question is a failure to pay, is to grant relief on terms that the defaulter pays what is due plus the costs of the other party."*
>
> The issue in that case was whether there should be relief from forfeiture in respect of a licence to discharge surface water into a canal. The annual payment for the licence, which had been granted in 1962, was £50. However, by the time of the proceedings, the value of the licence was between £300,000 to £440,000 per annum. Thus, refusing relief from forfeiture would result in a windfall to the licensor by reference to the profit that it could make by renegotiating the licence fee.

353. Even in the cases of forfeiture for breach of covenants, Lord Wolfson submitted, wilful defaults may still be relieved, the wilfulness falling to be weighed against the disproportionality of the gain to the lessor (or, indeed, loss to the lessee): ***Freifeld v West Kensington Court Ltd*** [2015] EWCA Civ 806, and per Viscount Dilhorne in ***Shiloh Spinners Ltd v Harding*** [1973] AC 691 at page 726, as follows:

> *"I only desire to add that the cases in which it is right to give relief against forfeiture where there has been a wilful breach of covenant are likely to be few in number and where the conduct of the person seeking to secure the forfeiture has been wholly unreasonable and of a rapacious and unconscionable character."*

354. In the present case, Lord Wolfson submitted that FWA's conduct has been deliberately to seek a large windfall, because the effect of the termination provisions in the Leases is that VietJet pays everything that will ever be due under the Leases, even though that would have allowed it to purchase the Aircraft, yet loses the Aircraft and has to pay for the costs of placing the Aircraft into the exacting redelivery condition (that had been set to deter it from not exercising the purchase option). Lord Wolfson suggested, FitzWalter's entire purpose was to try to become mortgagor and obtain the collateral for itself. As he put it in the course of closing submissions, what

FWA did was clever but also complex, and *"the complexity has tripped them up"*. This, he submitted, is unreasonable, unconscionable and rapacious. Lord Wolfson went on to submit that *"in no sensible respect"* was what happened *"a consequence of the contractual bargain"*.

355. I do not agree with Lord Wolfson about this. On the contrary and in line with my earlier conclusions, I agree with Mr Shah when he submitted that the windfall suggested by VietJet is, indeed, a consequence of the contractual bargain that VietJet voluntarily agreed under the Sub-Leases. The payment of those sums, which is a common feature of JOLCO transactions, was negotiated for the legitimate commercial purposes of incentivising VietJet to exercise its option to purchase the Aircraft and mitigating the risks of early termination of the transaction, which, for the Japanese investors, would have included the failure to obtain the intended tax benefits and the unexpected need to remarket and re-lease the Aircraft. Similarly, the requirement to comply with the redelivery conditions protected the Japanese investors against the potential volatility in the Aircrafts' value and improved their prospects of selling the Aircraft quickly and at a reasonable price.

356. This is not, therefore, a windfall case.

VietJet's defaults giving rise to the forfeiture

357. I turn, then, to consider the conduct of VietJet in failing to pay the rent that was due and that gave rise to the right of forfeiture against which relief is sought.

358. As at the dates of the Termination Notices, VietJet's defaults were as set out below:

	8937 Aircraft	**8906 Aircraft**	**8577 Aircraft**	**8592 Aircraft**
Amount of arrears	US$2,424,887.64	US$1,195,034	US$2,241,716.10	US$2,239,512.18
Length of default	110 days	48 days	118 days	114 days

These are substantial arrears, both in amount and time. As Mr Shah noted, by comparison, in ***Celestial Aviation***, where relief was refused, the total amount of arrears was significantly less: some US$800,000 across three aircraft, with the average default period prior to the termination notices being two weeks.

359. This, significantly, is in circumstances where Lord Wolfson accepted on behalf of VietJet, in the course of his opening submissions, that "*if we had known what was going to happen, we could have used the cash we had to bring these leases up to date*". In other words, VietJet could have paid the rent that was due but chose not to do so.

360. It is also not the case that VietJet did not know what was going to happen if the rent remained unpaid since, as is apparent from the exchanges with Natixis, VietJet had

been repeatedly warned during the deferral negotiations that, unless an agreement could be reached whereby VietJet would no longer be in default, "*the JOLCO facilities will be treated as a non performing loan for the lenders and I am afraid it will trigger an EoD*" and that there was interest from third parties in acquiring the loans. Mr Ta accepted that this had, indeed, been made clear.

