Neutral Citation Number: [2022] EWHC 1362 (Comm)

Case No: LM-2021-000081

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

THE LONDON CIRCUIT COMMERCIAL COURT (QBD)

Date: 6 June 2022

Before :

HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

FTAI AirOpCo UK Limited **Claimant**

- and –

Olympus Airways S.A. **Defendant**

- -
- -

Mr AARON TAYLOR (instructed by **NORTON ROSE FULBRIGHT LLP**) for the **Claimant**

Mr THOMAS STEWARD (instructed by **GATELEY UK LLP**) for the **Defendant**

Hearing dates: 5, 6 7 October 2021

Written Submissions from the Claimant: 5 November 2021; 19 November 2021
Written Submissions from the Defendant: 5 November 2021 (filed on 12 November 2021); 19 November 2021
Further oral submissions: 15 December 2021

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JUDGMENT

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

His Honour Judge Pearce :

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INTRODUCTION

1. This is my judgment on the trial of this case that took place from 5 to 7 October 2021. There was insufficient time to deal with closing submissions orally and hence I made a direction providing for the exchange of written submissions with the right for each party to serve further submission in reply, limited to matters of law and/or factual errors.

2. In the event, the Claimant's written closing submissions provided further primary evidence that had not been admitted in trial. The Defendant objected to such a course of action. This led to a further hearing before me on 15 December 2021 when I ruled against admission of the further material.

3. The length of this judgment reflects the very many issues that have been raised. The case is further complicated by repeated references by the Defendant to what it asserts the

"*regulatory"* position to have been. I have sought to confine the judgment to the main issues and have dealt summarily with certain arguments that appeared to me to be unpleaded, unsupported by evidence and/or unarguable.

4. Within this judgment:

   4.1. Various abbreviations are used. These are set out in Appendix 8, which also includes a glossary of the main terms used.

   4.2. Where passages are cited from the evidence given at trial, these are taken without alteration from the transcript, unless otherwise stated.

   4.3. Where passages are cited from witness statement that were originally in Greek, I have simply used the English translations;

   4.4. All references to dollar values are a reference to US dollars.

SUMMARY OF THE CLAIM

5. The Claimant is involved in finance within the aircraft industry. It is part of a group of companies that are controlled by Fortress Transportation and Infrastructure Investors LLC[1] and ultimately Fortress Investment Group LLC ("Fortress Investment"). The corporate structure of the companies was touched on by Mr Lewis, a witness for the Claimant, in his evidence and is referred to further below.

6. The Defendant is a Greek-based aircraft operator.

7. This claim relates to the lease of an Airbus 319-100 aircraft, registration SX-BHN, with manufacturer's serial number 1612 and two Engines with engine serial numbers 575280 and 779311 ("the Aircraft").

8. The Defendant leased the Aircraft from ALS Leasing UK Ltd ("ALS") (a sister company of the then-Owner, ALS Leasing Ltd) by an agreement dated 22 January 2016 ("the Lease Agreement")[2]. Relevant terms of the Leasing Agreement are set out at Appendix 1 to this judgment.

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[1] Slightly differing naming conventions have arisen in this case because Mr Lewis, the witness for the Claimant would call this company "FTAI" but the Defendant adopts "FTAI" as a name for the Claimant. For the sake of clarity I will hereafter use the name "Fortress Transportation" for Fortress Transportation and Infrastructure Investors LLC and "Fortress Group" for the whole group of companies owned by Fortress Investment. The exact inter-relationship of companies in the Fortress Group matters for the purpose of one issue identified below.

[2] ALS is part of the AerCap group of companies, described in the Defendant's opening as an international lease and finance group for aircraft and associated assets. The name "AerCap" is used at various points in the documents

9. The Lease Term was 48 months from the Delivery Date, being 10 March 2016. On 30 July 2018, ALS served a Notice of Default on the Defendant requiring the Defendant to ground the Aircraft ("the Grounding Notice"). As became apparent at trial, the aircraft was in fact flown commercially following service of this notice.

10. The Aircraft was sold by a contract ("the Sale Agreement") to a sister company of the Claimant in the Fortress Group, WWTAI AirOpCo DAC II ("WWTAI") in July 2018, and the Lease Agreement was novated to the Claimant pursuant to an agreement dated 5 October 2018 ("the Novation Agreement"), and accompanying Effective Time Supplement. Relevant terms of the Sale Agreement appear at Appendix 2 hereto and relevant terms of the Novation Agreement at Appendix 3. The Effective Time Supplement appears at Appendix 4. On the same date, the Claimant and WWTAI entered into a Head Lease Agreement, in order to regulate matters consequential upon the sale of the Aircraft and the novation of the Leasing Agreement.

11. The Claimant, as the lessor following novation, served a Notice of Event of Default on 26 October 2018, demanding that the events of default which were alleged to be continuing under the Lease Agreement (including unpaid rent) were cured by no later than 5pm Ne York time on 31 October 2018.

12. The Claimant alleges that the continuing events of default were not cured by 31 October 2018, or any time thereafter. On 1 November 2018, the Claimant served a Default and Termination Notice. A Second Default and Termination Notice was served on 2 November 2018.

13. It is common ground that the rent claimed has not been paid. The Defendant does not deny its obligation to pay some rent under the Agreement, but puts the Claimant to proof of the Effective Time of the Novation Agreement, and denies liability to pay rent arising prior to the Effective Time. It is the Claimant's case that the effect of the notices was that the leasing of the Aircraft was terminated and the Defendant was required to return it to Athens Airport in accordance with the demand in the Notice.

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before me. Nothing of significance turns on the distinction between the various companies in the AerCap group and for the sake of simplicity I simply refer to ALS.

14. Further, the Claimant contends that, as of 1 November 2018, and at all times thereafter, the Aircraft was in a condition that did not comply with the Return Condition set out in Article 23 of the Lease Agreement, and was not suitable for a ferry flight to the UK.

15. Later in 2019, the Aircraft was detained a result of debts owing by the Defendant to third parties. The Claimant says that it satisfied various debts owed by the Defendant in order to lift the detention, including parking charges payable to Athens Airport and VAT payable to the Greek customs authorities.

16. On 6 March 2020, the Claimant applied to the Greek authorities for permission to disassemble the Aircraft in situ. That permission was granted on 15 July 2020, and disassembly commenced on 21 July 2020. WWTAI sold the airframe in July 2020 for $750,000. The Engines were removed in August 2020, and are currently awaiting repair.

17. The Claimant claims the following relief:

    17.1. Unpaid Rent (Base Rent and Maintenance Rent, plus Default Rent from the period after the Expiration Date of the Lease Agreement);

    17.2. Costs and expenses incurred by the Claimant in enforcing its contractual rights;

    17.3. The Diminution in Value of the Aircraft (that is, the difference between the value the Aircraft would have had if it had been returned on the Expiration Date in Return Condition, and its actual value on the Termination Date); and

    17.4. Contractual (alternatively statutory) Interest.

18. The Defendant denies the claim on a variety of grounds identified below.

THE TRIAL

19. Witnesses were heard on 5, 6 and 7 October 2021. As noted above, it was intended that closing submissions be in writing but, because of an issue as to additional material relied on by the Claimant, further oral submissions on the Claimant's application to rely on additional evidence were heard on 15 December 2021. I refused that application and accordingly the closing submissions are limited to those dated 5 November 2021 and 19 November 2021 from the Claimant and 5 November 2021 (filed on 12 November 2021) and 19 November 2021 from the Defendant.

20. The parties relied on the following witnesses:

20.1. For the Claimant, Mr Jeff Lewis, head of aircraft leasing for the group of companies of which the Claimant forms part, whose statement is dated 1 April 2021. He gave oral evidence at trial.

20.2. For the Defendant:

20.2.1. The fourth witness statement of John Alyfantis, the Defendant's technical Manager, dated 30 July 2021[3];

20.2.2. The witness statement of Theodore Karabatis, the Defendant's commercial manager, dated 30 July 2021;

20.2.3. The witness statement of Theodore Dafaranas, a former advisor to the Defendant, dated 30 July 2021;

20.2.4. The witness statement of Eleni Kakavani, the Defendant's Head of Accounts, dated 30 July 2021.

All save Ms Kakavani gave evidence at trial.

21. This case turns in large part on analysis of the contractual and other documentation, rather than on factual issues addressed by the witnesses. However, there are some matters, referred to below, where the witness evidence is central.

22. The parties were given permission to rely on expert evidence:

22.1. Pursuant to the CCMC Order of HHJ Pelling QC dated 24 July 2020, as amended by the Order of Mr Justice Foxton dated 24 February 2021 made by consent, the parties instructed Mr Philip Seymour of the International Bureau of Aviation (IBA), as a Single Joint Expert on the issue of the condition and valuation of the Aircraft.

22.2. The parties each submitted further written questions to Mr Seymour following his report to which he responded in a composite response dated 21 May 2021. However, he did not reply to a number of the Defendant's questions, stating them to be outside the scope of his instructions, which were limited to the valuation of the Aircraft and the question as to whether it was in the Return Condition.

23. Following service of Mr Seymour's response to the parties' questions, the Defendant applied for an order that Mr Seymour respond to the questions which he had not answered

[3] All references to Mr Alyfantis' statement are to this statement unless otherwise stated. As the numbering implies, there were earlier statements.

and/or that the Defendant have permission to rely on a separate expert report. That application was dismissed by HHJ Pelling QC on 2 July 2021.

24. The Defendant made a further application on 16 July 2021 for permission that:

> *"(i) The Expert report be excluded totally due to his inexperience and failing to answer the Defendant's questions; and/or*
>
> *(ii) The Expert is required to attend and give oral evidence at the hearing about his report and/or*
>
> *(iii) The Defendant be allowed to appoint its own expert for the questions that the expert refused to answer; and/or*
>
> *(iv) Pro-rata return of the experts fees (i.e. Defendant paid 15,000 GBP) for failing to answer all the Defendant's questions."*

In a hearing on 23 September 2021, I refused that application, together with an application for permission to amend the defence and to counterclaim and for adjournment of the trial.

LAY WITNESS EVIDENCE AT TRIAL

25. I bear in mind that in this case, as in so many commercial disputes, the most reliable source of evidence is likely to be documentary in nature. Where the contemporary documents tell a clear story, later inconsistent accounts by witnesses based on their recollection of matters are likely to be unreliable for all of the reasons considered by Leggatt J as he then was in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) and Blue v Ashley [2017] EWHC 1928 (Comm). Nevertheless, as Floyd LJ said in Kogan v Martin [2019] EWCA Civ 1645 (citing the judgment of HHJ Gore QC in CXB v North West Anglia Foundation NHS Trust [2019] EWHC 2053 as to the caution to be exercised in applying the above passage from Gestmin), "*a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence."* This must be particularly so where, as here, there are certain aspects of the case which are not dealt with in contemporaneous document.

26. The Defendant makes the point that the Claimant did not challenge many parts of the Defendant's evidence during cross examination. However, the Claimant draws attention to the decision of Foskett J in Various Claimants v Giambrone [2015] EWHC 1946 (QB). Where a witness gives evidence that is irrelevant or fall outside of the scope that the witness can properly give, it is not necessary to challenge it by way of cross examination. Further,

the mere fact that an issue is not specifically challenged does not mean that it has to be accepted as an uncontested fact.

EXPERT EVIDENCE AT TRIAL

27. Mr Seymour's evidence was admitted in written form. It is largely supportive of the Claimant's case. In Appendix 3, he identifies various respects in which he says that the Aircraft was not in compliance with the Return Condition and sets out the cost of making it compliant, namely $2,270,800. Certain accrued Maintenance Reserves would fall to be applied against these works such that the net cost to the lessee of compliance as of that date would have been $1,682,654.

28. In response to written questions posed of him by the Defendant, he made other relevant comments:

    28.1. In response to the Defendant's question 3.5 *"As of November 2018, do you agree that the Aircraft was capable of (i) a ferry flight…?",* Mr Seymour says: "*I did not consider that the Aircraft was capable of any flight without addressing the overdue AD and missing batteries (by way of example)".*

    28.2. In response to the Defendant's question 3.6 *"As of the November 2018, do you agree that the Aircraft was certified to be flown…?",* Mr Seymour says, "*Although there was an Airworthiness Review Certificate issued prior to the aircraft being taken out of service it serves as evidence as at the date of issue and does not certify the airworthiness at any other date apart from the date of issue."*

29. Following those responses, the Defendant issued the unsuccessful application referred to above so as to seek to avoid the potential consequence of Mr Seymour's conclusions.

30. The Defendant seeks to place reliance upon the expertise of its witnesses. Both Mr Alyfantis and Mr Dafaranas are said to have experience in terms of aircraft maintenance and airworthiness. Whilst I am willing to accept that they have relevant experience, CPR Part 35 puts particular limitations on the admission of expert evidence. Regardless of whether the Defendant's witnesses are qualified to speak on matters of expertise, the Defendant has no permission to rely on such evidence, contrary to the requirement of CPR 35. Whilst there may be circumstances in which a person's experience and technical knowledge may unavoidably bear on their answer to a particular question that they are asked and therefore may become admissible in evidence, the court must be careful to

prevent a party riding roughshod over the various protections of Part 35, most obviously the fact that an expert giving evidence under Part 35 owes duties to the court in the way that other witnesses do not. Save in so far as their evidence is coincidental to the narrative of which they speak, any expert evidence given by these witnesses is not admissible, since permission has neither been sought nor granted under CPR 35 to rely on it as such.

31. Further, much of the evidence from its witnesses that the Defendant relies on in closing submissions is as to the regulatory position of an operator in the position of the Defendant (or indeed a lessor in the position of the Claimant). The Defendant's witnesses, particularly Mr Dafaranas and Mr Karabatis, repeatedly gave evidence as to what they said the effect of various of the events in this case were on the obligations of the parties. In so far as those matters were undisputed or supported by other material in front of me, I am happy to accept the evidence. But much of what the witnesses had to say appears to involve their interpretation of the relevant law, often in a way which is inconsistent with the rights that appear to arise under the Lease Agreement. The material upon which they have based their interpretation of the relevant regulatory framework was not put in front of me. It is not open to the Defendant to seek to evade other means of proving its case by having lay witnesses give evidence of matters of law that are not accepted (or in many cases even pleaded). I therefore treat such evidence with considerable caution.

THE AGREEMENTS

The Lease Agreement

32. The original Lease Agreement was signed on 22 January 2016 by ALS as Lessor and Olympus as Lessee. The Lease Term was 48 months from the Delivery Date.

33. On 10 March 2016, an "Estoppel and Acceptance Certificate" was issued, confirming the Delivery Date of the Aircraft (10 March 2016 at 17.00) and stating the agreed value to be $18,000,000. It is agreed that this was the Delivery Date under the Lease Agreement. Accordingly, pursuant to Article 4.1, the Lease Term was 48 months from that date, the Expiry Date being 10 March 2020.

34. Article 4.3 of the Lease Agreement defines the "*Termination Date*." The date is significant because the lessee remains liable to pay Base Rent until that date, pursuant to Article 5.4.2 of the Lease Agreement.

35. Article 5.1 of the Lease Agreement concerns the Security Deposit. As defined in Schedule I, the Security Deposit was in the total sum of $375,000.

36. Two kinds of Rent are payable under the Lease Agreement. First, Base Rent is payable monthly under Article 5.4. Under Article 8.1 of the Novation Agreement, the parties agreed that Base Rent is $125,000 per month. Second, Maintenance Rent ("MR"[4]), defined in Article 5.5, is payable monthly and is divided into several scheduled maintenance events, such as the Airframe 6-Year Check, and maintenance of the Engine Life Limited Parts. (Article 8.3 of the Novation Agreement sets out the rates for each category of Maintenance Rent; these rates are either incurred monthly or according to utilisation.) The Lease Agreement sets out various "Maintenance Rent Activities" ("MRAs") that the Defendant is obliged to perform. The MRAs correspond to the maintenance events in respect of which the Defendant is liable to pay Maintenance Rent. On performance, the Defendant is entitled to contribution to the cost under Article 13, having followed the procedure set out in Article 13.6 of the Lease Agreement. In summary, the Lessee is entitled to payment by the Lessor after (a) the applicable MRA is completed; (b) the supporting documentation as provided in Exhibit Q to the Lease Agreement has been submitted; (c) proof of payment has been submitted and (d) a MRA Claim is made by the Lessee. Under Article 13.9, any such invoice must be submitted or notified prior to the Termination Date.

37. The nature of Maintenance Rent is an important feature of this case. Article 5.5.2 of the Lease Agreement states that Maintenance Rent is to be treated as part of the Rent, to which the Lessor has absolute title on receipt, and that the Lessee has no right to or interest in those sums.

38. The difference between the total Maintenance Rent received by the Lessor and any contributions made by the Lessor pursuant to Article 13.6, constitutes the "*MRA Maintenance Rent Balance*" under the definition in Article 2.1. This is what is called the Maintenance Reserve – see footnote 4 above.

39. Article 5.8 provides for the payment of Default Interest following the Lessee's failure to pay Rent which has fallen due. The Default Interest Rate is defined in Clause F of Schedule I as one-month US Dollar LIBOR plus 8%.

[4] The abbreviation "MR" is used at times within the trial documents to mean Maintenance Rent and at times to mean maintenance Reserve(s) (sometimes MRs in the plural). The Maintenance Reserve is the sum of the Maintenance Rent (less the amounts paid out for Maintenance Rent activities as referred to below). I shall use MR only in the context of Maintenance Rent.

40. Article 5.14 provides that, *"If Lessee fails to make any payment under this Lease to a third party in connection with the Aircraft or fails to perform any other obligation required under this Lease, Lessor may (but is not required to) at its election… pay such amount."* In that event, the relevant sum is repayable by the Lessee to the Lessor as Rent, together with Default Interest.

41. Article 12.1 of the Lease Agreement sets out the Lessee's obligation to maintain the Aircraft, Engines and Parts, in accordance with the Maintenance Programme, the Manufacturer's type design, and with all requirements (including Airworthiness Directives) necessary in order to maintain a valid Certificate of Airworthiness.

42. Article 12.13 sets out the Lessor's right to inspect the Aircraft and Aircraft Documents at any time, on giving reasonable notice.

43. Article 17.1 of the Lease Agreement provides a wide-ranging indemnity provided by the Lessee to the Lessor, in respect of any liability, loss or claim arising out of, inter alia, airport charges, the detention of the Aircraft or any Event of Default.

44. Article 23 of the Lease Agreement sets out the cumulative requirements for putting the Aircraft into Return Condition.

45. Article 25.2 sets out the acts of the Lessee which constitute so-called "*Events of Default*" under the Lease Agreement. These include non-payment of Rent, failure to return the Aircraft on the Expiration Date, uncured failure to perform any obligation under the agreement and failure to pay airport charges or customs duties.

46. Article 25.3 sets out the Lessor's rights upon an Event of Default. Those include the rights:

    46.1. To *"terminate Lessee's right to lease the Aircraft and terminate Lessor's obligations;"*

    46.2. To *"terminate the leasing of the Aircraft whereupon [….] all rights of Lessee to possess and operate the Aircraft will immediately cease and terminate and in which case Lessee's obligations under this Lease will continue in full force and effect;"*

    46.3. To give notice to the Lessee requiring it to move the Aircraft to an airport or other location designated by the Lessor;

    46.4. To take possession of the Aircraft and Aircraft Documents;

46.5. To sell or lease all or any part of the Aircraft on such terms as it considers appropriate in its absolute discretion;

46.6. To take any steps to cure any default and recover the associated costs from the Lessee;

46.7. To take steps to enforce performance of the Lease Agreement and recover damages for breach; and/or

46.8. To apply the Security Deposit and MRA Maintenance Rent Balance.

47. By Article 25.6, the Lessee indemnifies the Lessor against *"any loss, damage, expense, cost or liability which Lessor may sustain or incur directly or indirectly as a result"* of an Event of Default, including:

47.1. Losses suffered as a result of a delay in the redelivery of the Aircraft, including parking and maintenance costs;

47.2. Sums outstanding under the Lease Agreement;

47.3. Losses suffered by the Lessor or Owner through their inability to place the Aircraft on lease with another person on as favourable terms;

47.4. Any losses suffered by the Lessor, Owner, or Relevant Party through the sale or disposition of an interest in the Aircraft on terms which are less profitable than leasing the Aircraft in accordance with the terms of the Lease Agreement would have been;

47.5. The costs of enforcing its remedies under the Lease Agreement;

47.6. "*Any loss, cost, expense or liability sustained by LESSOR or Owner due to LESSEE's failure to return the Aircraft in the condition required by this Lease*," including the costs required to put the Aircraft into Return Condition; and

47.7. "*An amount sufficient to fully compensate Owner for any loss or Diminution to Owner's residual interest in the Aircraft due to Lessee's failure to maintain the Aircraft in accordance with this Lease.*"

48. Article 25.9 (*"Use of 'Termination Date'"*) provides that, *"if Lessor terminates the leasing of the Aircraft"* and then repossesses the Aircraft prior to the Expiration Date, the Rent and damages payable to the Lessor shall be calculated in respect of the full Lease Term. In

particular, *"LESSOR is entitled to receive from LESSEE the Rent and the benefit of Lessee's insurance and maintenance of the Aircraft until expiration of the Lease Term."*

Estoppel and Acceptance Certificate

49. On the same date as the Lease Agreement, the Defendant signed an Estoppel and Acceptance Certificate in respect of the Aircraft, confirming the delivery condition of the Aircraft, and exhibiting detailed technical documents.

The Sale Agreement

50. By an agreement dated 18 July 2018, ALS sold the Aircraft to WWTAI. The relevant terms of the Sale Agreement appear at Appendix 4. The sale price was $15,000,000 but the "net sale price", the amount that WWTAI had to pay, was defined as the sale price less a deposit paid by WWTAI, the Security Deposit, the balance of any Maintenance Rent/Reserves then held by ALS and the rent received by ALS attributable to an identified period concluding with the day before the sale date.

51. An Acceptance Certificate was signed by WWTAI and ALS acknowledging purchase on 5 October 2018 at 8.30am and stating, amongst other things:

"*5. The Aircraft, Engines, Parts and Aircraft Documentation have been fully examined by Buyer and have been received in a condition fully satisfactory to Buyer and in full conformity with the Sale Agreement in every respect.*

6. Buyer agrees that it is purchasing the Aircraft "AS IS, WHERE IS AND WITH ALL FAULTS" and subject to the terms and conditions of the Sale Agreement."

The Novation and Amendment Agreement

52. By an agreement dated 5 October 2018 and called a "*Novation and Amendment Agreement*," ALS, as existing lessor, the Defendant as existing lessee and the Claimant as the new lessor agreed that the Claimant would succeed ALS as lessor and that the lease Agreement would be novated as of the "*Effective Time."*

53. The Novation Agreement contains a mutual release between ALS (as "Existing Lessor") and the Defendant (as Lessee), and the assumption of rights and obligations pursuant to the terms of the Lease Agreement (save for certain provisions such as delivery) between the Claimant (as "New Lessor") and the Defendant. Accordingly, whilst WWTAI secured a discount on the purchase price of the Aircraft equal to the amount of the Maintenance

Reserve at the time of sale, the Claimant took on a corresponding obligation to use the Maintenance Reserve in accordance with the Lease Agreement as novated. Equally, the assumption of responsibilities by the Claimant under the Lease Agreement created an obligation for it to deal with the security deposit as if it were in receipt of that money – hence the discount from the sale price to represent the amount of the Security Deposit.

54. Article 8.4 of the Novation Agreement sets out the MRA Maintenance Rent Balance at the time of the novation.

Effective Time Supplement

55. An "*Effective Time Supplement"* was subsequently signed, stating that the "*Effective Time*" for the purpose of the Novation Agreement was 11.30am on 5 October 2018.

THE ISSUES

56. The issues in dispute are set out thus at paragraph 30 of the Case Memorandum and List of Issues:

56.1. What was the Effective Time of the novation of the Lease Agreement? What sums (if any) claimed by the Claimant fell due prior to the Effective Time, and can the Claimant recover them?

56.2. What was the effect of the Notices served by the Claimant dated 26 October 2018, 1 November 2018 and 2 November 2018? What was the effect of the Claimants' request dated 23 November 2018?

56.3. What was the Termination Date of the lease Agreement?

56.4. Was the Aircraft in the condition required by Article 23 of the Lease ("the Return Condition[5]") as at the Termination Date contended for by the Defendant (1 November 2018)? If not, what was the Actual Condition of the Aircraft?

56.5. If the Termination Date of the lease Agreement was later than the Termination Date contended for by the Defendant, was the Defendant required to maintain the Aircraft until the true Termination Date? If so, did it comply with that obligation?

56.6. Is the Claimant entitled to any or all of the sums claimed in paragraphs 33-36 Amended Particulars of Claim?

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[5] Whilst this is not a defined term in the Lease Agreement, it has been adopted by the parties in the Case Memorandum and is a useful term.

56.7. Is the Claimant entitled to damages representing the diminution in value of the Aircraft, and if so, how are those damages to be calculated?

57. As the trial has evolved, it is helpful to redefine those issues:

57.1. Issue 1: Novation

57.1.1. What was the Effective Time of the novation of the Lease Agreement?

57.1.2. What sums (if any) claimed by the Claimant fell due prior to the Effective Time?

57.1.3. Can the Claimant recover such sums?

57.2. Issue 2: Default and Termination Notices:

57.2.1. What was the effect of the Notices served by the Claimant dated 26 October 2018, 1 November 2018 and 2 November 2018?

57.3. Issue 3: Termination Date:

57.3.1. What was the Termination Date of the lease Agreement?

57.4. Issue 4: Condition as at Termination Date:

57.4.1. Was the Aircraft in Return Condition as at the Termination Date as contended for by the Defendant?

57.4.2. If not, what was the Actual Condition of the Aircraft?

57.5. Issue 5: Maintenance until Termination Date:

57.5.1. If the true Termination Date of the Lease Agreement was later than the Defendant Termination Date, was the Defendant required:

(a) To maintain the Aircraft until the true Termination Date?

(b) To pay Maintenance Rent until the true Termination Date?

57.6. Issue 6: Relief

57.6.1. Is the Claimant entitled to any or all of the sums claimed in paragraphs 33 to 36 of the Amended Particulars of Claim?

57.6.2. Has the Claimant failed to mitigate its loss?

57.6.3. If so, to what extent at all is its recoverable loss reduced as a result?

57.6.4. Is the Claimant entitled to damages representing the diminution in value of the Aircraft?

57.6.5. If so, how are those damages to be calculated?

58. It should be noted that, in this redefinition of the issues, the question of the significance of the Claimant's request dated 23 November 2018 for the return of the Aircraft by ferry flight has been removed. As the trial unfolded, it became apparent that the issue as to whether the Claimant was entitled to and/or did require the Defendant to arrange a ferry flight was in fact not determinative of any of the key issues in the case. In so far as it is relevant, it is subsumed in other points as to the finding on the true Termination Date, the obligation of the Defendant to pay Maintenance Rent until that date and the Defendant's alleged liability for diminution in value.

RELEVANT FACTUAL HISTORY

59. The chronology of events, at least from the documents is well summarised in the chronologies provided by both parties. Appendix 5 to this judgment contains a chronology of the important dates and documents and I am grateful to counsel for both parties, on whom I have leant heavily for its contents. Relatively little in the chronology is in fact disputed, though not all of the points advanced by the Claimant are accepted by the Defendant. However, having considered the evidence from the Claimant (much of which is uncontradicted), I accept that this chronology accurately sets out the relevant events, identifying where significant matters are disputed. I have not adopted some of the matters in the parties' chronologies that amount to comment rather than the strict recitation of the relevant history.

60. In so far as greater detail needed on factual issues than is provided by the chronology, I refer to the evidence when dealing with the issue to which it is relevant.

61. However two areas of the case merit further consideration because they are relied on by the parties as undermining the credibility of the evidence called by the opposing party.

62. First, the Defendant attacks the credibility of the Claimant's witness, Mr Lewis and the case advanced by the Claimant generally, on the ground that the Claimant, rather than being an honest player in the field of aircraft finance, took over this lease with the fixed intention of terminating it, breaking the Aircraft and reletting the engines.

63. Mr Lewis is a senior vice president of Fortress Investment and Head of Aircraft Leasing for its subsidiary, Fortress Transportation. Fortress Transportation in turn controls WWTAI AirOpCo 1 Bermuda Limited, the parent company of the Claimant, as well as WWTAI, the owner of the Aircraft.

64. Mr Lewis was challenged on various aspects of his evidence. On the whole, he made appropriate concessions, accepting that some of the matters of which he spoke were outside his knowledge. It may have been unwise for him to have given evidence of such matters in the first place.

65. One of the issues touched on by Mr Lewis in his witness statement was the Claimant's intentions in respect of the Aircraft. At paragraphs 29 and 30, he said:

> *"29. Our intention for the Aircraft was to recover the asset and have it flown to the Maintenance Repair Organization facility in the UK using Olympus pilots (which was part of the airline's obligations under the Agreement). This ferry flight (i.e. flight to move the Aircraft), would take place prior to us deregistering the Aircraft from the Greek Civil Aviation Registry. Assuming the Aircraft would be in the return condition specified in the Lease Agreement, once the Aircraft was delivered to the GCAM/ASI MRO facility at Cirencester Airport the intention was to market the Aircraft for lease to a new operator.*
>
> *30. However, upon the Meton Skies physical inspection of the Aircraft which took place on 13 November 2018, it was evident that it had not been maintained or preserved properly [JL1 pages 26-47]. The financial investment required for maintenance to prepare it for the next operator (i.e. put it into Return Condition) would be significant. The Aircraft was over 20 years old and it was not economically viable for FTAI to do so. Given our historical experience with Olympus, we anticipated we would be end up having to undertake the maintenance ourselves, and even though we would be entitled to recover those costs from the airline we had concerns about the economic viability of outlaying those expenses. We therefore made the decision internally to focus on recovering the investment and value in the asset. At that point, our intention because to market the airframe for sale, and to remove the engines, repair them, and market the engines within our engine lease pool or for sale.*

66. This passage gives the impression that the Claimant only came to the idea of separating the engines from the Airframe after the Meton Skies inspection. The Defendant disputes this, contending that, almost from the outset, the Claimant intended to dismantle the plane, separating the engines, which would be leased or sold, and the airframe itself. The Defendant points to the fact that the Claimant and its associated companies had not inspected the Aircraft, reviewed the Aircraft documents nor asked the Defendant to sign a technical acceptance certificate prior to purchase. Mr Alyfantis describes these as "*standard practice in the industry*" at paragraph 12 of his statement and draws the inference from the failure to do so that the Claimant never intended to release the Aircraft as a whole.

67. During cross examination, Mr Lewis was taken to documents which referred to the Claimant's plans for the Aircraft prior to the Meton Skies inspection. In an exchange with counsel during cross examination, he said the following:

"Mr Steward: What those emails show is that you were intending to lease out the engines and sell the airframe.

Mr Lewis: That was one of the commercial opportunities that we had. What the emails don't show is that there is a marketing effort behind the scenes to find a lessee for the aircraft, but at the same time – because we tried to generate those opportunities and then make a smart decision, the decision that's best for the business. At the time, the leasing opportunities were very weak and it was very quickly apparent that, once we ran the financial models, analysing the opportunities, for the reason I just stated a minute ago, was that the economics of selling the airframe and putting the engines into the lease pool, or selling them if it was opportunistic, were favourable to try to find a new lease for the aircraft.

Mr Steward: But that's the problem, isn't it, Mr Lewis, there are no emails supporting your suggestion that there were attempts to lease out this aircraft? There's nothing at all to show that that's what you were trying to do with this aircraft. What the emails show is that you have taken the decision, pretty early on, on 2 November, that the best way to go was to lease out the engines and sell the airframe.

Mr Lewis: Well, you know, I cannot comment to the existence of emails. I do know personally that I was trying to market this airframe for lease. However, the model very strongly suggested, and it was – let me – the model supported the decision that was made."

68. The Defendant argues that Mr Lewis was unconvincing in his evidence that attempts were made to find a customer who would lease the Aircraft and that this was an attempt to divert from the position that a firm decision had been taken to sell off the Airframe and lease out the engines separately. I do not accept that Mr Lewis was evasive or in some way unconvincing on this issue. In fact, to the contrary, he was quite clear that the most likely course of action, from the time of the decision to serve the Termination Notice was that the engines would be separated from the Airframe and leased separately. He said that this was the "*number one*" course of action that "*would have the highest percentage chance of success.*" This was a clear acknowledgment of what was being put by the Defendant and does not suggest evasiveness at all.

69. It is correct that the original statement gives a different impression. However, the Defendant's statements of case do not reveal the significance that this issue is now said to have. If the Defendant had pleaded that it was always the Claimant's intention to manufacture or induce a situation where the Defendant was in default and the Claimant became entitled to take back the Aircraft from the outset of the lease and lease the engines out separately, the failure of Mr Lewis to mention in his witness statement that the Fortress Group was favouring leasing the engines separately may have been significant. Since that was not the pleaded case but an argument only advanced at trial, I see little significance in it.

70. Ultimately, the Defendant's case on this issue seems to be that, whilst Mr Lewis was accepting the possibility of separate leasing of the engines, he was not being straightforward in that he refused to acknowledge that this was not merely the most likely course of action for Fortress but rather was its determined position. I see no reason to reject his evidence that the separation of the engines from the Aircraft was simply the most likely option, but that if a suitable customer had been found who would lease the Aircraft on acceptable terms, that this too was a possible course of action. That would make perfect economic sense and further, had he been trying to hide the true situation, I would not have expected him to concede that sale of the engines was the most likely option.

71. In any event, the fact that the Claimant was contemplating the dismantling of the Aircraft to allow the separate leasing of the engines does not detract from the obligations of the Defendant relating to the Return Condition. Those obligations as set out above are clear from the terms of the lease Agreement. What the Fortress Group did with the Aircraft after

its return was a matter for it, but the Claimant was entitled to require return in that condition. What it decided to do with the Aircraft might very well depend on its condition on return. In any event, whilst it is clear that some aspects of the Return Condition are only relevant if the Airframe and engines remain united (for example, the requirement in clause 23.9.8 that the Aircraft be airworthy), others (for example the obligation that Parts installed on the Aircraft meet particular requirements, for example in clauses 23.9.2, 23.9.5 and 23.9.6) would apply both to the Aircraft if it remained whole of the airframe and engines if they were separated.

72. The Claimant in contrast places great emphasis on the use of the Aircraft in August 2018 as indicative of a lack of straightforwardness by at least some of the Defendant's witnesses. As noted above, ALS served a Grounding Notice on 30 July 2018. The Defence, signed by Mr Karabatis, states at paragraph 39:

"*ALS Leasing UK Limited served a Notice dated 30 July 2018 requiring the Defendant to cease commercial operations of the aircraft, not to move the aircraft from the grounding location until further express written notice from the lessor and not to operate or handle the aircraft. The aircraft was grounded pursuant to that notice. At the time of grounding, the aircraft was airworthy.*"

73. Mr Alyfantis speaks of the Grounding Notice at paragraph 9 of his statement:

> *"…OLY received a "grounding notice" telling us not to move the Aircraft. This was on 30th July 2018. I remember asking the Commercial department what was going but they said to me that the Aircraft was being sold so it was to be grounded for a while. My team continued with the analysis but took no formal action (since we were told not to touch the Aircraft) until Aercap/ALS told us what was the next steps."*

This clearly gives the impression that the Aircraft was not in fact used commercially after 30 July 2018.

74. The evidence of Mr Karabatis was even clearer on this point. In his statement at paragraph 31, he said:

"The Aircraft, as part of the sale to FTAI, was ordered to be grounded by ALS on 30 July 2018. In August and September 2018, OLY received two invoices for August and September hire/rent and maintenance reserves. These invoices are attached as TK/3. They clearly state that the August and September sums for both hire and maintenance reserves. I

remember that OLY disagreed with these invoices since ALS required OLY to ground the Aircraft which means we could not use it for revenue services. Due to confidentiality, I will not discuss the terms of the settlement but I can say that OLY and ALS came to a commercial arrangement for the outstanding sums. This was resolved."

75. The Defendant's chronology for trial says of the Grounding Notice that "*Such notice was never revoked or withdrawn by the Claimant or ALS at any time."* Its opening describes the Grounding Notice as having interfered with the Defendant's warranty of quiet enjoyment.

76. During cross examination on this issue, Mr Karabatis said that, following the receipt of the grounding notice, "*Then we did receive an order from Aercap to operate, you know, for another period of time during August month. And then they gave us the advice, you know, that it stop this operation and they have other plans, you know, for the aircraft, so we delivered the aircraft back to Athens. So really the effect, it was there but never has been recalled, you know, by any written, if I remember well, other document. We just receive instructions from Aercap to act like that*." That account, and the acknowledgement of the commercial use of the Aircraft in August 2018, is significantly inconsistent with the account at paragraph 31 of the statement saying that the Aircraft could not be used for revenue purposes in that and the following month.

77. In fact in August 2018, the Aircraft was in Kuwait, subleased by the Defendant to Wataniya Airways. The "Monthly Aircraft Utilization and Status Report" for August 2018 shows that the Aircraft was flown on 29 days during that month, in a total of 121 cycles, way beyond what would be expected of an aircraft that had been grounded and was only subject to operation for the purpose of maintenance.

78. When cross examined on this material, Mr Alyfantis said that this usage, together with a final flight from Kuwait back to Athens on 31 August 2018, was with the consent of ALS. He further said that the usage was effectively a deal done directly between ALS and the sub lessee in which the rent was paid direct to ALS. In consequence, it is said, ALS agreed that maintenance rent was not payable. This is said to be the confidential agreement referred to in Mr Karabatis' statement.

THE CLAIMANT'S CASE

General Points

79. Within its closing and reply submissions, the Claimant complains that the Defendant has sought at trial to advance many arguments that are unpleaded and has sought through closing submissions to introduce new material in support of its case that was not admitted at trial.

80. Further, it contends that, in so far as the court is concerned to assess the reliability of the witness evidence adduced by the Defendant, it should be very cautious to accept what Mr Karabatis and Mr Alyfantis have to say, given that (the Claimant contends) they have been inconsistent as to the use of the Aircraft in August 2018.