361. Furthermore, VietJet continued to operate the Aircraft for a further year after (and in breach of) the Termination Notices, the Grounding Notices and the Repossession Notices. Thus, during the first nine months of 2022, prior to delivering the Aircraft to FWA, VietJet undertook 4,320 flights using the Aircraft, which amounts to an average of 5.4 flights per day using the CEO Aircraft and 2.7 flights per day using the NEO Aircraft. Had rent continued to be payable over that period, VietJet would have had to pay over US$21 million in further rental payments, as follows:

	8937 Aircraft	**8906 Aircraft**	**8577 Aircraft**	**8592 Aircraft**
Rental accruing between termination and 15 December 2022	US$4,849,775.28	US$5,975,170.00	US$5,227,120.00	US$5,214,960.00
Total	US$21,267,025.28			

362. It follows, I agree with Mr Shah, that the defaults were substantial and longstanding. VietJet chose to default in circumstances where it could have satisfied its outstanding obligations, and it did so with its eyes wide open to the consequences that followed.

363. Thereafter, VietJet earned what would have been a substantial income through its unlawful use of the Aircraft, but still did not satisfy its obligations, only belatedly suggesting that relief from forfeiture would be appropriate.

364. More than two years after the Termination Notices, VietJet has still not paid the outstanding rental despite the fact that it is owing on its own case.

VietJet's conduct in Vietnam

365. It is convenient, next, to address what VietJet did in Vietnam.

366. I do so, first, by noting Lord Wolfson's submission that in ***Gill v Lewis*** [1956] 2 QB 1 the Court of Appeal held that it would only be in *"very exceptional cases"* that the conduct of the party claiming relief would disqualify them from doing so and *"extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant"*.

367. To this should be added ***The 'Courage'*** [2022] EWHC 452 (Comm), where Sir Andrew Smith suggested at [163]-[164] that:

> *"163. In answer to this argument, Mr Dunning did not respond to the individual complaints about the Defendants' conduct, but relied upon the principle that a party is not precluded from equitable relief unless the misconduct or impropriety has a sufficient connection with the equitable relief sought: see* ***The Royal Bank of Scotland Plc v Highland Financial Partners LP****, [2013] EWCA Civ 328. This principle can be traced back to the words of Lord Chief Baron Eyre in* ***Dering v Winchelsea****, (1787) 1 Cos 318, 319, who referred to 'an immediate and necessary relation to the equity sued for'.*
>
> *164. I accept that, unless misconduct or impropriety on the part of the applicant for relief from forfeiture is closely connected with the application, while it is relevant to the decision whether to grant relief, it is to be assessed together with other considerations: thus, in* ***Freifeld v West Kensington Court Ltd.****, [2015] EWCA 806, a case about an application for relief from forfeiture of a lease, Arden LJ said 'The windfall point is about proportionality. The appellants' egregious conduct is not relevant to the question of the windfall, which is a self-standing consideration to be considered on its own merits and then weighed against the appellants' egregious conduct. Once it is appreciated that the value of the leasehold interest is an advantage which the respondent will obtain from forfeiture, it has to be thrown into the balance with other considerations'."*

368. I agree with Lord Wolfson when he submitted that Sir Andrew Smith's reference to the '*unclean hands*' maxim means that he should not be taken as watering down the existing jurisprudence about what gives rise to '*unclean hands*', namely that there should be an "*immediate and necessary relation to the equity sued for*" (***Dering v Winchelsea*** at page 319), such that the party is "s*eeking to derive advantage from his dishonest conduct in so direct a manner that it is considered unjust to grant him relief"*, as it was put by Lord Briggs and Hamblen LJ (approving the test applied by Males J (as he then was) in ***UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH*** [2017] EWCA Civ 1567, [2017] 2 Lloyd's Rep. 621 at [171].