Issue 1: Novation

81. The Claimant contends that the Effective Time of the Novation Agreement is, by virtue of Article 10 of that agreement, the date set out in the Effective Time Supplement, namely 5 October 2018. The latter was signed on 5 October 2018 by each of ALS, the Claimant and the Defendant, the Effective Time being deemed to be 11.30 (Greek time) on that day.

82. The Defendant itself pleaded reliance on the Effective Time Supplement at paragraph 9 of its Amended Defence, stating "*the novation of the Lease Agreement is effective as at the Effective Time, as evidenced by the Effective Time Supplement.*" Whilst the Defendant goes on in the defence to put the Claimant to proof of the Effective Time, it did not advance a positive case.

83. The Claimant contends that the Defendant's case advanced at trial set out below, to the effect that the formalities required for compliance with the conditions precedent of the Effective Time Supplement could not have been (or at the very least were not) completed before around 15 October 2017 is vague and in any event of no consequence unless the Defendant says (which it does not) that the Effective Time was after 15 October 2018.

84. As to the sums due as of 1 November 2018, the Claimant contends that the Base Rent of $125,000 payable on 10 October 2018 and the Maintenance Rent of $30,545 for September 2018, payable on 15 October 2018, were clearly sums payable after the Effective Time, for which the Defendant is liable.

85. As for the Maintenance Rent of $223,897 for August 2018, this was payable on 15 September 2018, which was clearly before the Effective Time for novation even on the

Claimant's case. In his witness statement, Mr Lewis referred to an invoice from the Claimant for this sum in the bundle. The Claimant contends that the Maintenance Rent for August 2018 is due to it pursuant to Article 2.1.4 of the Novation Agreement, which provides that "*Lessee consents to and accepts the assumption by the New Lessor of the rights, benefits, interests, obligations, duties and liabilities of Lessor under the Novated Lease Documents and the New Lessor's agreement to perform the obligations of Lessor under the Novated Lease documents*". The unpaid rent was a "*benefit"* or "*interest"* to which the Claimant is entitled by virtue of Article 2.1.4.

86. Further, in his oral evidence, Mr Lewis spoke of there being "*a gentleman's agreement"* between ALS and the Fortress Group pursuant to which the outstanding Rent would be deducted from the purchase price payable to ALS for the Aircraft and then re-invoiced by the Claimant to Defendant.

87. In so far as the Defendant contends that it had in fact already discharged its liability for the Maintenance Rent for August 2018 pursuant to an agreement with ALS (as to which see below), the outgoing lessor, the Claimant points to the following:

87.1. It is clear that, notwithstanding the grounding notice, the Aircraft was used commercially in August 2018. As I have noted above, Mr Alyfantis appeared to be saying in cross examination that the any flights were for the purpose of maintenance, though, given the evidence that came to light during the trial of there having been 121 flight cycles in that month, that seemed unlikely. In answer to a question from me, he confirmed that the flights in August were very largely "*revenue-gathering"* flights. Yet Mr Karabatis said at paragraph 1 of his statement that the Aircraft was grounded for the period of the rent liability in August 2018, relying on this as the reason for why the Defendant had disputed about the rent for August 2018, then come to an arrangement with ALS relating to it.

87.2. The Defendant asserts that there was some kind of commercial agreement with ALS about the sum due prior to the Novation but it has failed to produce that agreement. The Claimant requested a copy of the document (see for example letter from the Claimant's solicitors dated 7 September 2021), to which the Defendant replied variously that the settlement was "*confidential"* and "*irrelevant to the current claim"* (see Defendant's letter of 17 September 2021), but later said "*there is no*

settlement agreement to send you. Aercap and OLY settled the claims between themselves which are confidential."

87.3. If such an agreement exists, the fact that it is confidential is not a sufficient basis on which to resist its disclosure, not least when its contents are expressly relied upon in the Defendant's witness evidence (see PD51U, paragraph 21). The Claimant contends that the failure to produce the settlement agreement should be taken as evidence that no such agreement exists.

87.4. It follows that the Defendant has failed to give a clear account of the use to which the Aircraft was put in August 2018, the basis for any dispute about the liability to pay rent for that month or the alleged compromise of any such liability.

88. The Claimant therefore contends that the court should reject any suggestion that the Defendant has discharged its liability for the Maintenance Rent for August 2018 and instead should find it liable for that claim.

Issue 2: Default and Termination Notices

89. The Claimant relies on three notices served on 26 October 2018, 1 November 2018 and 2 November 2018.

89.1. The Notice dated 26 October 2018. This is headed "*Default Notice*" and states:

"*…This letter is to inform you that one or more Events of Default under Section 25 of the Lease have occurred and are continuing, including, but not limited to, Lessee's failure to pay Basic Rent and Maintenance Rent pursuant to the Lease. Lessor has repeatedly demanded payment of the overdue amounts described herein. Lessee's failure and refusal to so pay and/or its delay in such payment constitute Events of Default under the Lease and warrant the immediate termination of the Lease, repossession of the Aircraft and the exercise of further rights and remedies by Lessor.*

Lessor hereby demands that Lessee immediately cure all such Events of Default. If by 5:00 pm New York time on October 31 2018, Lessee has not cured all Events of Default to the satisfaction of Lessor, then Lessor shall forthwith commence exercising any and all available remedies including, without limitation, immediate termination of the Lease, repossession of the Aircraft and initiation of legal proceedings against Lessee (and any other appropriate parties) in any appropriate

forum to recover all damages suffered by Lessor as a result of Lessee's breaches of its obligations under the Lease or under applicable law…"

89.2. The Notice dated 1 November 2018. This is headed "*Default and Termination Notice*" and states:

"…This Notice is to inform you that one or more Events of Default under the Lease have occurred and are continuing. Please be advised that Lessor, in accordance with Section 25 of the Lease, hereby notifies Lessee that Lessor terminates Lessee's rights under the Lease, provided however such termination is without prejudice of Lessee's continuing obligations under the Lease and Lessor's rights to pursue all remedies under the Lease and applicable law, all of which are specifically reserved and not waived hereby.

Lessor further has the right, without further notice and after applicable cure periods, if any, to pursue any and all remedies available to Lessor under the Lease or under applicable law as Lessor determines to be appropriate…"

89.3. The Notice dated 2 November 2018. This is headed "*Second Default and Termination Notice*" and states:

"*…This Notice is to inform you that one or more Events of Default under Section 25 of the Lease have occurred and are continuing, including, but not limited to, Lessee's failure to pay Basic Rent and Maintenance Rent pursuant to the Lease as outlined on Annex I hereto. Pursuant to the Default Notice (1612) dated October 26, 2018 and sent to your attention via electronic mail and attached hereto as Annex II (the "Default Notice"), Lessor demanded you cure all of such Events of Default to the satisfaction of Lessor by 5:00 pm New York time on October 31, 2018.*

Please be advised that Lessor, in accordance with Section 25 of the Lease, hereby notifies Lessee that Lessor terminates the Lease and Lessee's rights under the Lease, provided however such termination is without prejudice of Lessee's continuing obligations under the Lease and Lessor's rights to pursue all remedies under the Lease and applicable law, all of which are specifically reserved and not waived hereby. Lessor demands Lessee immediately return the Aircraft to Lessor at the Athens International Airport.

Lessor further has the right, without further notice and after applicable cure periods, if any, to pursue any and all remedies available to Lessor under the Lease or under applicable law as Lessor determines to be appropriate…"

The Notice had attached a Schedule of three invoices, for the sums of $125,000, $30,545 and $223,897.

90. The Claimant contends that the effect of the second and third of these notices, whether taken individually or collectively with the other notices, was to bring the leasing of the Aircraft to an end and to require the Defendant to return the Aircraft, with the Claimant retaining its rights to other remedies under the Lease Agreement pursuant to clause 25.3(b).

91. The unpaid sums allegedly giving rise to the default are:

    91.1. Maintenance Rent of $223,897 for August 2018, payable on 15 September 2018,

    91.2. Base Rent of $125,000 payable on 10 October 2018;

    91.3. Maintenance Rent of $30,545 for September 2018, payable on 15 October 2018,

92. In so far as the court might find, under Issue 1, that the Defendant was not in fact liable for all of these sums, the Claimant contends that the Notices would remain valid. In this regard, the Claimant argues that a party serving a contractual termination notice based on a specified but invalid event of default, may nonetheless rely at trial upon the existence of an alternative event of default existing at the time of the notice that would have entitled it to terminate. It relies on two authorities in support of this proposition, ED&F Man v Fluxo-Cane [2010] EWHC 212 (Comm) and Sucden Financial v Fluxo-Cane [2010] EWHC 2133 (Comm). It must follow, says the Claimant, that a party which gives a termination notice based on several specified events of default, some of which were valid and some of which were invalid, will be entitled at trial to rely upon the valid events of default as justifying the termination notice.

93. The failure to pay the sums due on 10 October 2018 and 15 October 2018 themselves justified the service of a Default Notice and a Termination Notice and it follows that those notices were effective to bring the leasing of the Aircraft to an end.

Issue 3: Termination Date

94. This Claimant contends that the leasing of the Aircraft was terminated by service of notice of default and then termination. The result is that Termination Date within the meaning of clause 4.3 of the Lease Agreement would be:

"*…the date on which the first of the following events occurs:*

4.3.1 there is a Total Loss of the Aircraft prior to Delivery pursuant to Article 3.5;
4.3.2 cancellation of this Lease occurs pursuant to Article 3.6;
4.3.3 there is a Total Loss of the Aircraft and payment in respect thereof is made in accordance with Article 19.3;
4.3.4 LESSOR repossesses the Aircraft or otherwise terminates the leasing of the Aircraft under this Lease and recovers possession and control of the Aircraft following an Event of Default; or
4.3.5 LESSEE returns the Aircraft in the condition required by Article 23 after the Expiration Date."

95. Clauses 4.3.1 to 4.3.3 are not relevant here (because there was no Total Loss or cancellation pursuant to Article 3.6) and clause 4.3.5 has no relevance because the Aircraft was never returned by the Defendant in the condition required by Article 23. Accordingly the Termination Date is the date on which the Claimant recovered possession and control of the Aircraft after the Event of Default that led to the Default Notices, namely 21 July 2020 (or in the alternative 15 July 2020 or 6 March 2020).

96. Those dates are based on:

96.1. The actual recovery of possession and control of the Aircraft in July 2020; or

96.2. When it applied for permission to recover the Aircraft in March 2020.

97. Mr Lewis sets out at paragraph 117 and following in his statement the Claimant's factual case as to it regaining possession and control of the Aircraft. On 6 March 2020, WWTAI applied to General Directorate of Customs for determination of the process of disassembly and export of the Aircraft. This was approved on 22 June 2020. On 8 June 2020, WWTAI entered into a memorandum of agreement with Polyeco SA for the undertaking of the necessary work. The Customs Office of Athens Airport provided a permit for dismantling the Aircraft on 15 July 2020 and on 21 July 2020, the Claimant accessed the Aircraft to commence disassembly. None of these dates have been disputed by the Defendant.

98. The Claimant contends that the continued application of the Lease Agreement until then is demonstrated in various ways.

    98.1. It wrote to the Defendant on 23 November 2018 demanding delivery of the Aircraft to Air Salvage International in Cirencester in the following terms:

    "*The letter serves as confirmation that in accordance with the termination of the lease for A319 MSN 1612, we request that Olympus Airways S.A. deliver the aircraft to the Air Salvage International Ltd facility at Cotswold Airport, Cirencester UK. All technical matters, including the ferry flight, Export Certificate of Airworthiness, and the De-registration process, are to be coordinated with our technical team*."

    Mr Lewis referred in evidence to a discussion with the Defendant about the ferry flight:

    "*The discussion that we have with Olympus was that we were to have co-operation and the aircraft was to be ferried. We covered Olympus' expenses. We did everything possible to assist Olympus to ferry the aircraft, and that was mutually agreed that they would ferry the aircraft, and the evidence supports that*."

    Mr Lewis maintained in cross examination that there was an agreement to that effect, stating, "*This was an agreement, a mutual agreement that we had, that Olympus would ferry the aircraft. They requested the formal letter and we provided it*."

    The acknowledgment of a right to require a ferry flight is evidence of the continued operation of the terms of the lease Agreement.

    98.2. The Claimant, by its lawyer, Rebecca Rigney, emailed the Defendant on 2 November 2018 stating, "*Fortress demands immediate return of the Aircraft at Athens International Airport."* Mr Alyfantis responded on the same day, saying, "*Please be advised that the aircraft is parked in Athens and has not been operated since lease termination, or in fact since quite some time before. With reservation of all of our rights as our legal team is processing the relevant documents Lessor's technical team or the team wishing to take repossession is welcome to contact us to coordinate a smooth return of the aircraft."* The Claimant says that this is plainly inconsistent with the Defendant having given up possession or control as of that time.

98.3. In November 2018, the Claimant was attempting to arrange an inspection of the Aircraft by Mr Stefanos Arvanitidis of Meton Skies. On 9 November 2018, he emailed Mr Alyfantis, stating amongst other things:

"On Tuesday 13 Nov 2018, I will meet Olympus representative (possibly Theodoros) at the Athens International Airport in front of the Building 17 main gate at 10:00 local. Ground power and accessing (as requested previously below) will be available in order for me to do some general Visual only checks and take some pictures. Approved personnel will be available which will give power to the A/C and also open the A/C panels. On our side, I will make sure we will not interfere or disrupt at all with your scheduled Cabin Crew Training, which will be on-going in parallel from 11:00 to 14:00 in the cabin of the A/C."

In cross examination, Mr Alyfantis accepted that the Defendant was indeed using the Aircraft for Cabin Crew training in November 2018. The Claimant says that this is plainly inconsistent with the Defendant having given up possession and control of the Aircraft at that time.

98.4. On 28 November 2018, in an email to Stephane Arvanitidis of AeroReps, Mr Alyfantis asserted that the Defendant remained the CAMO of the Aircraft.

98.5. The Aircraft Documentation (which under Article 2.1 of the Lease Agreement is included within the definition of the Aircraft) was not loaded onto the Aircraft until 12 July 2019, as Mr Alyfantis accepted in cross examination.

98.6. On 30 July 2019, Mr Alyfantis emailed Mr Lewis in a manner wholly inconsistent with the assertion that the Defendant believed it had given over control of the Aircraft:

"Hi Jeff,

OLY's intention is to complete the process and return your aircraft.

However

Our Camo Team is overloaded and having very little support on this project

Perhaps it's possible to expedite if we appoint a person to be able to progress and work some of the items on the ramp along with Athens Aero.

I'll talk with Theo and revert.

John"

Yet again, the Claimant says that this is plainly inconsistent with the Defendant having given up possession and control of the Aircraft as of that time. Rather, it is consistent with the Lessee being aware that it is required to return the Aircraft by means of the ferry flight.

98.7. The Defendant acknowledged an obligation to return the Aircraft by Ferry Flight as illustrated for example in the email of 15 October 2019 sent by Mr Alyfantis to Mr Lewis, stating:

"*We do all recognize that the help was more than significant to the process of the project. Indeed it's a matter that I've relayed internally and there are actions underway to complete this payment and obtain the PTF. No excuses from my side, I do need however to obtain the Flight conditions in order to submit our application to EASA and HCAA and finally obtain the PTF.*"

The Claimant contends that the Defendant's acceptance of the Claimant's right to demand a ferry flight and professed assistance in bringing that to happen is not consistent with it having parted with possession and control of the Aircraft.

98.8. By email dated 31 January 2020, Mr Nikoletatos, then the Accountable Manager, stated to Athens Aero:

"*Recently, we have been informed that, your 145 AMO was proceeded to remove the engines from A319 SX-BHN MSN 01612 without our as AOC holder permission.*

Gentlemen, we would like to make clear, that in accordance with European Commission and National Regulations, while an aircraft is remaining endorsed in an Operators Certificate (AOC), the specific AOC holder is responsible for the aircraft Airworthiness

Consequently, any action on the above mentioned aircraft without the specific AOC holder permission, constitutes violation of the applicable regulations and Olympus Airways keep the wrights (sic) *to proceed accordingly.*

On behalf of Olympus Airways."

99. Further, the Claimant's case is that it is clear from the Report of Mr Seymour that the Aircraft was not in the Return Condition. In this respect, the Claimant's case is dealt with further under Issue 4.

100. On the specific issue of the ferry flight, the Claimant contends that the Defendant agreed to arrange the ferry flight following the demand under Article 23.4. The failure to arrange this was itself a breach of contract by the Defendant.

101. On the Claimant's case, the Termination Date here is determined by Article 4.3.4 as being the date upon which the Claimant repossessed and recovered possession and control of the Aircraft following an Event of Default

102. As to the test to be applied as to whether the Claimant had repossessed and had recovered possession and control of the Aircraft, my attention is drawn to the judgment of Foxton J in ILFC Uk Ltd and Aercap Ireland Ltd v Olympus Airways [2020] EWHC 221.

Issue 4: Condition as of 1 November 2018

103. In considering whether the Aircraft was in the Return Condition as of 1 November 2018, the Claimant says this is easily answered by looking at the evidence of Mr Seymour. The Aircraft was not in the Return Condition. It required the work set out in Appendix 3 to the report identified under the heading "*Summary*" as costed in the column "*As of Nov 18*" to make it so.

Issue 5: Maintenance until Termination Date

104. The Claimant contends that the liability to pay Maintenance Rent and to maintain the Aircraft until the Termination Date is clear from the terms of the lease Agreement. Article 12 expressly states that the obligation to maintain continues until the Termination Date. As to liability to pay Maintenance Rent this is, logically, a corollary to the obligation to maintain (and hence it would naturally be payable for the same term) and is stated to be payable in addition to Base Rent by the terms of Article 5.5. There is no provision limiting the obligation to pay to any lesser period than that of the Base Rent and therefore, like Base Rent, it is payable until the Termination Date.

105. The Claimant points out that the arguments advanced by the Defendant in closing involve unpleaded and previously unexplored argument that the Claimant had in some way "*waived*" its rights under Article 23, had *"accepted"* redelivery of the Aircraft and/or that the mere offering of possession of the Aircraft to the Claimant was sufficient to discharge

liabilities under the Lease Agreement. The Defendant's pleaded case is that the Claimant had actual possession and control of the Aircraft from 1 November 2018[6] but not that, for some other reason, there was no liability to pay Maintenance Rent from then until the true Termination Date.

106. In any event, the Claimant says there is no basis for any of the findings sought by the Defendant:

106.1. The alleged waiver is not only unpleaded, but it is also entirely unclear as to what is alleged to amount to a waiver of rights and how that alleged waiver would affect the Claimant's clear contractual right to payment;

106.2. The argument that the Claimant had accepted redelivery of the Aircraft is no more than a restatement of the assertion that the Claimant had repossessed and/or taken possession and control of the Aircraft at some earlier date than that pleaded by the Claimant, the issues addressed in Issue 3 above;

106.3. The contention that offering possession of the Aircraft to the Claimant as sufficient to discharge the liability to maintain (and the associated liability for Maintenance Rent) is ill-defined and in any event unprincipled.

107. In so far as the Defendant contends that the Claimant was in repudiatory breach of contract in requiring the payment of sums in the Default and Termination Notices in excess of that to which it was entitled, the Claimant contends that:

107.1. It was entitled to the sum claimed;

107.2. In any event, the Defendant has never either pleaded or adduced evidence of an act of acceptance of the alleged repudiatory breach on its part. The Defence at paragraph 32 merely asserts acceptance of the breach without identifying how it was accepted.

Issue 6: Relief

108. I start by dealing with the Claimant's entitlement in principle to the sums claimed in paragraphs 33 to 36 of the Amended Particulars of Claim. The Claimant claims the sums set out in a Schedule provided with its closing submissions. That calculation is included in

[6] See paragraph 48 of the Amended Defence – not 2019 as in the Claimant's Reply Submissions.

Appendix 6 to this judgment, albeit that I have not incorporated the detail of either the figures themselves or the calculation of interest.

109. The claims fall into the following categories:

109.1. Unpaid rent;

109.2. Enforcement costs;

109.3. Diminution in value.

110. The Claimant claims unpaid Rent in respect of three periods:

110.1. Maintenance Rent for August 2018, payable on 15 September 2018, $223,897

110.2. Base Rent, payable on 10 October 2018, $125,000

110.3. Maintenance Rent for September 2018, payable on 15 October 2018, $30,545

110.4. Base Rent payable between November 2018 and 10 March 2020[7] (the Expiration Date of the Lease Agreement):

110.5. Default Rent[8] between 10 March 2020 and July 2020 (on the Claimant's case, the Termination Date of the Lease Agreement): $1,101,370.12

110.6. Maintenance Rent payable between November 2018 and July 2020: $948,629.96

111. The first three of these items all fell due, even on the Claimant's case, prior to the Termination Date of the contract. Therefore, subject to the argument as to whether any or all of them fell due before the Effective Time, which is dealt with under Issue 1 above, they are all sums for which the Claimant contends the Defendant is undoubtedly liable.

112. Base Rent is payable until the Termination Date of the lease in accordance with Article 4.3, but because of the different rate payable after the Expiration Date, this claim has been calculated only to the Expiration date. The Base Rent payable between November 2018 and 10 March 2020 was $125,000 per month for 17 months, a total of $2,125,000 before interest.

113. In respect of Default Rent, under Article 23.14.3 of the Lease Agreement, twice the amount of Base Rent is payable from the Expiration Date (20 March 2020) to the Termination Date

[7] By article 5.4.2, the lessee is obliged to pay Base Rent until the Termination Date, but by article 23.14.3, the amount of rent between the Expiration Date and Termination Date is twice the Base Rent. Accordingly, the Claimant claims Base Rent to the Expiration Date then Default Rent to the Termination Date.

[8] See footnote 7.

(21 July 2020). Accordingly, the Default Rent is twice the normal Base Rent, that is $250,000 per month. That gives a daily rate of USD 8,219.18. The relevant period is 134 days. Accordingly, the Rent payable is USD 1,093,151 before interest.

114. The Claimant claims the fixed amount of the Maintenance Rent from the date of termination of the leasing to the Expiration Date, being $30,545 per month, as set out in Clause 8 of the Novation Agreement. (The higher amount claimed for example for August 2018 is not recoverable because the Aircraft was not flown in the months from November 2018.) The sum was subject to uplift of 4% at the beginning of each calendar year in accordance with Article 5.5.1 of the Lease Agreement, that is $31,767 per month for 2019 and $33,037 per month for 2020. The Claimant claims this in respect of the 22 months from October 2018 (which sum became payable on 15 November 2018) to July 2020.

115. The Claimant's calculation of the Base Rent, Maintenance Rent and Default Rent is summarised in Appendix 6 to this judgment.

116. From the sums payable as calculated above, the Claimant has subtracted the sum of $375,000, representing the Security Deposit which was paid by the Defendant (to the original Lessor ALS, and then passed on to the Claimant) and which the Claimant has retained. Since, but for the Defendant's alleged breaches of contract, the Security Deposit would have been credited to the Defendant at the Termination Date pursuant to Article 5.1, it is clearly the case that the Claimant must give credit for this sum against the sums it says are due to it on breach of the contract.

117. The Claimant rejects the contention that it is liable to give credit for the Maintenance Rent. It repeats the submission above that Maintenance Rent is not a sum held simply for the purpose of maintenance in the manner contemplated by the Defendant's case, but rather a sum to which the Claimant is absolutely entitled, reflecting the need for the aircraft to be maintained.

118. Further the Claimant denies that the Defendant is not liable to pay Maintenance Rent pursuant to Article 5.5.2 of the Lease by reason of the fact that it did not have "*lease, possession and control*" of the Aircraft. There is nothing in the wording of the Lease Agreement to mean that the simultaneous occurrence of all three of these is a pre-condition to the liability to pay Maintenance Rent. Rather Article 5.5.2 is using this language to make clear that rent is payable for use of the Aircraft rather than creating some kind of segregated pot that is only capable of being used for maintenance costs. The Claimant says that the

conclusion contended for by the Defendant would be inconsistent with the decision of Foxton J in ILFC v Olympus [2020] EWHC 221.

119. On the argument that the Claimant was under a duty to mitigate its loss by taking steps to recover possession of the Aircraft earlier, the Claimant says that this is misconceived as a matter of law. The rent that is payable until the Termination Date gives rise to a claim in debt not in damages, to which the obligation to mitigate does not arise. In any event, the mitigation suggested, accepting the return of the Aircraft in a condition that did not comply with Article 23 of the Lease Agreement was a matter that the Claimant could not become obliged to do under cover of a duty of mitigation, given that its power to do so was stated to be in its "*sole and absolute discretion"* by Article 23.14.4 and would have obliged the Claimant to retake possession of the Aircraft in circumstances that were against its commercial interests, namely that it would be assuming control of an Aircraft that was not in the Return Condition. In any event until November 2019, the Defendant appeared to be seeking to assist in a ferry flight and it was not unreasonable for the Claimant to take it at its word and seek to organise the ferry flight.

120. The Claimant claims various other costs in its attempts to enforce its rights under the Lease Agreement:

    120.1. Parking charges paid to Athens Airport on behalf of the Defendant;

    120.2. VAT on Base Rent paid to the Customs authority on behalf of the Defendant;

    120.3. Fees payable to Meton Skies (the Claimant's technical advisors);

    120.4. Fees payable to Athens Aeroservices (for repair and maintenance);

    120.5. Legal fees of counsel assisting with the recovery of the Aircraft; and

    120.6. Costs associated with dismantling the Aircraft in Athens and shipping the Engines to the UK.

121. The costs are set out in the Particulars of Claim then updated in the Claimant's closing submissions and a schedule served for the purpose of the trial. They are summarised in Appendix 7 to this judgment. The stated purpose of the various payments has been summarised from the Claimant's documents and reference should be made back to the Claimant's submissions and the documents identified therein to see in greater detail the basis and calculation of the various sums claimed.

122. There is one figure, a payment of $24,495.68 on 4 March 2020, which is item 61 in the Schedule which is included in error and is not pursued by the Claimant.

123. Certain of the costs set out above were invoiced to and paid on the Claimant's behalf by its Affiliates (such as WWTAI). In so far as the payments were made by affiliate companies such as WWTAI, the Claimant contends that it is liable to reimburse those entities under Clause 13.2 of the Head Lease, which states:

"*Lessee shall be liable for any and all unpaid Rent and for all reasonable legal fees and other costs and expenses incurred by any Indemnitee by reason of the occurrence of any Event of Default or the exercise of Lessor's remedies with respect thereto, including all costs and expenses incurred in connection with the return of the Aircraft or any part thereof in accordance with the terms of Clause 11 or in placing the Aircraft or any part thereof in the condition and with airworthiness certificates as required hereunder.*"

124. In consequence, the Claimant says that it is entitled to recover for invoices paid by affiliates, including WWTAI, in so far as the costs therein were incurred as a result of any Event of Default or the exercise of remedies in respect thereto. The losses that are claimed here flow from either the service of the Termination and Default Notice or the subsequent failure of the Defendant to continue or perform its obligations in relation to the Aircraft under the Lease Agreement, hence they are recoverable.

125. However, certain of the invoices relied on, those numbered 3, 5, 11, 2, 36, 39, 42, 44, 45, 46, 50, 51, 52, 53, 54, 58, 59, 62, 63, 65 and 70 in the Schedule, are addressed to Fortress Transportation rather than WWTAI or the Claimant. Where Fortress Transportation paid the invoices, the Claimant concedes that:

    125.1. Liability would not arise under the Head Lease if in fact the invoices were paid by Fortress Transportation, which is not an affiliate within the meaning of the Head Lease;

    125.2. The evidence at trial does not support the assertion that WWTAI paid them.

126. The natural inference from the evidence at trial is that they were paid by the party to whom they were addressed namely Fortress Transportation. However, the Claimant contends that they were in fact paid by WWTAI and therefore are recoverable by the Claimant under Clause 13.2. It was for this reason that the Claimant sought to introduce further material following the conclusion of the trial as to how various payments had been made. I refused

permission to rely on this supplemental material. It follows, as is conceded on behalf of the Claimant, that those invoices addressed to Fortress Investment Group are not recoverable.

127. The Claimant, within its closing submissions, responds to an argument that, in incurring the costs in respect of which invoices are raised, it failed to act reasonably so as to mitigate its loss. This is certainly not a pleaded case nor, as I read the Defendant's submissions, is it an argument that they seek to advance, even if some of the cross examination may have seemed to point in this direction. In any event, the Claimant contends that the point is unarguable on the evidence. The Defendant has not properly set out a case nor attempted to show how incurring any of these costs was in any way unreasonable.

128. As to damages for diminution in the value of the Aircraft, Article 25.6 of the Lease Agreement, the Defendant is liable to indemnify the Claimant against *"any loss, damage, expense, cost or liability which Lessor may sustain or incur directly or indirectly as a result"* of its Default, including, under Article 25.6(i), *"an amount sufficient to fully compensate Owner for any loss or Diminution to Owner's residual interest in the Aircraft due to Lessee's failure to maintain the Aircraft in accordance with this Lease*".

129. It follows that the argument made by the Defendant – namely that the Claimant has no entitlement to claim the diminution in value because it is the head lessee, rather than the owner, of the Aircraft – is incorrect. Article 25.6(i) gives the Lessor a claim to the diminution in value precisely to avoid the lacuna that might otherwise arise.

130. The joint expert was instructed on the basis that the Diminution in Value is to be calculated as the value of the Aircraft in the Return Condition less its actual value on return. The Claimant argues that, if this approach is correct, the appropriate dates to take for these valuations are

    130.1. Return Condition value: the date when the Aircraft ought to have been returned, had the Defendant fulfilled its obligations under the Lease Agreement, that is, the Expiration Date (March 2020). That figure is $9,820,000

    130.2. Actual value: the date when the Aircraft was in fact returned, that is, the Termination Date (July 2020). That figure is $6,483,000.

131. Based on this calculation, the diminution in value is $3,337,000. However, the Claimant advances the argument that in fact the correct figure to take as the value of the Aircraft but for the default of the Defendant is the agreed value of the Aircraft as at Article 23.14.3 of

the Lease Agreement, namely $19,000,000. Thus the Claimant claims this figure less the actual value in July 2020, a net sum of $11,517,000.

132. The Defendant argues that the obligation under the Lease Agreement to pay damages of diminution in value is only triggered by a "*failure to maintain the Aircraft*," meaning a specific breach of Article 12 of the Lease Agreement, rather than any other failure to maintain the Aircraft in the condition required by the Lease Agreement. The Claimant rejects this argument on the grounds that there is nothing in the wording of Article 25.6 to limit damages to loss caused by particular failures to maintain such as those specified in Article 12. The natural meaning of the phrase "*failure to maintain the Aircraft in accordance with this Lease"* is a reference to all the maintenance requirements within the Lease Agreement, rather than the isolated set of maintenance requirements in Article 12. Further, the Claimant takes issue with the Defendant's argument that Article 25.6 only applies in respect of failure to maintain that amounts to an Event of Default but that, since termination here was based on is default in paying rent rather than a failure to maintain, the only "relevant" Diminution in Value that FTAI could claim is diminution arising from the non-payment of Rent. The clear and natural meaning of Article 25.6 is to provide an indemnity against Losses suffered by the Lessor from any continuing Event of Default by the Lessee. The failure to return the Aircraft in Return Condition was straightforwardly an Event of Default under Article 25.2(d) which has caused loss to the Claimant which is recoverable under this provision.

133. As to the Defendant's argument that the Lessor must prove a causative link between the failure to maintain and the diminution to the owner's residual interest in the Aircraft, there is nothing in the wording of the Lease Agreement to require this interpretation and in any event it is apparent from the evidence of Mr Seymour that the reduction in value was caused by a failure to maintain.

134. The Claimant, correctly to my mind, identifies a secondary argument being advanced by the Defendant about Maintenance Reserves, which is relevant to the quantification of the diminution in Value claim namely that, but for the Events of Default, the Defendant would (presumably) have continued to maintain the Aircraft, engaging in Maintenance Rent activities which would have given rise to an obligation on the Claimant to pay Maintenance Contributions. Thus, in seeking to recover damages for the diminution in value of the Aircraft as well as to receive and retain the gross amount of Maintenance Rent payments,

the Claimant puts itself in a better position than it would have been in but for the Defendant's breaches.

135. The Claimant describes this argument as "*superficially attractive*" but contends that it is flawed both in fact and in law:

135.1. The work required to put the Aircraft into Return Condition is not simply the same as the work that would be done as part of the scheduled maintenance for which OLY would be entitled to reimbursement. Instead, putting the Aircraft into Return Condition – that is, into compliance with the detailed and strict provisions of Article 23 – would require a large number of tasks that would not form part of a valid MRA Claim. The costs of these tasks could not form part of an MRA Claim under Article 13; they are costs that the Lessee must pay on its own account.

135.2. A significant number of the repairs required to the Aircraft as a result of its poor condition were not matters which would form part of any scheduled maintenance, and would not normally have been required prior to redelivery, if the Aircraft had been properly maintained throughout the Lease Term.

135.3. Even as regards scheduled maintenance, it is not simply the case that OLY would be able to claim the full Maintenance Reserve on the Expiration Date. Instead, Maintenance Rent is payable in specific amounts with respect to specific maintenance tasks. The Maintenance Contribution would only be obliged to contribute to specific tasks at specific times.

135.4. The amount of Maintenance Contribution that OLY would in fact have been able to claim would depend upon the actual cost of the works.

135.5. The hypothetical "*no breach*" assumption is false in that it assumes that the Defendant would have left the Aircraft on the ground and paid the basic Maintenance Rent. In fact this is not what should be assumed to have happened because that itself would be a breach - to leave the Aircraft on the ground without proper preservation and storage would have been contrary to the terms of the Lease Agreement and such acts would themselves have incurred cost for the Defendant.

136. As the Claimant puts it in closing, "*Even if some deduction were appropriate as a matter of principle, the Court would require a far more detailed, rigorous, and nuanced assessment of the maintenance costs that would have been incurred, and of the*

Maintenance Contributions that OLY could properly claim in respect of each scheduled Maintenance Event at any given time. The Court does not have before it the evidence on which such an assessment could be based."

THE DEFENDANT'S CASE

General points

137. The Defendant, in its opening submissions, summarised its position thus:

> "*18. This dispute between the parties is sadly one which is very common in aviation and in aircraft leasing. It stems mainly from the way in which banks and financial institutions have created an industry with standard leasing documents that (i) are very strict in their requirements, (ii) are drafted in a very one-sided manner, with very little opportunity for negotiations save for the limited commercial terms, (iii) provide almost no opportunity to delay making payment (even if there is a legitimate concern by the Lessee) and finally (iv) provides draconian sanctions for even the most minor breaches. The Defendant shall say that the situation has been unfairly exploited by the Lessor in the present case.*
>
> *19. Ideally, the relationship between lessor/lessee should be cordial, with the intentions to maximize revenue for both lessee and lessor, but the inequality of bargaining power often leads to disputes. Here, the original Lease Agreement was with ALS (part of the Aercap Group – a world leader in aircraft leasing) and the Defendant had a very good relationship. What transpired in this case is nothing more than a more powerful party trying to leverage the weaker party into submission over a modest debt – almost as soon as it had taken over the lease following a novation – with the sole aim to lease the Aircraft's engines to a third party and scrap the airframe*."

This contention, that the Claimant is trying to take advantage of unfair contract terms, permeates much of the Defendant's case.

138. Further the Defendant asserts at paragraph 24 of its written opening, "*The real reason behind the grounding notice appears to have been not for Olympus debts allegedly owe to ALS, but more of a "formality", given that the SPA had already been signed (nearly two weeks previously). It is usual in aircraft sales and purchases for an aircraft to be grounded*

pending the paperwork to transfer title and to protect the asset from potential operational damage."

139. The case that this was a "*formality"* intended to protect the Aircraft is difficult to reconcile with the Defendant's acceptance that in fact ALS agreed to the Aircraft continuing to be used during the term of the Grounding Notice. It was not a point that the Defendant pursued in closing submissions.

140. The Defendant makes the further overarching point that, as of 1 November 2018, the Claimant had purportedly (albeit wrongly) terminated the leasing of the Aircraft and the aircraft was at Athens International Airport. This was the destination to which the Claimant demanded return by the Second Default and Termination notice and, from 1 November 2018, the Claimant was in "*effective"* possession and control of the Aircraft. Accordingly, either:

    140.1. The Defendant's obligations under the Lease Agreement terminated;

    140.2. The Defendant had no right or power to use the Aircraft;

    140.3. The Claimant had the necessary power to retake control if the Aircraft if it chose;

    140.4. The Claimant failed to take steps to mitigate its loss by exercising that power.

141. I have noted above the complaint by the Claimant that these points are not adequately pleaded. However, on the material before the court it is in my judgment possible to reach a conclusion on each of them without unfairness to either party.

<u>Issue 1: Novation</u>

142. The Claimant claims Rent payable as of 15 October 2018.

    142.1. $223,897 by way of Maintenance Rent for August 2018, payable on 15 September 2018;

    142.2. $125,000 by way of Base Rent, payable on 10 October 2018; and

    142.3. $30,545 by way of Maintenance Rent for September 2018, payable on 15 October 2018.

143. The Defendant does not dispute that the Maintenance Rent for September 2018 was due on or after the Effective Date and that therefore the Defendant is liable in principle for that sum (subject to other arguments dealt with below under Issue 6) but contends that other

two sums claimed, Maintenance Rent for August 2018 and Base Rent payable on 10 October 2018, are not even in principle recoverable by the Claimant.

144. In respect of Maintenance Rent for August 2018, the Defendant disputes its liability to the Claimant for this sum on two grounds:

    144.1. That any liability for this rent had been discharged by agreement with ALS;

    144.2. That in any event, as a sum falling due prior to novation, it is not recoverable under the Novation Agreement.

145. On the first of these, at paragraph 31 of his witness statement, Mr Karabatis said, "*In August and September 2018, OLY received two invoices for August and September hire/rent and maintenance reserves. These invoices are attached as TK/3. They clearly state that the August and September sums for both hire and maintenance reserves. I remember that OLY disagreed with these invoices since ALS required OLY to ground the Aircraft which means we could not use it for revenue services. Due to confidentiality, I will not discuss the terms of the settlement but I can say that OLY and ALS came to a commercial arrangement for the outstanding sums. This was resolved*."