369. It is with these principles in mind that I approach this issue. Doing so, my conclusion, as I shall explain, is that Mr Lissack KC was right when he submitted that VietJet has conducted and orchestrated a campaign in Vietnam since it delivered the Aircraft to FWA pursuant to the various orders made by this Court that has been designed to interfere with FWA's efforts to export the Aircraft from Vietnam and, in turn, both to permit VietJet to raise and maintain its claim to relief from forfeiture and to compel the re-leasing of the Aircraft to VietJet. This misconduct is not only so closely connected with VietJet's application for relief from forfeiture, but also so egregious, that VietJet should be precluded from the relief sought.

370. Lord Wolfson highlighted in relation to the Consent Order made by Bryan J on 16 November 2022, an order which was expressed to be made under Art. 13 of the Convention and *"without prejudice to any arguments that either party may wish to raise in the substantive trial of this claim"*, that, whilst the order required VietJet to co-operate (when requested) in relation to deregistration, it imposed no obligations or restraints on VietJet in relation to export.

371. As for the order made on 31 March 2023 by Waksman J, again Lord Wolfson highlighted how this also did not (at any rate expressly) include any provisions relating to the export of the aircraft.

372. There was, then, Lord Wolfson reminded the Court, an application in May 2023 by FWA, seeking an order that VietJet *"procure for the Claimant the export and physical transfer of the Aircraft"*. That application was dismissed by Bright J as misconceived, confirming that export was distinct from *"possession, custody or control"* and that VietJet at least had no positive obligation to do anything to facilitate the former.

373. It was only in February 2024 that Foxton J made a further order which expressly prohibited VietJet from interfering with *"any aspect of the export/re-export process, or any steps required to export the Aircraft from Vietnam"*. Until then, Lord Wolfson observed, VietJet was under no positive obligation to facilitate the export of the aircraft from Vietnam, and it is not alleged by FWA that VietJet has done anything to hinder the export of the aircraft since that order was made.

374. Lord Wolfson went on to submit that nothing that VietJet did between February 2023 and April 2023 in relation to the Shareholder Proceedings involved impropriety on the part of VietJet. He submitted, in particular, that the injunctions obtained by VietJet were both lifted rapidly, lasting for little more than a month in total. Furthermore, Lord Wolfson suggested, VietJet itself sought to explain to the relevant authorities why it considers the shareholders' claims to be misconceived, and to reiterate that it consents to FWA's deregistration and export of the aircraft.

375. The most that can sensibly be said, Lord Wolfson observed, is that it appears that somebody at VietJet may have passed some material to its shareholder, Silva Star, in circumstances where Silva Star is ultimately beneficially owned by VietJet's Chairwoman, Madam Thao, and VietJet's then Vice-General Director was a director of its parent company, Polar Star. That, Lord Wolfson submitted, is not sufficient since, as he put it, it is one thing to identify that a director's knowledge can be attributed to Silva Star, but quite another for it to be suggested that such knowledge can be attributed to VietJet in circumstances where what was done was done in the name not of VietJet but in the name of Silva Star and given that it is not said that VietJet controls Silva Star, but, rather, that two of VietJet's directors do so.

376. I do not agree with Lord Wolfson about this. First, I agree, on the contrary, with Mr Lissack when he submitted that it is obvious, as far as the Shareholder Proceedings are concerned, that these would have constituted a clear breach of the Consent Order had VietJet directly launched those proceedings and applied for the relief that Silva Star sought, namely the suspension of the Deregistration Decisions and that VietJet be "*entitled to continued registration for operation of*" the Aircraft.

377. Secondly, VietJet's case ignores what is said on behalf of FWA, which is that Madam Thao and Dr Phuong acted through Silva Star (and, subsequently, the Replacement Shareholder Claimants) in bringing the Shareholder Proceedings. That is the conduct which FWA says is attributable to VietJet. Madam Thao was VietJet's Managing Director whilst Dr Phuong was its Vice-Managing Director. As such, if they had brought the Shareholder Proceedings in their own names, as shareholders of VietJet, their conduct in doing this would have been attributable to VietJet. The fact that,

instead of doing so directly, they brought the Shareholder Proceedings through Silva Star, a corporate vehicle used to hold a portion of Madam Thao's shareholding in VietJet, makes no difference: the conduct is still attributable to VietJet. I agree with Mr Lissack, in short, that what Madam Thao and Dr Phuong plainly did was to use Silva Star as a corporate cypher for what VietJet, or they themselves, could not do directly, which was to flout the Consent Order and further orders reinforcing it. In so using Silva Star, they were acting for and on behalf of VietJet to which their acts are manifestly attributable in English law.

378. I agree, furthermore, that, as Mr Lissack put it, the *"extraordinary"* timing with which the Replacement Shareholder Claimants stepped into the shoes of Silva Star and obtained identical relief on the very same day that the original injunction was discharged, having only applied for such relief after FWA pointed out the connections between Silva Star and VietJet's most senior personnel, removes any doubt as to what the Shareholder Proceedings were intended to achieve and on whose behalf that intention was held. The more so, given how the Shareholder Proceedings came to be re-activated after a year's dormancy just as FWA prepared to export the 8906 Aircraft.

379. It should also be borne in mind that the relief sought in the Shareholder Proceedings was (and is) to VietJet's direct benefit since it is VietJet which would be the beneficiary of the continued registration and operation of the Aircraft. What was being done in relation to the Shareholder Proceedings was (and is), quite obviously, being orchestrated by VietJet. To conclude otherwise would be to ignore reality.

380. This brings me to the correspondence, which I propose to address only briefly. This is correspondence with certain regulatory and governmental bodies in Vietnam on the status of the Aircraft following the Consent Order. Whatever the position in relation to the correspondence in the earlier period - from April 2023 to August 2023 – later correspondence, which was only disclosed by VietJet on the first day of the trial after the abandonment of its claim that the correspondence was subject to state secrecy, shows very clearly that VietJet has sought to interfere with efforts to export the Aircraft.

381. This correspondence consisted of a letter from the CAAV on 18 August 2023 seeking VietJet's *"official position"* on its processing of FWA's export application for the 8577 Aircraft. This was followed by a letter dated 8 September 2023, by which VietJet replied to the CAAV, setting out its position on its rights in relation to MSN 8577 and ending by asking the CAAV to:

> *"review, evaluate, and make objective, responsible decisions in accordance with regulations of law, ensuring the legitimate rights and interests of VJA with respect to the Aircraft, including Aircraft 8577 while there has not been a final judgment from the English Court on the dispute between related parties."*

382. VietJet also enclosed an opinion from the law firm, Vina Legal, indicating that the CAAV does not have jurisdiction to issue an ECoA after an aircraft is deregistered.

383. Three days later, on 11 September 2023, VietJet wrote to the Vietnamese Deputy Prime Minister explaining its position about the case and ending by saying:

"We also hope to receive the attention and support from the Prime Minister, the Deputy Prime Minister Tran Hong Ha, the Ministry of Transport and the Civil Aviation Authority of Vietnam to protect the legitimate rights and interests of VietJet in particular and Vietnamese domestic airlines in general on the principle of complying with the law, respecting business ethics, fair trade spirit, aiming for sustainable and long-term interests for enterprises, society and our country."

384. On 2 October 2023, VietJet sent a similar letter to the Deputy Minister of Transport, ending:

"we respectfully hope that the Deputy Minister will consider and assess in accordance with the laws to ensure VJA's legitimate rights and interests towards the disputed Aircraft while there has not been a final decision from the English Court on the dispute between related parties."

385. The following week, on 10 October 2023, VietJet sent a further similar letter to the Ministry of Transport, ending:

"With the above summary about the contents and developments of the above dispute in the English court, we respectfully hope that the Ministry will consider, assess, and have directions on relevant agencies to implement in accordance with the laws to ensure VJA's legitimate rights and interests towards the disputed Aircraft while there has not been a final decision from the English Court on the dispute between related parties. (We would like to submit legal opinions of YKVN and Vina Legal)."

386. In these letters, VietJet maintained that export of the Aircraft would be illegal, making no mention of its previous position in earlier correspondence (the correspondence which had previously been voluntarily disclosed) that it both consented to export and that there was no basis to prevent it. Mr Ta suggested in evidence that VietJet's letters to the CAAV and various Vietnamese government recipients in September-October 2023 merely stated that any export of the Aircraft should follow the law without in any way seeking to encourage them to stop the export. I am doubtful about that characterisation but, in any event, the later correspondence that only belatedly came to be disclosed makes it clear that VietJet was, on the contrary, looking to obstruct.