146. Mr Karabatis was questioned about this issue in cross examination and said:

    "*What I'm saying is that the management of Aercap and the management of Olympus, you know, they did come to a resolution, which I'm not informed (inaudible), that when the aircraft was delivered with a novation agreement over to Fortress, that Olympus did not have any, to the best of my knowledge, any outstanding from that."*

147. Mr Taylor for the Claimant put it to him that the Lessee's obligation to pay the Maintenance Rent for August 2018 was transferred from ALS to the Claimant, to which Mr Karabatis responded, "*I don't know that. It is not under my knowledge, no….I am not informed, you know, about (inaudible) process between the August revenue, you know, and the charges of maintenance invoice*."

148. In any event, the Defendant disputes the Claimant's right to rely on Article 2.1.4 of the Novation Agreement in respect of Maintenance Rent due before the Effective Date. It points out that Article 2.1.4 is "*subject to Article 2.1.3"* and that Article 2.1.3 states that the Claimant "*agrees to assume the rights, benefits, interests and obligations, duties and liabilities of "Lessor" under the Novated Lease Documents arising from and after the Effective Time…"* Correspondingly, under Article 2.1.6, the Defendant owed its

obligations, duties, undertakings and liabilities to the claimant only "*from and after the Effective Time.*" Therefore any right, benefit or interest which had arisen before the Effective Time was not assumed by the Claimant. This is a right that arises before the Effective Time even on the Claimant's case and therefore it is not recoverable.

149. In respect of the Base Rent payable on 10 October 2018, the liability in principle of the Defendant for this sum turns simply on the Effective Time of Novation.

150. The Defendant contends that the effective time for the Novation agreement required compliance with the formalities listed at Clause 5 of the Novation Agreement (see Appendix 5 below). In particular, it was necessary to deposit the relevant documents with the regulators and the HCAA had to recognise the change of ownership and issue new certificates as well as undertake other regulatory steps.

151. In his statement at paragraph 13, Mr Alyfantis says the following as to the Effective Time:

"13. I was made aware of a Novation Agreement signed in early October 2018 (Novation between ALS, OLY and FTAI (despite FTAI having no technical staff at the time) – see JA/1. While I remember the document at the time, I did not see it in full and maybe I had a quick look at it in 2018. As I was not the OLY Commercial department it did not require my input. I also saw this document recently again for my previous witness statements. It refers to an "effective date" in the Novation where all the formalities and requirements were met for the transfer of the Aircraft – this included some technical matters. These matters finished around 15th October 2018 I recall, so Fortress was not involved before that as far as I remember on the handover."

14. There was no "formal" handing over or closing call between ALS, FTAI and OLY. There wasn't even a call – just an assumption (wrongly at the time since not all formalities had been done) by Fortress that they had taken over the Aircraft. Again this is peculiar behaviour by Fortress."

152. In cross examination, Mr Alyfantis confirmed that he was not in control or managing the commercial process at the time of the transfer of ownership and novation of the Lease Agreement and could not speak to the formalities of completing the novation.

153. Mr Karabatis says:

"20. As part of the documents for transfer of the Aircraft from ALS to WWTAI in October 2018, OLY representatives (including me) had to sign the following documents:

(a) Novation Agreement between ALS, OLY and FTAI (NB. WWTAI was not a party to this agreement at all);

(b) Deregistration Power of Attorney

(c) IDERA

(d) Other related documents requested by Fortress.

21. I remember that OLY representatives signed the above documents and any other that ALS and FTAI required at the time in 2018.

22. I also recall that in mid or late October 2018 (cannot remember the exact time), these originally signed documents were picked up from OLY's offices in Athens by Greek lawyers appointed by Fortress in Athens, Greece. The originals of the above were therefore with Fortress since October 2018 and these were irrevocable. Further there can be no complaint from FTAI about OLY filing the documents as you need originals to file at the Hellenic Civil Aviation Authority ("HCAA") – but of course OLY handed them over to Fortress lawyers in I think October or November 2018 (at Fortress request) so therefore OLY could not file anything – photocopies are not acceptable in Greece.

…

32. … the Novation Agreement … at clause 2.1 made it clear that all claims, obligations, rights, etc. were terminated and discharged in full. Therefore as of 15 October (which is the "Effective Date" as set out in the Novation Agreement or even 5th October 2018 if there is any dispute), there can be no claim against OLY by either ALS or indeed FTAI. The reason is that the Novation Agreement stated in the "Effective Date" which was about 15th October 2018."

154. Mr Lewis was cross examined about the satisfaction of the conditions precedent and said that he was unable to speak to this issue, not having been involved.

155. Thus, the Defendant contends, the Claimant has failed to prove that the Effective Time of the Novation is any earlier than the date it asserts, namely on or around 15 October 2018. That same suggested date is referred to in the closing submission of the Defendant.

Issue 2: Default and Termination Notices

156. The Defendant acknowledges service of the three notices. The evidence of Mr Alyfantis is to the effect that:

156.1. The Notice of Default dated 26 October 2018, did not annex any invoices.

156.2. The Termination Notice dated 1 November 2018 attached a schedule of "*apparently outstanding invoices"* which was said to be wrong because the invoices were wrongly dated and included items relating to August 2018.

156.3. The Second Notice of Default and Termination Notice, dated 2 November 2018, did not particularise the sums due[9].

157. The Defendant's pleaded case is that, if the Effective Time is later than 15 October 2018, the Claimant's actions in serving Notices of Default (all three of the Notices referred to above and served on 26 October 2018, 1 November 2018 and 2 November 2018) and in serving Termination Notices (the second and third of those notices) were repudiatory breaches of contract by the Claimant, on the grounds that the sums said to be due were not in fact due. It is pleaded that the Defendant accepted the breach (but not how it did so) and that therefore the Claimant is not entitled to the relief sought.

158. As noted above, the Defendant however concedes that the Effective Time was 15 October 2018, so that the third of the sums claimed, Maintenance Rent for September 2018, was in principle due and owing.

159. In opening submissions, the Defendant had argued that the Base Rent of $125,000 due in October 2018 was also not payable, because the Grounding Notice interfered with the Defendant's quiet enjoyment of the Aircraft. This case is not pleaded. It was not pursued in closing submissions. This is unsurprising given the concession in cross examination by the Defendant's witnesses that the Aircraft was in fact used following service of the Grounding Notice.

160. However the Defendant continued to argue in closing submissions, that the sums due as of 1 November 2018 were "*(a) unknown, (b) incorrect and/or confusing invoices and (c) inflated"* and that as a result the Notices did not validly terminate the leasing of the Aircraft. The reference to the invoices being "*incorrect and/or confusing"* is based on the evidence of Ms Kakavani at paragraph 13 of her statement, in which she makes reference to invoices delivered by the Claimant being "*wrong and full of mistakes."* The Defendant relies on several points:

[9] For reasons set out below, it is probable that Mr Alyfantis has described the notices of 1 and 2 November 2018 the wrong way round. It is not obvious that anything turns on this, given how the parties put their respective cases.

160.1. The Defendant's opening submissions assert that "*no physical invoices had been sent to Olympus until after the Notice of Default and Termination had already been sent. In fact the 3 actual invoices said to under the default notices were never sent to the Claimant at the time – only the notices themselves.*" The alleged failure to send invoices (which has not been contradicted by the Claimant) continues to be relied on by the Defendant in closing submissions as significant. It is said to be important from an accounting perspective, given the need to know the amount of the indebtedness, and banking compliance point of view, having regard to Greek currency controls.

160.2. As was put to Mr Lewis during cross examination, the dates on some of the Claimant's invoices appear to be wrong. Mr Lewis stated that, at this time, the Claimant's invoicing was not an automated process and appeared to accept that there were errors in the invoicing.

160.3. The Defendant notes an email dated 2 November 2018 (internal to the Claimant) where it is stated of the Defendant, "*they owe us $505k today.*" Mr Lewis was unable to explain that figure and it does not seem to equate to the other figures claimed. (The claims on the default and termination notices totalled $379,442.)

161. As the Claimant notes, the Defendant has not pleaded a case as to the formal validity of the notices and permission to amend to do so was refused. In any event, the Defendant relies upon the decision of Freedman J in Lombard North Central plc v European Skyjets Ltd [2010] EWHC 679 in support of the proposition that a notice of default must be accurate so that the debtor knows how much it has to pay. That case involved an appeal from a decision of a Deputy Master who had refused to set aside a default judgment, in part on the grounds that a notice of termination in respect of a long-term lending contract was valid. The notice referred to an indebtedness of $154,701.36, whereas the true balance of account under the loan agreement was an indebtedness of just $179.99. The evidence before the court was that the debtor could and would have discharged this sum if the true amount of the indebtedness had been made known. Freedman J, in allowing the appeal stated:

"47. The necessity for a default notice which contains information at least approximating to the correct figure of the indebtedness in the context of this case is consistent with the reasoning below as to why there is at lowest an argument with real prospects of success to the effect that the default notice must identify all events of default relied upon. Without

knowledge of what was being asserted by Lombard, the recipient of the default notice would be inhibited from accessing and exercising the rights and remedies otherwise available to challenge the notice whether by declaratory relief or injunction or any argument based on relief from forfeiture. In those circumstances, Mr Coppel QC submitted as a matter of construction or as an implied term based on business or legal efficacy that the default notice required identification with reasonable accuracy of the nature of the breach. This applies to a default notice which fails to identify Events of Default now relied upon, and it applies also to the issue of an Event of Default which so starkly misstates the amount of the indebtedness, that is hundreds of thousands of dollars instead of $179.99.

48. An alternative approach might be through an estoppel preventing Lombard from relying on the $179.99 figure. The reason for this is that having represented that it would be the much higher figures, this arguably caused SkyJets to resign itself to not being able to pay at the end of October. It is then inequitable for Lombard to treat the small sum of $179.99 as being the correct sum without first correcting the representation and giving SkyJets a reasonable to pay the same, no doubt a very short period of time. That never occurred. On that basis, it is arguable that there is an estoppel by representation precluding Lombard from invoking acceleration based on the sum of $179.99. There are also points about penalties and forfeiture which I shall address below.

49. …I am satisfied that the analysis above is such that there is a real prospect in the very unusual circumstances of this case of this giving way to an analysis in favour of SkyJets. If there had been an application for summary judgment against SkyJets, I am satisfied that on these arguments the appropriate order would be one against summary judgment and in favour of SkyJets."

162. The Defendant contends that the same principle applies here where the notices are unclear and/or incorrect as to the amount that is due. It seeks to distinguish ED&F Man v Fluxo-Cane and Sucden Financial v Fluxo-Cane on the grounds that those two cases involved margin calls where there was a real urgency to the issue and that there were in any event ongoing discussions between the parties about the default, neither of which applies here.

163. The Defendant also contends that the fact that the Claimant had in its possession the Security Deposit means that, rather than serving Default and Termination Notices, it could have simply applied the Security Deposit to make good the shortfall. As Mr Alyfantis put it in paragraph 23 of this statement:

"*FTAI still had all of OLY's SD and all the MRs from Aercap, which were over $3.5m in total and therefore had plenty of funds to do any return conditions repairs needed. Therefore I didn't expect that FTAI would ask anything more since they claimed for the failure to pay the MR and the SD only up to 1 November 2018 – nothing more*."

164. The Defendant draws attention to the evidence of Mr Lewis when he was cross examined about the Security Deposit.

"Mr Steward: What about using the security deposit to defray the outstanding sums? Was that something you considered?

Mr Lewis: Under the lease agreement, the security deposit becomes property of the lessor in the event of default. It is quite common, and we've done this many times, that if the lessee makes an effort to cure the default, we work out a payment plan. In the past I have either waived or returned – you know, applied all the security deposit or part of it. But the entire purpose of a security deposit is to have some security in the deal in the event of exactly what has happened happens. So, no, at the time we did not use any of the security deposit to defer any of the arrears. Had there been an attempt to work out a financial arrangement, that could have been part of the discussion."

165. The Defendant argues that the Claimant could and should have applied the Security Deposit to the outstanding sums, the Lease Agreement on its true construction contemplating the use of the Security Deposit in the event of a default of this nature. These could, at worst on the Defendant's case on its liability to pay Base and Maintenance Rent as claimed in the Default and Termination Notices, have substantially reduced the default and, at best, have entirely remedied the shortfall.

166. Further, the Claimant was in possession of the Maintenance Reserves and could have applied these to the upcoming 6-year check by offering them to the Defendant. As it is put in closing submissions:

"The Claimant has failed to account for the MRs in its claim and secondly had no right to appropriate the MRs as they did as per the terms of the Lease Agreement. It is now common ground that the Claimant deducted the SD and MRs from the purchase price of the Aircraft in July 2018 – three months before the Novation Agreement was signed. It is also clear that the Claimant did not ask the Defendant for permission to use the SD and the MRs for the sale and purchase of the Aircraft."

The Defendant complains that the Claimant did not keep it updated with statements of account that would have allowed it to know the exact amount of the Maintenance Reserve.

167. In summary, the Defendant puts it thus in closing submissions:

“*The Claimant’s claim for $223,897 must fail, and its purported termination was wrongful, because it was brought about by the Claimant’s own failings and misleading invoices. Instead, the Defendant would have been responsible for just $155,545 or $30,545 – a sum that could have easily been paid by the Defendant to avoid default or covered by the SD. The simple point is that as of 1 November 2018, the Claimant was not out of pocket and had over $3.5m of the Defendant’s funds*.”

168. Still further, the Defendant refers to the previous owner’s apparent practice of allowing longer time periods for payment on account of Greece’s capital controls, as referred to by Ms Kakavani at paragraph 3(vi) of her statement, where she speaks of ALS being “*flexible”* as to payments. It stated in closing submissions that, “*It was usual practice for the invoices sent by ALS Leasing to be paid within 3 weeks after issuance and this includes the Greek capital controls that were in existence at the time. This is unlike FTAI who suggests that invoicing and payment should have been immediate which is not accurate.”*

169. It should however be noted in respect of this assertion that it is not the Defendant’s pleaded case that it had a contractual entitlement to delay payment. To the contrary, paragraph 25 of the Defence pleads an obligation on the Defendant to make payments on “*the due date”* defined in each case in accordance with provisions in the Lease Agreement as to when the relevant rental payments were to be made.

Issue 3: Termination Date:

170. The Defendant’s opening submissions describe the Termination Date as being a “*key question”* in the claim. At paragraph 33 of the Amended Defence, the Defendant argues that the service by the Claimant of a Notice of Default and Termination was a repudiatory breach. In the alternative, it contended that, if the Notices were legitimately served, the effect of the notice was that the Termination Date of the Lease Agreement was 1 November 2018. It reasons that:

170.1. There was a Grounding Notice in force in respect of the Aircraft from July 2018 which had not been revoked or retracted by the Claimant.

170.2. The Second Default and Termination Notice, served by the Claimant on 1 November 2018[10], demanded that the Defendant immediately return the Aircraft to the Lessor at Athens International airport.

170.3. The Aircraft had already been returned to Athens International Airport pursuant to the agreement with ALS.

170.4. Accordingly, the Defendant had complied with its obligation under clause 23.4 of the Lease Agreement.

170.5. Thereafter the Claimant had repossessed the Aircraft and recovered possession and control within the meaning of clause 4.3.4 at the time of the demand.

171. This interpretation was clearly put by Mr Theoklitos Nikoletatos[11] in a letter dated 5 May 2020 to amongst others the HCAA, Athens International airport and the Greek Customs authority. He spoke of the Defendant being "*completely alienated from the aircraft since November 2018"* as a result of which "*today we are neither in a position to know its exact condition nor whether there is access to it, who has given it to whom, under which capacity and to what purpose."*

172. Mr Alyfantis was cross examined about the document. Clearly he was not its author and sensibly, in light of the material referred to at paragraph 97 above, he distances himself from it. It would be difficult to maintain an argument that the Defendant was "*completely alienated"* from an aircraft when it was, for example, using it for cabin crew training.

173. The Defendant however continues to maintain that the Claimant was in control and possession of the Aircraft from 1 November 2018. It contends that the Defendant complied with the order to redeliver the Aircraft to Athens International airport (it already being there). Accordingly it contends that "*all rights and obligations under the Lease Agreement from the regulatory point of view had also terminated."*

174. The Defendant contends that the Claimant was not entitled to make the demand for a ferry flight to Cirencester by the notice dated 23 November 2018 referred to above and that it is not open to the Claimant therefore to argue that the non-compliance with the ferry flight condition in some way bears on the identification of the true Termination Date.

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[10] The notice is dated 2 November 2018. Mr. Alyfantis deals with this apparent discrepancy at paragraph 22 of his witness statement, attributing it to time zone differences. It appears to be common ground that it was in fact served on 1 November 2018. In any event, neither party takes a point on this timing.

[11] The accountable manager for the Defendant, now sadly deceased.

175. By Article 23.4 of the lease Agreement, the obligation on the Defendant was to return the Aircraft to the Claimant at an airport in Western Europe or "*at such other location as may be mutually agreed"* by the Claimant and the Defendant. The Defendant argues that it had returned the Aircraft to an airport in Western Europe (namely Athens International Airport) or (if Athens is not in Western Europe) that this was the place to which the Claimant had demanded return.

176. The right to require the Lessee to operate a ferry flight arises under Article 23.19, which provides amongst other things that, "*If the Aircraft is not at the location set forth in Article 23.4 at the time that LESSOR advises LESSEE of the need for such ferry flight, LESSEE will be responsible for the costs of such ferry flight only to the extent of the costs that would have been incurred if the Aircraft had been flown to the location determined in accordance with Article 23.4."* That right could not arise here where the Aircraft was already at the location required by Article 23.4. It is not thereafter open to the Claimant under Article 23.4 to specify some further place to which the Defendant must deliver the Aircraft. As the Defendant points out, the request for delivery to Cirencester was made around one week after the Termination Notice.

177. The Defendant says that the idea of a requirement of a ferry flight is both inconsistent with the terms of the Lease Agreement (given that the Aircraft was already in Athens, as requested by the Claimant) and in any event inconsistent with the terms of the letter, which referred to a request, not a requirement for a ferry flight. The Defendant contends that it did what it could to enable such a ferry flight to take place.