387. That is made all the clearer when the letter to the Ministry of Transport dated 10 October 2023 is looked at since that refers, specifically, to the export procedures conducted by the CAAV for the 8577 Aircraft in circumstances where the CAAV had issued an ECoA equivalent for the 8577 Aircraft the day before. I agree with Mr Lissack when he submitted that the strong inference is that VietJet knew, at least, that the CAAV was close to finalising its verifications of the 8577 Aircraft and that it was doing in this communication was lobbying the CAAV's supervising government department to hinder the export of the Aircraft generally, and the 8577 Aircraft specifically.

388. Mr Lissack submitted, by way of conclusion in this context, that what the correspondence demonstrates is that VietJet was seeking to interfere with FWA's efforts to export the Aircraft from Vietnam in order that the Aircraft would remain in Vietnam. He added that, so long as the Aircraft remained (or remain) in Vietnam, FWA could not (and cannot) fully repair and re-lease them to a new lessee. It follows, Mr Lissack suggested, that VietJet's misconduct is inextricably linked to its claim for

relief from forfeiture, since VietJet's conduct was intended to permit VietJet to raise and maintain its claim to relief from forfeiture, which would have been (as Mr Lissack put it) *"even more hopeless"* if the Aircraft had been re-leased to a third party (as FitzWalter was entitled to do), and to force FitzWalter to re-lease the Aircraft to VietJet - the result that it seeks through its application for relief from forfeiture. I agree with Mr Lissack about this.

The nature of the commercial arrangements

389. Mr Shah went on to make a further submission. This was that, whilst relief from forfeiture is granted only exceptionally in general, in commercial cases that is even more so.

390. Thus, in ***The Scaptrade*** at page 704A-C Lord Diplock agreed with Goff LJ (as he then was) that:

> *"It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason, of course, that the English courts have time and again asserted the need for certainty in commercial transactions - for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly."*

391. More recently, Sir William Blair made the same point in ***SY Roro 1*** at [146], when agreeing with the view of the arbitral tribunal in that case:

> "*These are bespoke commercial contracts negotiated between sophisticated counterparties advised by lawyers. Considerations of commercial certainty are very important and the case law demonstrates that relief from forfeiture is (rightly) rarely granted in bespoke contracts negotiated between experienced commercial counterparties.*"

392. The reason is that commercial parties should know with certainty whether the terms of a contract will be enforced, and there is a need to avoid destabilising commercial relationships, as made clear by Lord Hoffmann in ***Union Eagle Ltd v Golden Achievement*** [1997] AC 514 at pages 519-520.

393. I agree, furthermore, with Mr Shah that those considerations apply *a fortiori* in the context of a leasing transaction subject to the Convention and in the context of an aircraft leasing transaction generally. As Hamblen J put it in ***Celestial Aviation*** at [72]-[73]:

> *"72. I consider that the ASLAs are transactions in respect of which the need for certainty is very much present. As Celestial submitted, commercial certainty is an important consideration in respect of an operating lease of an aircraft in which the lessor maintains a valuable reversionary interest. An aircraft is a valuable asset, with high value components, which is of its very nature*

> *'moveable' and depreciating, which is left in the hands of the other party in a foreign country where it will be registered for the purpose of the lease (and need to be deregistered to be operated elsewhere). The lessor, having a reversionary right to the asset, needs to know and agree with precision with the lessee: (a) the obligations of each party, (b) the events that will entitle to lessor to terminate the contract and recover its asset and (c) provisions which will show how, as a matter of business practicality, the contract will be terminated, the asset recovered and possession returned by the lessee to the lessor.*
>
> *73. The consequence of the relief jurisdiction being exercisable in cases such as the present is likely to be to make it open to any lessee of a commercial aircraft under an English law operating lease such as the ASLAs to contend that relief from forfeiture can be granted. As was borne out by Celestial's evidence, there are many such leases and this is likely to cause significant uncertainty in the aviation sector: the lessor will not know when (or indeed whether) it can terminate a lease and will be prevented from being able to rely timeously or at all on the clear and detailed default and termination provisions of its leases."*

394. Lord Wolfson suggested that this is a point which is relevant to jurisdiction rather than discretion, noting that this is how Hamblen J himself appears to have considered the matter in ***Celestial Aviation***. I am not persuaded that this is the case – at least that it is not permissible to consider the issue of certainty in the discretion context.

395. In any event and more substantively, I reject Lord Wolfson's further suggestion that recognising the availability of relief on grounds of non-payment of rent does not give rise to any meaningful uncertainty since the relief is given as a matter of course, and so parties will always know where they stand. In the present context, I cannot accept, particularly given the authorities to which I was taken in the aviation field where relief was not granted but, more generally, given that relief is an exceptional jurisdiction, that there is the certainty that Lord Wolfson suggested.

Compelling the parties to transact

396. Lastly, Mr Shah submitted that it would not be fair and equitable to compel FWA to transact with VietJet for two reasons: first, because VietJet represents a serious future credit risk in light of its proven unreliability in meeting its payment obligations; and, secondly, because FWA cannot be fairly compelled to enter into a commercial relationship with VietJet.

397. Again, although Lord Wolfson suggested that it lies ill in the mouth of a hedge fund *"that deliberately bought into these loans when VietJet was already in difficulties"*, I agree with Mr Shah about this. The credit risk is heightened in circumstances where: the Leases were for the Aircraft, the value of which will have depreciated further by the time of any future default; and VietJet's conduct in unlawfully retaining possession of the Aircraft and reducing their value further by continuing to operate them indicates that readily recovering the Aircraft in the case of any future default would be extremely difficult.

398. Secondly, again as Mr Shah submitted, it would be inequitable for FWA to have to transact with a party that has engaged in the conduct that VietJet has in orchestrating proceedings designed to undermine FWA's dealings with the regulatory authorities.

Indeed, again as Mr Shah observed, VietJet has itself sought to characterise FitzWalter as having engaged (as Lord Wolfson variously put it) in a *"scheme"* and an *"absolute farrago"* in order to obtain its rights in relation to the Aircraft. The idea, in such circumstances, that VietJet and FWA could be expected to work together going forwards is somewhat fanciful.

Overall

399. These various factors, viewed separately and cumulatively, make it impossible to conclude that it would be unconscionable for FWA to insist upon the enforcement of the termination rights under the Sub-Leases. By way of summary:

(1) This is not a windfall case because what was done by FWA was what was permitted to be done under the contractual arrangements that had been agreed.

(2) VietJet's defaults were substantial and longstanding, and VietJet could have satisfied its outstanding obligations but chose not to do this despite knowing what would happen if the arrears were not paid.

(3) VietJet thereafter went on to use the Aircraft, earning an income through doing so and only belatedly suggesting that relief from forfeiture would be appropriate.

(4) VietJet has conducted and orchestrated a campaign in Vietnam since it delivered the Aircraft to FWA that has been designed to interfere with FWA's efforts to export the Aircraft from Vietnam and, in turn, to compel the re-leasing of the Aircraft to VietJet. That is conduct which is both egregious and closely connected with VietJet's application for relief from forfeiture.

(5) This is not one of those exceptional cases where, in a commercial context where certainty is important, relief from forfeiture should be granted.

(6) In the circumstances, as just explained, it would also not be fair and equitable to compel FWA to transact with VietJet.

400. Accordingly, on the assumption that the Court has jurisdiction, in the Court's discretion, the answer to Question 12 is 'no' and VietJet's application for relief from forfeiture is refused.

Conclusion

401. It follows that FWA's claim succeeds.

402. The precise form of the relief that is appropriate, as a result, will need to be considered separately. If that can be done at the hand down of this judgment, that would be desirable. If that is not possible, then, it will need to be addressed at a separate hearing. Either way, the parties are urged to do their best to reach agreement if at all possible on the relief that should ensue from this judgment.

403. I end by thanking counsel and solicitors for the assistance which they gave me in relation to what was a difficult and complex case.