178. The failure to have a ferry flight to Cirencester was, on the Defendant's case, the fault of the Claimant. Mr Dafaranas put it thus at paragraph 21 of his statement:

"*What a 'special ferry flight permit' is, is a one off permission to fly an aircraft without passengers. Usually to obtain a special permit, it requires an assessment of the Aircraft condition by a regulated CAMO and an application to in this case, the HCAA. I have done numerous issuances of special ferry flight permits for operators such as Aegean Airlines, Olympic Air, etc. when I was the Airworthiness Advisor at the HCAA and they are relatively easy to obtain. Generally these permits are given especially where the aircraft has a valid COA and ARC. Special ferry flight permits are obtainable even where there are outstanding maintenance issues with the aircraft – and the aircraft is being flown to a MRO or similar for repair. This was the case here but I am aware that FTAI never made a formal*

application to the HCAA – therefore they cannot now say that Olympus blocked them doing so since this is not what happened especially since FTAI held all the required regulatory documents for the Aircraft to be flown away. The HCAA would have only accepted an application from the owner (which was not FTAI) if it had applied…"

179. In so far as the Claimant relies on the argument that the Aircraft was not in the Return Condition as of 1 November 2018 (see Issue 4), the Defendant draws attention to Article 23.14.4 of the lease Agreement, pursuant to which the Claimant was at liberty, "*in its sole and absolute discretion, to accept the return of the Aircraft prior to the Aircraft being put in the condition required by this Article 23*." The Defendant relies on the act of the Claimant in terminating the leasing of the Aircraft and demanding its immediate return in November 2018, notwithstanding that the Claimant already had a concern about the condition of the Aircraft. This is demonstrated by an email from Mr Lewis dated 31 October 2018, in which he said, "*We are terminating MSN 1612 with Olympus – please start the repossession process. My concern is access to technical and the condition of the aircraft – please arrange a rep to be there ASAP*."

180. If the Defendant fails on its primary argument that the Termination Date was 1 November 2020, it contends that the Termination Date cannot be later than 6 March 2020, when the Claimant's parent company applied to the general Directorate of Customs for Determination of the process of disassembly. By then, the condition of the Aircraft was irrelevant (as Mr Lewis' conceded in cross examination).

181. In the alternative, the Defendant argues that the failure to exercise the right under Article 23.14.4 earlier than 2020 goes to the argument of a failure to mitigate dealt with as part of Issue 6.

Issue 4: Condition as of 1 November 2018

182. In so far as the Claimant contends that the Aircraft was not in the Return Condition as of 1 November 2018, the Defendant:

    182.1. Does not accept that this is correct;

    182.2. Argues that it is irrelevant, since the Claimant had exercised its right under Article 23.14.4 to accept the return of the Aircraft prior to it being put in the condition required by this Article 23; and in any event

182.3. Further argues that it is irrelevant, given that (on the Defendant's case) the Claimant had by this time determined to lease the engines out separately from the Airframe.

183. On the first point, the condition of the Aircraft as of 1 November 2018, the Defendant relies on the following:

183.1. The Aircraft had valid operational certificates – Certificate of Airworthiness ("CoA"), Certificate of Registration ("CoR") and Airworthiness Review Certificate ("ARC").

183.2. The Aircraft was maintained in accordance with the Maintenance Manual and Maintenance Planning Document ("MPD").

183.3. The witness statements of Mr Alyfantis, Mr Karabatis and Mr Dafaranas all support this conclusion.

184. As to the reliance on the report of Mr Seymour, the Defendant says that he is "*with respect, not qualified to consider whether the Aircraft was airworthy or not or whether it was in compliance with the requirements of Article 23*" (paragraph 79 of closing submissions). It is notable that, in its evidence, the Defendant's witnesses seek to assert their superior ability to give evidence as to whether the Aircraft met the Return Condition, but Mr Seymour has not been questioned on his ability to give an opinion on this issue, the questioning focussing rather on the substance of his opinion and many other matters that are clearly not within his expertise at all.

185. The Defendant goes on at paragraph 80 of its closing submissions:

"*The Defendant will also say that Mr Seymour has failed to consider properly the following documents which are crucial to the Aircraft's status, airworthiness and value: (i) Certificate of Airworthiness – valid as at 1 November 2018, (ii) Certification of Registration – valid as at 1 November 2018, (iii) Aircraft Review Certificate – valid as at 1 November 2018, (iv) Acceptance Certificate (Oct 2018) ... All Aircraft certification was valid and effective in 2018. The Claimant has not pleaded any basis on which these certificates can or should be disregarded, and it is too late to raise such a case now.*

81. As with a vehicle, an MOT is prima facie proof of the vehicle's roadworthiness, and an aircraft is no different. The HCAA is a regulator of aviation and aircraft certification. They will do a survey or inspection when required and that is usually for the Certificate of Airworthiness or the annual Aircraft Review Certificate – they do not interfere with day to

day operations of an aircraft or AOC holder unless they have to. They rely on the issuance of the Certificate of Airworthiness and ARC prima facie to permit an aircraft to fly. The airport authority also has no ability to ground an aircraft where the aircraft holds valid COA, COR and ARC. The leading case on certification airworthiness and liability of the relevant authority is Perrett[12]*. Although it deals with the liability of the PFA (certifying authority) arising from an aircraft accident, the case does set out the responsibilities of the relevant authority and the importance of the certificates issued in that they are accepted at face value when issued for the purposes of third party reliance in the airworthiness of the aircraft.*

82. This is compounded by the fact that Mr Seymour did not inspect the Aircraft or the engines at any time (despite the latter being in the UK during the time of his report), and instead relied upon a report from Meton Skies, who did nothing more than provide a cosmetic report."

186. In so far as the Claimant relies on the argument that the Defendant continued to be the CAMO for the Aircraft, the Defendant reasons that, whilst prior to 1 November 2018, it was the CAMO for the Aircraft, after that date (and following termination of the leasing of the Aircraft), the Claimant did not appoint a new CAMO but appears to have continued to rely on the Defendant to provide CAMO services. In contrast, according to Mr Alyfantis, "*when CAMO redelivers an aircraft the redelivery is considered complete once all the documents and records of the aircraft are handed over. The aircraft was already at the destination as indicated by FTI which is in Athens, Greece. So from my ... I worked on this perspective, we had to hand over the records*."

187. It should be noted that the Defendant within the Defence and its evidence spoke of the CAMO responsibilities as though they lay with the Defendant even after 1 November 2018 – see for example the Amended Defence at paragraphs 43 and the statement of Mr Dafaranas at paragraph 22. Indeed, paragraph 86 of the Defendant's written opening seeks positively to rely on the assertion that the Defendant continued to hold the Air Operators Certificate after 1 November 2018 and that its CAMO had control over whether the Aircraft was fit to fly in an attempt to meet the Claimant's case based on the report from Meton Skies. Yet further, on 30 July 2019, Mr Alyfantis emailed Mr Lewis to speak of the "*intention to complete the process and return your aircraft."* However this was delayed

[12] A reference to Perrett v Collins [1998] EWCA 884

because "*our CAMO team is overloaded and having very little support on this project.*" Mr Alyfantis sought to explain the apparent inconsistency over who the CAMO was as follows: "*So, at this point in time, Fortress was actually pushing us to perform the CAMO, although we were terminated. Of course, in an effort to seek to complete this project and assist Fortress, we would syntax the permit to fly request, as we did, and also syntax all the necessity – all the necessary or scope regarding the return to service and cater for (inaudible) flight. Again, this was not be on any agreement and be on any obligation to do so*." This is also said to be explained on the basis that the Defendant was acting as the agent of the Claimant to arrange CAMO services rather than continuing to be the Lessee of the Aircraft.

188. The second argument, that the Return Condition is irrelevant because the Claimant had accepted the Aircraft back into its possession under Article 23.14.4 is another way of putting the same issue as is addressed in Issue 3 and need not be covered here.

189. The basis for the third argument is that, as early as 2 November 2018, internal emails within the Fortress group show that the possibility of leasing the engines out separately from the Aircraft had been contemplated. Mr Lewis agreed in cross examination that the process here being contemplated was the sale of the airframe by Fortress, with the engines being transferred into their lease pool. He considered that the economic analysis of the situation at the time supported this course of action. However, he also maintained that he was attempting to lease out the Aircraft, albeit that he was not able to give any detail as to who had been approached.

Issue 5: Maintenance until Termination Date:

190. The Defendant denies that it was obliged to maintain the Aircraft after 1 November 2018, regardless of when the true Termination Date was.

191. First, the Defendant relies (again) on the fact that the Claimant was holding both the Security Deposit and the Maintenance Reserve. The Defendant could not in those circumstances be expected to have carried out the necessary maintenance. As it is put in closing, "*From a trading and industry point of view, this was just not workable and is not how MRs and the industry works*."

192. Further, the Defendant contends that the Claimant was in repudiatory breach of the Lease Agreement by its demand for sums that the Claimant was not entitled to, namely the Maintenance Rent for August 2018 and/or the Base Rent due on 10 October 2018. The

demand for the payment of these monies was, says the Defendant, a repudiatory breach of contract.

193. The Defendant at paragraph 8(a) of its closing submissions contends that the Claimant had "*waived*" the requirement that the Aircraft be in the Return Condition. The exact basis upon which this argument is put is unclear from the Defendant's written submissions.

194. It may be that this is simply an argument that the Claimant had exercised its rights under the combination of Articles 4.3.4 and 23.14.4 to take the Aircraft back into its possession and control. If so, it is dealt with as part of the issue 3 relating to the Termination Date.

195. Alternatively, it may be that this is the argument advanced by the Defendant that, since the Aircraft as purchased by the Claimant "*as is, where is*"[13], it is not then open to the Claimant to complain that the Aircraft was not in the Return Condition. If so, this is not a pleaded case, but I deal with it in any event below.

196. Yet further alternatively, it may be that the Defendant is arguing that the Claimant could have exercised its rights such as to allow it to maintain the Aircraft, using the services of Meton Skies[14] (whom the Defendant describes as the Claimant's agent) and/or other Greek-based providers of service.

Issue 6: Relief

197. The Defendant's arguments on the payment of Basic and Maintenance Rent prior to 1 November 2018 are dealt with above. The Defendant mounts the further argument that it is not liable for Maintenance Rent unless it had "*lease, possession and operation of the Aircraft*" under Article 5.5.2 of the Lease Agreement. The Defendant did not have all three of these, given that the Aircraft was grounded and that the Claimant had purported to terminate the leasing of the Aircraft.

198. The Defendant contends that, in addition to the Claimant's concession that it cannot recover the invoices identified above that were addressed to Fortress Investment Group, it is not able to recover for invoices addressed to WWTAI, namely items numbered 1, 2, 4, 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 35, 37, 38, 41, 43, 47,

[13] See Article 4.1 of the Sale Agreement.
[14] Technically based in Cyprus not Greece, as I understand it.

48, 60, 64, 66, 67, 68, 69[15] and 71 in Appendix 6. In addition, item 57 is addressed to "WWTAI General" and the Claimant cannot recover it because it cannot show which company within the group paid the invoice.

199. The Defendant contends that the Claimant cannot prove that it paid these invoices. In so far as WWTAI paid them, the Defendant does not deny the Claimant's right in principle to claim monies on behalf of WWTAI under the terms of the Head Lease, but contends that the Claimant fails to show any relevant Event of Default. In fact, the relevant Event of Default is the failure to return the Aircraft to the Claimant on the expiration date in accordance with Article 23 (see Article 25.2(d) of the Lease Agreement). This default led to a situation in which the Claimant remained out of possession of an aircraft in deteriorating condition which required it to need technical support, to repair the Aircraft and to have associated works carried out. All of the invoices addressed to WWTAI appear to me to fall within this category. I am entitled to assume that WWTAI as the addressee of the invoices paid them and therefore I conclude that these invoices are recoverable.

200. As to items 7, 49 and 55, the Defendant states that it is unclear to whom these invoices were addressed or who paid them and these claims must fail.

201. As to items 30, 31, 32, 33, 34 and 40 the Defendant says that these invoices are addressed to the Defendant but the Claimant, through Mr Lewis, was unable to identify which company had paid them.

202. Of item 56, the Defendant says this invoice is addressed to N Panagi & Co Customs Brokers and states "For WWTAI AirOpCo II DAC" and "FTAI AirOpCo UK Limited". Mr Lewis explained that it was "*to have the aircraft released so it could be sent out of the country*" . The Defendant says this was the Claimant's choice but was not caused by any default on its part.

203. The Defendant does not deal with any objection to the invoice from Air Salvage at item 71 in Appendix 7, though does mention the item in Appendix A to its closing submissions.

[15] The transcript misses a short passage at this point in the hearing, as the Defendant notes. My note of what was said of this invoice by Mr Lewis is, "*The service request was from Olympus. I do not have a breakdown of the invoice. I know all of the invoices were paid. I know the Athens Aeroservices invoices were paid because of discussion with Yiannis. The aircraft would not have been released without these invoices being paid. Yannis is the accountable manager for Athens Aeroservices. There are invoices about this.*" For the sake of completeness, I should add that the Defendant states that some evidence about Papapetros, Papangelis was also missed at this time. I have no note of questioning on those invoices in the part of the hearing where the transcript is missed (which anyway would appear to have been very short), though nothing turns on this since all the claims relating to Papapetros, Papangelis fees fail for other reasons.

204. The Defendant notes that the invoice from Norton Rose Fulbright for $51,006.75 referred to in the Particulars of Claim is in fact being claimed as costs not damages according to the Claimant's opening submissions. This figure has not been included in the Claimant's schedule.

205. The Defendant summarises the figures from those claimed by the Claimant in opening and those sought in closing submissions. It notes that the figures given in opening themselves differ from the figures pleaded in the Amended Particulars of Claim:

	Opening	Closing
Base rent	$2,125,000	$2,125,000
Maintenance Rent	$671,990	$948,629.96
Default rent	$1,093,151	$1,101,370.12
Enforcement costs	$994,445.33	$1,009,143.24
Diminution in value	$11,517,000/$3,337,000	$11,517,000/$3,337,000

In so far as the figures differ in closing from opening, the Defendant contends that the lower should be taken, though it concedes that the difference between the figures for enforcement costs relates to the Claimant's decision not to pursue the fees of Norton Rose Fulbright as damages and the decision to seek to recover a sum paid to Air Salvage International.[16]

206. The Defendant contends that the Claimant's claim for Base and Maintenance Rent under Article 25.6(c) are claims for damages not in debt and are subject to the duty to mitigate. Article 25.6(c) is concerned with the Lessee's liability for losses caused by the inability of the Lessor or owner to be able to lease the Aircraft following an Event of Default. It is clear that, if the Claimant's case is made out, there is an Event of Default here and that the Claimant (or WWTAI as owner) was unable to lease the Aircraft for a considerable period following that default. The Defendant pleads at paragraph 84 of the Amended Defence by way of failure to mitigate that the Claimant:

"(a) Appointed Meton to recover the Aircraft but, as set out in paragraph 21 of the POC, Meton did not recover the Aircraft;

[16] Item 71 in appendix 7 to this judgment.

(b) It did not appoint a MRO until November 2019, as set out in paragraph 25 of the POC; and

(c) Has not applied the Security Deposit of US $375,000 under Article 25.3(l).”

207. In closing submissions it says that “*there were multiple steps the Claimant could and should have taken, such as re-taking possession earlier than 1 November 2018, waiving any return condition requirements under Article 23.4.14, appointing its own CAMO, finding alternative lessees and/or actually offering the Aircraft in the leasing market with MRs attached (including the engine which have remained idle for over 3 years).*” The Defendant draws attention to the decision of the Court of Appeal in Credit Suisse v Arabian Aircraft & Equipment Leasing [2013] EWCA 1169 as showing similar circumstances in which the court considered the duty to mitigate.

208. As to the diminution in value claim, the Defendant contends:

208.1. there is no evidence of a causative failure to maintain leading to the alleged diminution in value between March and July 2020

208.2. the evidence is clear that the Claimant’s intention was not to re-lease the Aircraft, but simply to lease out the engines separately from the airframe. Any value of the Aircraft to the Claimant was not as a single unified asset, but dismantled into parts.

209. The Defendant points to other problems with the evidence on diminution in value:

209.1. Mr Seymour acknowledges that factors other than simply the maintenance state of the Aircraft affected its value, for example, normal depreciation, market conditions and the perception that a parked Aircraft was “*distressed.”* These could not be the proper basis for a diminution in value claim based on a failure to maintain.

209.2. Mr Seymour has failed properly to take account of the Maintenance Reserve.

210. The Defendant relies upon Sunrock Aircraft Corporation v SAS [2007] EWCA Civ 882, The Court of Appeal set out at paragraph 32 what the Defendant says are the relevant principles with regard to a claim of this nature:

“…the measure of damages for redelivering a hired chattel in damaged condition was the cost of repairs, unless it was unreasonable to effect the repairs; if it was unreasonable to effect the repairs, then the measure was the diminution of value. The applicable principles are set out in Ruxley Electronics v Forsyth [1996] AC 344, a case on a building contract.

… in the speech of Lord Jauncy at 357: 'Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate'."

DISCUSSION

Issue 1: Novation

211. The Effective Time Supplement is clear that the Effective Time for the purpose of novation of the Lease Agreement is 11.30am local Greek time on 5 October 2018. It is correct that the Novation Agreement contains conditions precedent, but the parties have signed the Effective Time Supplement to confirm that the conditions precedent have been complied with.

212. In any event, the Defendant's evidence that the conditions precedent had not been complied with by 5 October 2018 is vague and unconvincing. Neither Mr Alyfantis nor Mr Karabatis appear to have had close involvement with the process. Their assertion that the conditions precedent cannot have been complied with before around 15 October 2018 are inconsistent with the document that the Defendant itself signed. I would have rejected their evidence on this issue due to those weaknesses, but I am fortified in my conclusion that I cannot accept what they have to say by my finding below that, on the issue of the liability of the Defendant for the Maintenance Rent for August 2018, both witnesses have given misleading evidence as to the use of the Aircraft in that month, with an attempt to deceive the court.

213. The Defendant has shown no convincing basis to go behind the date given in the Effective Time Supplement, which is a clear assertion that the conditions precedent had been complied with by then. On the balance of probabilities, the Novation Agreement was effective from the date stated therein, 5 October 2018.

214. It follows that the sum $125,000 by way of Base Rent, payable on 10 October 2018 and the sum of $30,545 by way of Maintenance Rent for September 2018, payable on 15 October 2018 fell due after the Effective Time.

215. As for the Defendant's alleged liability for the Maintenance Rent for August 2018, I reject the Defendant's suggestion that it had discharged this liability pursuant to an agreement with ALS for the following reasons:

215.1. The Defendant's case that it had no liability to pay rent for this month because the Aircraft was grounded. This case is put expressly by Mr Karabatis at paragraph 31 of his statement and impliedly by Mr Alyfantis in paragraph 9 of his statement. It is clearly untrue, given the flight records that have been disclosed. Nobody who had considered those records could have made the mistake of believing that the Aircraft was in fact grounded for the month of August 2018. No reason has been given for the error made by both witnesses and I am driven to conclude that they both made statements that they knew were untrue and have tried to deceive the court on this issue. The obvious reason for this is in an attempt to justify not paying Maintenance Rent for that month when they knew it was in fact due.

215.2. In any event, if there were a settlement agreement of the kind discussed between ALS and the Defendant, either a written version would have been forthcoming (yet the Defendant has said there is no written agreement to disclose) or the Defendant would have produced evidence of the terms of the agreement that was reached. It has done neither, fortifying my conclusion that in fact the reference to an agreement compromising this liability is untrue and is an attempt to divert the court from the true situation, namely that the rent for that month was not paid.

216. However, I accept the Defendant's interpretation of Article 2.1.4. The obligations of the Defendant, as lessee, are subject to the rights of the Claimant as the new lessor. Those rights are expressly defined in Article 2.1.3 as "*arising from and after the Effective Time.*" It is correct that article 2.1.4 makes reference to the outgoing lessor's obligations, but only in the context of defining the nature of the obligations, not stating that existing crystallised liabilities (other than those expressly dealt with in Article 2.1.3) outlive the novation of the Lease Agreement.

217. I note Mr Lewis' evidence that there was a "*gentleman's agreement*" about the Maintenance Rent for August 2018. I see no reason to doubt his version that this sum was deducted from the purchase price payable by the Claimant to ALS on the assumption that the Claimant would recover it from the Defendant. However, I am not persuaded that the Claimant is entitled to recover the sum under Article 2.1.4 for the reasons that I have identified and no other basis for recovery has been put before me. It follows that the Claimant is not entitled to recover the Maintenance Rent for August 2018 which fell due prior to novation.

218. It follows that, on Issue 1 as defined above, the following answers are reached:

218.1. What was the Effective Time of the novation of the Lease Agreement?

5 October 2018

218.2. What sums (if any) claimed by the Claimant fell due prior to the Effective Time?

The Maintenance Rent for August 2018

218.3. Can the Claimant recover such sums?

No

Issue 2: Default and Termination Notices

219. I have noted in my summary of the parties' cases that the Claimant produces notices of which the third, that dated 2 November 2018, has a schedule of invoices attached, containing figures that match those which the Claimant now says were due as of 1 November 2018. In contrast, Mr Alyfantis for the Defendant says that it was the second notice which contained the schedule. Mr Alyfantis is probably wrong:

219.1. He appears to have the notices out of order (the second default notice appears from his statement to have been the second notice in time, but was in fact the third in time);

219.2. In any event the Second Default and Termination Notice clearly in its text refers to an annex setting out the invoices, whereas neither of the other notices refer to such a schedule.

220. The service of the Termination Notice dated 1 November 2018 was effective to bring the leasing of the Aircraft to a conclusion on that date for the following reasons:

220.1. The Default Notice of 26 October 2018 states that the default is the Defendant's failure to pay Base and Maintenance Rent in accordance with the Lease Agreement.

220.2. The Defendant was in fact in default in failing to pay these sums.

220.3. Therefore the Default Notice correctly identified the fact of those defaults, although it did not set out the amount allegedly due.

220.4. The Defendant did not comply with the demand to cure the Events of Default.

220.5. In accordance with the terms of the default notice, the Claimant then issued the Termination Notice dated 1 November 2018 in accordance with its contractual right to terminate for an Event of Default.

221. The Defendant is not assisted by the arguments that the amounts claimed by the Claimant were inaccurate and/or confusing and/or not supported by invoices do not assist the Defendant. It did not seek clarification of the sums that were sought. Indeed, it is striking that, in the email from Mr Alyfantis dated 2 November 2018 referred to above, he did not take exception with the Claimant's right to terminate the leasing of the Aircraft, nor did he suggest that there was any ambiguity about the Defendant's obligations to pay the sums claimed. In any event, the Defendant cannot say that it was misled into not paying the sums due when two of them were clearly payable under the terms of the Lease Agreement.

222. The fact that the Claimant subsequently gave inaccurate figures in the Termination Notice of 2 November 2018 cannot assist the Defendant because the leasing of the Aircraft had already been terminated by then. In any event, if I had needed to determine the effect of any inaccuracy, I would have held on the facts of this case that assertion of some Events of Default that were valid is sufficient to render the Termination Notice valid. This is consistent with the decisions in ED&F Man v Fluxo-Cane and Sucden Financial v Fluxo-Cane. I do not accept that the Defendant shows any valid basis for distinguishing those decision.

223. In contrast, the decision of Freedman J in Lombard North Central plc v European Skyjets Ltd is clearly distinguishable:

223.1. The Judge in that case was concerned with whether the defendant's case was arguable not whether the defendant made out its case.

223.2. The arguable defence was that, as a matter of construction or as an implied term based on business or legal efficacy, the default notice required identification with reasonable accuracy of the nature of the breach and/or the conduct of the claimant might give rise to an estoppel. In contrast, the Defendant has neither pleaded nor argued that, on its proper construction, the Lease Agreement required accurate (or even reasonably accurate) identification, nor that such a term should be implied as a matter of law. Equally, there is no argument for an estoppel arising against the Claimant.

223.3. It is striking that Freedman J in Lombard North spoke of the "*very unusual facts of the case.*" It is clear that the Judge held there to be an arguable defence notwithstanding the fact that an argument as to an error in a default notice would not normally avail someone in the position of the defendant in that case.

224. It is possible that circumstances might arise in the context of claims such as the present one where the confusion as to sums due at the time of service of a Default and/or Termination Notice might render them invalid. In particular, if a party could say that it simply had no clear knowledge of what it was due to pay, but was willing and able to pay that which was due, it is conceivable that an argument along the lines of those contemplated by Freedman J in Lombard North might avail the Defendant. However, no such argument has been formulated here. Rather, the Defendant simply says that, because the only notice that particularised the claim was, at least in respect of one invoice, incorrect, the Claimant was not entitled to terminate the Lease Agreement. In my judgment, that argument is inconsistent with the judgements in Fluxo-Cane cases referred to above

225. The Defendant is also not assisted by the evidence of Ms Kakavani as to the inaccuracies of other invoices. The fact that some other invoices may have been erroneous gives no ground for holding that the Termination Notice in this case as not valid.

226. As to the Defendant's argument that the Security Deposit could and should have been applied against the outstanding payments due from the Defendant. Mr Lewis accepted in cross examination in the passage referred to above that this may be a realistic commercial position that, where a party is attempting to put right a default, the lessor might well accommodate them by allowing time for payment and might apply the security deposit to discharge part of it. But he made the obvious point that, to use the security deposit in this ay would reduce the value of the security that the Claimant had. In reality, there is no contractual obligation on the Claimant to use the Security Deposit in this way. In so far as the Defendant appeals to some form of trade practice, it has neither pleaded nor proved that and I am entirely unconvinced that the Defendant's contractual obligation to pay rent is in some way varied by an implied obligation on the part of the Claimant to use the Security Deposit in a particular fashion.

227. The Defendant's argument that the Maintenance Reserve should have been used in this way suffers from the same problem. It is clear from the terms of the Lease Agreement that the Maintenance Reserve is part of the rent payable under the lease which upon payment

becomes the lessor's property. It is correct that, upon the happening of certain events of maintenance, as defined, the Lessor comes under an obligation to pay sums to the Lessee. It is further clear from the terminology that the accrued Maintenance Reserve is seen as the pot from which such payments are to be funded. It is yet further clear that the Maintenance Reserve "*follows*" the Aircraft (as demonstrated by the fact that, on sale, the purchase price as reduced by the amount of the Maintenance Reserve) but the Claimant took on the responsibility to pay for the relevant Maintenance Reserve Activities (regardless of whether the maintenance related to use before of after the purchase of the Aircraft by WWTAI).

228. However, none of this leads to a conclusion that the Claimant is obliged to use the Maintenance Reserve in a particular way. That would be inconsistent with the express terms of the Lease Agreement, is not a necessary implied term to give business efficacy to the lease Agreement, nor is demonstrated to be a trade practice that the court should give effect to. Quite simply, it was up to the Claimant what it (or its associated company) did with the monies, albeit that it remained under an obligation to reimburse the Defendant in certain circumstances.

229. The final point advanced by the Defendant, that the practice of the previous owner to allow indulgence in terms of time for payment, is equally unsustainable. Yet again, the Defendant appears to be arguing for some implied term. This is not pleaded and is inconsistent with the express terms of the Lease Agreement (and indeed its own acknowledgment of its duties in paragraph 25 of the Defence) which is unsupported by evidence or convincing legal argument.

230. It follows on Issue 2:

What was the effect of the Notices served by the Claimant dated 26 October 2018, 1 November 2018 and 2 November 2018?

The Notices had the effect as to bring the leasing of the aircraft to an end in accordance with Article 25.3(b) following an Event of Default

Issue 3: Termination Date

231. I have set out above the Defendant's case that the Termination Date is 1 November 2018 based on the argument that the Second Default and Termination Notice demanded that the Defendant immediately return the Aircraft to the Lessor at Athens International airport;

that the Aircraft was already at Athens International Airport pursuant to the agreement with ALS; that the Defendant had therefore complied with its obligation under clause 23.4 of the Lease Agreement and that the Claimant thereafter repossessed the Aircraft and recovered possession and control within the meaning of clause 4.3.4 at the time of the demand.

232. However, as the Claimant points out, there are numerous examples, after 1 November 2018 of the Defendant asserting control over the Aircraft and exercising such control. Indeed, the Defendant went further to deny the Claimant's right to possession and control, in particular:

232.1. Mr Alyfantis's response to the email from Rebecca Rigney on 2 November 2018.

232.2. The use by the Defendant of the Aircraft for Cabin Crew training on 13 November 2018.

232.3. The assertion by Mr Alyfantis on 28 November 2018, in an email to Stephane Arvanitidis of AeroReps, that the Defendant remained the CAMO of the Aircraft.

232.4. The failure to hand over the Aircraft Documentation before 12 June 2019

232.5. The email from Mr Alyfantis to Mr Lewis dated 30 July 2019 which speaks of an intention to "*return your aircraft*."

232.6. The email dated 31 January 2020 from Mr Nikoletatos asserting that the Defendant was the AOC holder and that the removal of the engines on behalf of the Claimant was a breach of its rights in the Aircraft.

233. The Defendant repeatedly took the stance that it remained in possession and control of the Aircraft. In contrast, there is no evidence that the Claimant had such possession or control until it applied to dismantle the Aircraft. Prior to then, whilst it might be argued that the Claimant could have taken possession or control, there is simply no coherent case that it had done so.

234. I do not consider the fact that the Claimant had not withdrawn the Grounding Notice to be in some way indicative of a transfer of possession and control. It has not been suggested that, when first issued, the Grounding Notice transferred possession and control. Indeed, given that the Defendant continued to operate the Aircraft, it plainly did not. Even if this was with the consent of ALS (as to which I have some doubt, though I accept that the state of the evidence is not sufficient to permit me to reject the account of the Defendant's

witnesses on this point), no argument has been advanced that possession and control could somehow pass back and forth between the lessor and lessee as a result of agreements that related not to who had possession and control but rather how the Aircraft might be used.

235. I am however also not satisfied that the issue as to the Claimant requiring or requesting the Defendant's cooperation in arranging a Ferry Flight is of assistance in determining this issue. I accept the Defendant's argument that the idea of a requirement of a ferry flight is inconsistent with the terms of the Lease Agreement, given that the Aircraft was already in Athens, as requested by the Claimant. I do not see that any contractual obligation to cooperate with the arrangement of a ferry flight arose. Further, the mere fact that the Defendant was in fact willing to assist with this does not demonstrate that it retained possession and control of the Aircraft.

236. Yet further, the fact that the Aircraft was not in the Return Condition as of 1 November 2018 (my finding on Issue 4 below) does not greatly assist in determining the Termination Date other than in the negative sense that it is not open to the Defendant to argue that it returned the Aircraft in the Return Condition – in point of fact it has not sought to argue that it did so.

237. As to the true Termination Date, I agree with the Defendant that the request for permission to disassemble the aircraft on 6 March 2020 is only consistent with the Claimant believing that it had possession or control of the Aircraft. Whilst it might have been able to take possession and control before that date, there is no basis for concluding that it did so. However, once it sought permission to disassemble, it committed to the position that it was in control and possession of the Aircraft.

238. It follows on Issue 4:

    238.1. What was the Termination Date of the Lease Agreement?

    6 March 2020

Issue 4: Condition as of 1 November 2018

239. The obligation as to the Return Condition is clear from the terms of the Lease Agreement:

    239.1. The return of the Aircraft in the Return Condition at the Expiration Date would invoke the Termination Date provisions (clause 4.3.5);

239.2. The failure to return the Aircraft in the Return Condition would amount to breach of Clause 23.9 of the Lease Agreement.

240. The difficulty with the Defendant's argument on the condition of the Aircraft as of 1 November 2018 is that it seeks to contradict the conclusions of the jointly instructed expert by relying on the opinions of its own witnesses. I accept that the there is no "bright line" rule that a single joint expert's opinion must be accepted by the court. In Griffiths v TUI [2021] EWCA Civ 1442, Asplin LJ, who gave the leading judgment for the majority in the Court of Appeal, said at paragraph 40, "*There is no rule that an expert's report which is uncontroverted and which complies with CPR PD 35 cannot be impugned in submissions and ultimately rejected by the judge. It all depends upon all of the circumstances of the case, the nature of the report itself and the purpose for which it is being used in the claim."* The Court of Appeal in that case considered the judgement of Clarke LJ in Coopers Payen Ltd v Southampton Container Terminal Ltd [2004] Lloyds Rep 331 where he said at paragraph 42, *"... the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong*." In Griffiths v TUI, Asplin LJ said of this passage at paragraph 46 of her judgment, "*There is no suggestion that* [Clarke LJ] *had in mind an expert's report which was a bare ipse dixit , nor was he considering the situation in which the expert's report did not deal with all the relevant issues, the expert's conclusion was unsubstantiated by the reasoning or the reasoning was inadequate or incomplete. It cannot be assumed, therefore, that Clarke LJ's dicta were intended to cover an expert's report of that kind*."

241. The present case is not one where it can be said that the factual basis of the expert's report is agreed. However, by far the greater objection that the Defendant has to the report is that the expert has failed to take into account matters that he ought to have done or that he has taken into account matters that he should not have done. This is a vastly different situation from the "*ipse dixit"* being considered in Griffiths where the trial Judge identified a number of deficiencies of reasoning and analysis in the expert's report. In contrast, the Defendant's criticisms of Mr Seymour's evidence in this case involve considering whether (for example) Mr Alyfantis is right in his expression of opinion as to the cost of bringing the Aircraft to a state in which it could have been flown out of Athens Airport as well as

whether, if it was fit to be flown out of Athens Airport, this was indicative that the Aircraft was in the Return Condition.

242. The court is simply unable to assess that kind of argument without expert evidence from an independent witness put in proper form that sets out a case that can be challenged (if appropriate) by the opposing party. The Defendant has not done this. I accept that the Defendant has been dissatisfied with the evidence of Mr Seymour from an early point and it may be that it has been let down by its previous lawyers in the manner in which expert evidence has been dealt with in this case. But that cannot permit the court to drive a coach and horses through the rules of evidence and the need for parties to advance a case by way of admissible evidence that is served in accordance with the rules.

243. The Defendant says in opening that "*It is ... not for the Claimant to assert, without more, that the Defendant's witnesses cannot describe or give technical or operational evidence on matters which they are certified to do day to day or have vast amount of experience thereof.*" I profoundly disagree. That is exactly what the Claimant is entitled to do in circumstances where the Defendant has not obtained permission to rely on expert evidence.

244. It is correct, as the Defendant asserts, that at times Mr Lewis has also expressed opening evidence base on experience if not expertise. I agree with the Defendant that this is no more admissible than the similar evidence from its own witnesses.

245. In any event, it is not clear from the Defendant's evidence that it truly asserts that the Aircraft was in the Return Condition as of 1 November 2018. Its case seems to turn on the airworthiness of the Aircraft not its actual condition. This can most simply be seen from paragraph 101 to 105 of the Defendant's closing submissions, which do not assert that the Aircraft was in the Return Condition, merely that it was airworthy and had been maintained in accordance with the Olympus Maintenance Manual and MPD. The emphasis in the Defendant's witness statements is on the airworthiness of the Aircraft and the servicing required as of November 2018.

246. I am satisfied on the material before the court that the Aircraft was not in the Return Condition and that the necessary works were those identified by Mr Seymour in the relevant columns of the table in Appendix 3 to his report. In summary:

246.1. Was the Aircraft in Return Condition as of 1 November 2018?

No

246.2. If not, what was the Actual Condition of the Aircraft?

As described in the column in Appendix 3 to the report of Mr Seymour that relates to November 2018

Issue 5: Maintenance until Termination Date

247. On the face of the terms of the Lease Agreement, I agree with the Claimant that the Defendant is clearly liable both to maintain the Aircraft in accordance with the Lease Agreement and to pay Maintenance Rent until the date determined by the Court to be the true Termination Date. No other interpretation is consistent with the express terms in particular of Article 13 of the lease Agreement.

248. I have set out above my conclusion on the proper interpretation as to how the Security Deposit and Maintenance Reserve are held by the Claimant. Whilst the Claimant concedes correctly that the Security Deposit must be deducted from the claim that it makes, since the Defendant is entitled to return of that sum subject to making good the Claimant's losses, there was no obligation for the Claimant to apply those monies to the maintenance of the Aircraft and correspondingly no basis for the Defendant to say that it was not liable to maintain the Aircraft because the Claimant (or its associated companies) had control of the monies.

249. On the argument that the Claimant was in repudiatory breach of contract, assuming for the moment that, in claiming monies to which it was not entitled, the Claimant was in repudiatory breach, there is simply no evidence that the Defendant accepted any such alleged repudiation (nor has it ever identified what it says to amount to such acceptance). Indeed, all of the evidence is that to the opposite effect. Until this matter came to litigation, the Defendant's position was that it continued to have rights under the lease Agreement, as demonstrated by the matters referred to above in support of the conclusion that the Claimant had not retaken possession and control of the Aircraft. Further, the Defendant contends that the Claimant was in repudiatory breach of the Lease Agreement by its demand for sums that the Claimant was not entitled to, namely the Maintenance Rent for August 2018 and/or the Base Rent due on 10 October 2018.

250. In respect of the argument of waiver, in so far as the Defendant is arguing that the Claimant had exercised its rights under the combination of Articles 4.3.4 and 23.14.4 to take the Aircraft back into its possession and control that has already been dealt with as part of Issue 3.

251. The further alternative argument is that WWTAI had purchased the Aircraft "*as is, where is and with all faults*" (pursuant to Article 4.1 of the Sale Agreement) and cannot now complain as to its condition. The Defendant limits this argument in its opening submissions to matters relating to the condition of the Aircraft at the time of novation of the Lease Agreement. This has the merit of being rational, since it is difficult to see how the purchaser of an asset that is intended to be leased out could be taken to accept future deteriorations in its condition as a hazard of ownership against which it is unable to guard by requiring the lessee to maintain the asset. However even in respect of defects in the Aircraft that existed at the time of novation of the Lease Agreement to the Claimant, it is clear that the Sale Agreement is concerned with issues between the seller and purchaser, not the purchaser and lessee. If this were not the case, it is difficult to see how, for example the purchaser could be held responsible for compensating the lessee for Maintenance Rent Activities that relate to the condition of the Aircraft prior to as well as after the novation. Yet it is clear from the Novation Agreement that this is what is intended. In my judgment, the terms of the Sale Agreement play no part in determining liabilities between the purchaser and lessee.

252. I see nothing in the argument that the Claimant in fact assumed a responsibility to maintain the Aircraft after 1 November 2018. The evidence is clear that the Claimant was seeking to arrange its return and that it was reliant on others including the Defendant to discharge their duties in respect of the Aircraft. Given the clear terms of the Lease Agreement, I do not see that the fact that the Claimant could have taken on the maintenance responsibility meant that, as a matter of law, it did so.

253. On issue 5, my conclusions are:

If the true Termination Date of the Lease Agreement was later than the Defendant Termination Date, was the Defendant required

253.1. To maintain the Aircraft until the true Termination Date?

Yes

253.2. To pay Maintenance Rent until the true Termination Date?

Yes

Issue 6: Relief

254. On the issue of liability for rent, I agree with the Claimant's arguments that:

254.1. On the face of the terms of the lease, the Claimant is entitled to base Rent until the expiation of the Lease Agreement and thereafter Default Rent until the Termination Date;

254.2. The Defendant is liable for Maintenance Rent until the Termination Date.

255. I reject the suggestion that the result of sending Default and Termination Notices that terminated the Defendant's right to use the Aircraft and required its return mean that the Maintenance Rent is no longer payable. The Lease Agreement contemplates that Maintenance Rent will be payable for the same term as Base Rent. The amounts of such rent are calculated in part by reference to use and in part by reference to other factors. The definition section of the lease Agreement (Article 2) state that Maintenance Rent is calculated for periods up to and including the Termination Date. It would be perverse to interpret the terms of Article 5.5.2 as creating some kind of condition precedent to the payment of Maintenance Rent which is not consistent with the scheme for the payment of the rent. It follows that the actual operation of the Aircraft is not a pre condition to the liability for Maintenance Rant.

256. In respect of the claims for rent, my findings on this and other issues lead to the following conclusions:

256.1. The Claimant is not entitled to Maintenance Rent for August 2018.

256.2. The Claimant is entitled to Base Rent of $125,000 payable on 10 October 2018

256.3. The Claimant is entitled to Maintenance Rent of $30,545 payable on 15 October 2018

256.4. Following service of the default and termination notices, the Claimant is entitled for the 16 months from November 2018 to the expiration date in March 2020 of rent, that is to say:

(a) Base rent of $125,000 x 16 - $2,000,000

(b) Maintenance Rent of $30,545 x 3 = $91,635[17]; $31,767 x 12 = $381,204[18]; and $33,037 x 2 = $66,074[19]; $6,516[20] – a total of $551,429

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[17] October – December 2018

[18] 2019

[19] January – February 2020

[20] 6 days at a daily rate of ($33,037 x 12)/365 = £1,086

256.5. Given my finding that the termination Date as 6 March 2020, the Claimant is not entitled to Default Rent.

257. On the issue of Maintenance Rent, I accept the Claimant's argument that this is not in principle deductible from the claim. The Claimant is not required to give credit for Maintenance Rents that it has received but not re-credited to the Defendant on account of Maintenance Rent Activities for the reasons set out at paragraph 228 above.

258. As to the argument that the Claimant failed to mitigate its loss by reletting the Aircraft and/or the engines sooner, it is obvious, at least with the benefit of hindsight, that the Claimant may have been able to retrieve the Aircraft earlier and to have put either the whole Aircraft or at least the engines out on a new lease earlier if it had exercised its right under Article 23 to accept the Aircraft back in non-compliant condition. However, I agree with the Claimant's argument that the claim for rent is a debt claim to which the duty to mitigate does not apply. Even though the Lease Agreement gives the right in Article 25 to the Claimant to claim damages for losses caused by an Event of Default such as failing to return the Aircraft in the Return Condition, it does not follow that a claim for rent following such default falls within that Article. This is a clear debt claim rather than a claim for damages. Hence the duty to mitigate does not arise.

259. In any event, I am not persuaded that the Defendant shows any unreasonable act on the part of the Claimant in respect of failing to retake possession and control of the Aircraft earlier. The Defendant challenged the Claimant's right to act as it wished in respect of the Aircraft. This is not a case where the Defendant simply gave up on the aircraft and failed to engage with the Claimant. Rather it asserted rights in respect of it and sought to affect how the Claimant acted. In those circumstances, I do not see that the Claimant can be criticised for seeking to engage with the Defendant to perform a ferry flight.

260. Turning to the claim in respect of expenses and costs incurred by the Claimant and associated companies, I accept the Claimant's case that it is more probable than not that all of the invoices referred to in the claim were paid by some company in the Fortress Group. I say this because the very possession of these invoices by the Claimant is indicative that the invoices were referred to the Claimant or one of the companies connected with it, and that Mr Lewis' evidence that the Fortress Group pays its invoices is, as a general proposition and absent evidence to the contrary in any particular case, probably true – if it were not true at least in general, it is highly unlikely that the Group would be the successful

entity that it is. I do not consider that it is necessary for the Claimant to show chapter and verse of the payment of any invoice to persuade the court that it is more probable than not that it was paid.

261. However, the difficult comes in showing how, if the invoice was not addressed to the Claimant, the Claimant is entitled to recover the sum due under it. If the Claimant were able to show actual payment of invoices as it sought to do in relying on further evidence after trial, it probably would be able to recover the sum. However, in so far as invoices are not addressed to the Claimant, there is no evidence of this.

262. I have identified above that, in so far as expenses were paid by Fortress Investment Group rather than WWTAI or other affiliates of the Claimant, those sums are not recoverable. I have identified those items in Appendix 7 to this judgment.

263. In addition, the apparent payment of $24,495.68 on 4 March 2020 is not sufficiently particularised to justify allowing its recovery and does not appear to be claimed by the Claimant, as I have noted above.

264. As to invoices addressed to WWTAI, the Court is entitled to assume that that company paid invoices that were addressed to it. Further, I accept the Claimant's argument that the nature of these invoices and the evidence of Mr Lewis is such that they probably relate to the maintenance of the Aircraft and associated fuelling and parking costs that were incurred because the Defendant had defaulted on payment of the rent, the Claimant had demanded return of the Aircraft in accordance with Article 23, but the Defendant had not complied with that demand. However, I do not consider that Item 72 falls into this category. Rather it falls into the same category as item 56 which is dealt with below. It follows that these sums are, apart from item 72, recoverable.

265. Items 7, 49 and 55 in respect of which neither the person invoiced nor the person who paid are identified cannot be recoverable. The Claimant concedes that it cannot prove that invoices addressed to Fortress Investment were paid by the Claimant or that the Claimant is otherwise entitled to recover the costs under the Head lease. Since it is possible that these invoices were addressed to Fortress Investment Group, it must follow that the Claimant fails to prove its case on them. Item 57 falls into a similar category. Although the invoice is addressed to a named party, WWTAI General, that is not a company and it must follow that the true addressee is unknown. Again the payer is unknown, so the invoice is not recoverable.

266. As to items 30, 31, 32, 33, 34 and 40 in appendix 7, these were addressed to the Defendant. The Claimant's evidence is sufficient to show on the balance of probabilities that some company in the Fortress Group paid them, but since the payer cannot be identified and therefore be shown to be a company within the Head Lease, the Claimant fails to prove that it is entitled to recover the costs paid over.

267. I agree with the Defendant's argument in respect of item 56 in Appendix 7. The decision to relocate the Aircraft was not a consequence of any default by the Defendant but rather the Claimant's decision as to what was the appropriate manner to deal with its investment following recovery of the Aircraft. The same principle applies in respect of item 72. These do not relate to any default by the Defendant. In particular, since for reasons set out above, the Defendant was not obliged to arrange a ferry flight, no relief consequent upon their failure to do so is recoverable.

268. I have noted above the Claimant's response to any argument by the Defendant that it failed to mitigate its loss in incurring these expenses. In my judgment the Claimant is right to say that there is simply no adequate particularised case to make such findings.

269. I turn finally to the claim for diminution in value. This is a claim under a contractual indemnity. I accept the Claimant's argument that the common law measure of damages for returning a hired chattel in a damaged condition is not the proper basis of calculating the loss. Rather the loss recoverable is the amount sufficient to fully compensate the owner for any diminution in value of the owner's interest flowing from a failure to maintain. If the Aircraft had been maintained, it would have been returned in the Return Condition. The Aircraft should have been returned in this condition at the expiry of the Lease Term in March 2020. Thus the Claimant's loss is the value that the Aircraft would have had in the Return Condition in March 2020 less the value that it had when actually returned. On the basis of my judgment above, the Claimant took the irrevocable step to retake the Aircraft in March 2020 and its actual value should be calculated as at that date.

270. As to the Defendant's argument that this approach to valuation fails to take into account matters other than the failure to maintain, I do not accept this to be the case. It is clear from Mr Seymour's report that, in calculating value as of March 2020 (and indeed July 2020), he has discounted from both the Actual Value and the return Value the same figure to reflect the distress as defined in the report. Thus the fact that the Aircraft had been on the tarmac for well over a year and has suffered a fall in value due to this does not affect the

difference between the two figures and therefore does not fall as a loss which the Defendant might have to meet.

271. In any event, it is clear from the calculation at Appendix 4(a) that it is the effect of maintenance (or rather the lack of it) that gives rise to the different in the "MAMV(x)[21]" figures. Thus the only difference in the MAMV(x) figures for the same date is the maintenance adjustment (MX Adj) reflecting the maintenance that either has occurred (in the Actual Value figure) or should have occurred (in the Return Condition figure). Thus these figures, at least in so far as one is comparing them on the same date only reflect loss in value caused by the failure to maintain the Aircraft in the Return Condition, the very loss that is contemplated by Article 25.6.

272. As the Claimant notes, the Defendant raised a separate and rather more nuanced argument that, but for the breaches of the lease by the Defendant, the Claimant would have been obliged to pay out in respect of Maintenance Contributions for works that would have been required to render the Aircraft in the Return Condition. Thus, in so far as the Claimant seeks to recover losses for the fact that the Aircraft is not in the Return Condition, it should give credit for the Maintenance Contribution it would have needed to have paid out in consequence of the Defendant maintained the Aircraft in that condition. The Claimant raises several arguments as to why it says this argument is flawed.

273. The Defendant's argument that the amount of the Maintenance Contribution that the Claimant would have paid out to so also achieve the Maintenance Condition should be set against this is in principle clearly correct and is not seriously challenged by the Claimant. However, there is simply no basis for knowing what that figure is. It has not been analysed and I have no basis for assessing that figure.

274. I conclude that the Claimant is entitled to the sum of $9,820,000 - $8,018,000 = $1,802,000 on account of diminution in value under Article 25.6 of the lease Agreement.

275. Given that the calculation of interest in this case is complex, I will leave it to the parties to seek to agree the relevant figures, if not to return to me for a further hearing on the issue.

276. Accordingly, the various parts of Issue 6 are answered as follows:

[21] Maintenance Adjusted Market Value adjusted for Distress, in other words the market value based on the half-life of the Aircraft parts, adjusted for the maintenance that has occurred and any transaction distress.

276.1. Is the Claimant entitled to any or all of the sums claimed in paragraphs 33 to 36 of the Amended Particulars of Claim?

Yes. It is entitled to:

Base Rent payable on 10 October 2018 of $125,000

Maintenance Rent payable on 15 October 2018 of $30,545

Base Rent from November 2018 to March 2020 of $2,125,000

Maintenance Rent for November 2018 to March 202 of $514,884

This invoices marked "Yes" in the right hand column of the Table at appendix 7 to this judgment, in the total sum of $

Interest to be agreed or assessed

276.2. Has the Claimant failed to mitigate its loss?

No

276.3. If so, to what extent at all is its recoverable loss reduced as a result?

Not applicable

276.4. Is the Claimant entitled to damages representing the diminution in value of the Aircraft?

Yes

276.5. If so, how are those damages to be calculated?

By the methodology above, leading to an award of $1,802,000

Interest to be agreed or assessed

CONCLUSION

277. For the reasons set out above, I find that the Claimant is entitled to judgment for the sums set out above. It is required to give credit for the Security Deposit but not for the Maintenance Reserves.

278. The calculation of interest on these sums requires the parties to discuss and if possible agree the Claimant's entitlement to interest. In the first instance, the Claimant should set out the calculation of its claim for interest in a schedule to allow the Defendant to comment on it.

APPENDIX 1 – RELEVANT PROVISIONS OF THE LEASE AGREEMENT[22]

ARTICLE 4 – LEASE TERM

4.1 Lease Term. The term of leasing of the Aircraft will commence on the Delivery Date and continue for a term of 48 months ("Lease Term").

4.2 "Expiration Date." "Expiration Date" means the date on which LESSEE is required to return the Aircraft to LESSOR in the condition required by Article 23 on the last day of the Lease Term.

4.3 "Termination Date." If LESSEE returns the Aircraft to LESSOR on the Expiration Date in the condition required by Article 23, then "Termination Date" has the same meaning as "Expiration Date". If LESSEE does not do so, then "Termination Date" means the date on which the first of the following events occurs:

4.3.1 there is a Total Loss of the Aircraft prior to Delivery pursuant to Article 3.5;

4.3.2 cancellation of this Lease occurs pursuant to Article 3.6;

4.3.3 there is a Total Loss of the Aircraft and payment in respect thereof is made in accordance with Article 19.3;

4.3.4 LESSOR repossesses the Aircraft or otherwise terminates the leasing of the Aircraft under this Lease and recovers possession and control of the Aircraft following an Event of Default; or

4.3.5 LESSEE returns the Aircraft in the condition required by Article 23 after the Expiration Date.

ARTICLE 5 – RENT AND OTHER PAYMENTS

5.1 Security Deposit.

5.1.1 LESSEE will pay LESSOR the Security Deposit as security for its lease of the Aircraft in accordance with Schedule I.

5.1.2 Upon payment by LESSEE, the Security Deposit will irrevocably and unconditionally become the property of LESSOR and may be commingled with the general funds of LESSOR or any Affiliate of LESSOR and any interest earned on such Security Deposit will be for LESSOR'S account. LESSOR will not hold (or be deemed to hold) any such funds for the benefit of or in any capacity for LESSEE, including as agent or on trust for LESSEE or otherwise. If the Security Deposit is reduced below the required amount by application to meet LESSEE'S unperformed obligations under this Lease or any other Operative Document or any Other Agreement, LESSEE will replenish the Security Deposit within three Business Days after LESSOR'S demand therefor. To the extent that LESSEE is deemed to retain any right, title or interest in or to the Security Deposit, LESSEE hereby grants a security interest in and

[22] Capitalisation is as in the original in this Appendix and other extracts from agreements in Appendices 4 and 5 below,

first fixed charge and pledge of all of its right, title and interest in and to the Security Deposit, any right to repayment thereof by LESSOR and the proceeds thereof to LESSOR, on behalf of LESSOR and its Affiliates, as security for LESSEE'S obligations under this Lease the other Operative Documents and all Other Agreements and may be applied by LESSOR upon the occurrence of a Default or Event of Default hereunder or of a default by LESSEE under any Other Agreements.

5.1.3 After the Termination Date, provided (a) no Event of Default has occurred and is continuing and (b) no default by LESSEE exists under any Other Agreement, then LESSOR will pay to LESSEE an amount equal to the amount of the Security Deposit then held by LESSOR as cash, without interest, less an amount determined by LESSOR to be a reasonable estimate of the costs, if any, which LESSOR will incur to remedy any unperformed obligations of LESSEE under this lease, including the correction of any discrepancies from the required condition of the Aircraft on return of the Aircraft.[…]

5.4 Base Rent

5.4.1 LESSEE will pay LESSOR Base Rent for the Aircraft in accordance with Schedule I.

5.4.2 The first payment of Base Rent during the Lease Term will be paid no later than three Business Days prior to the Scheduled Delivery Date. Each subsequent payment of Base Rent will be due monthly thereafter no later than the same day of the month as the Delivery Date of the Aircraft except that, if such day is not a Business Day, Base Rent will be due on the immediately preceding Business Day. If Delivery occurred on the 29th, 30th or 31st of the month and in any given month during the Lease Term in which a Base Rent payment is due there is no such corresponding date. Base Rent will be payable on the last Business Day of such month. Any pro rata amount of Base Rent payable hereunder will be prorated based on the actual number of days in the applicable Lease Term. LESSEE hereby acknowledges and agrees that Base Rent will be payable in respect of each of the Delivery Date and the Termination Date.

5.5 Maintenance Rent

5.5.1 In addition to Base Rent, and subject to escalation and adjustment as provided in this Article 5.5.1, LESSEE will pay to LESSOR the following categories of Maintenance Rent (each as defined on Schedule I) based on the utilization of the Aircraft during the applicable Maintenance Rent Period: Airframe 6-Year Check Maintenance Rent, Airframe 12-Year Check Maintenance Rent, Performance Restoration Maintenance Rent, Engine LLP Maintenance Rent, Landing Gear Maintenance Rent and APU Maintenance Rent, (collectively "Maintenance Rent" and each of the rates listed in Schedule I, a "Maintenance Rent Rate").

(a) Except for the Engine LLP Maintenance Rent rate, all of the Maintenance Rent Rates listed in Schedule I are based on January 2015 cost estimates and, without requirement for any notice, will escalate by the percentages specified in Schedule I on the first day of each Maintenance Rent Adjustment Period (other than the one falling on the Delivery Date). For avoidance of doubt, such escalation calculation will be made on the first day of the Maintenance Rent Adjustment Period to the then-existing Maintenance Rent Rates and the resulting escalated Maintenance Rent Rates will be payable for all operation and lapse of calendar time in respect of the Aircraft in that same Maintenance Rent Adjustment Period. In addition to the foregoing, each Maintenance Rent Rate is subject to further increase based on (a) any material change in the maintenance recommendations (work content or interval) of Manufacturer or Engine Manufacturer, as applicable, and (b) the actual cost experience of Lessee in respect of the corresponding MRA (as evidenced by prior MRA Claims).

(b) The Engine LLP Maintenance Rent rate will be adjusted as of the first day of each Maintenance Rent Adjustment Period (other than the one falling on the Delivery Date) to be equal to the then current Engine LLP Cost per Cycle. The "Engine LLP Cost per Cycle" for an Engine for any given calendar year will be calculated by (a) dividing (i) Engine Manufacturer's list price for that particular year for each Engine life limited part in the Engine by (ii) Engine Manufacturer's approved cycle life for each such Engine life limited part to arrive at the "Individual LLP Cost per Cycle" and then (b) adding the Individual LLP Cost per Cycle amounts for all Engine life limited parts to arrive at the aggregate Engine LLP Cost per Cycle. If Engine Manufacturer's list price for an Engine life-limited Part is not available as of January 1 of any given calendar year, the adjustment of the Engine LLP Maintenance Rent rate in respect of such calendar year will be made as soon as Engine Manufacturer's list price becomes available (with such adjustment retroactive to January 1 of such calendar year).

(c) In respect of Performance Restoration Maintenance Rent payable during the period from the Scheduled Delivery Date through December 31, 2016, LESSEE will pay LESSOR Performance Restoration Maintenance Rent in the amount set out in Schedule I for each Engine (payable when the Engine is utilized on the Aircraft or another aircraft}. On January 1, 2017 and thereafter on the first day of each Maintenance Rent Adjustment Period (other than the one falling on the Delivery Date) during the Lease Term, the Performance Restoration Maintenance Rent rate applicable to each Engine will be adjusted based upon the Flight Hour/Cycle Ratio operated by such Engine during the immediately preceding Maintenance Rent Adjustment Period to be the applicable rate set forth in the table in Schedule I, Section D.3 (as such rates are escalated as described in Article 5.5.1(a) above). The adjusted Performance

Restoration Maintenance Rent rate for each Engine will be payable for all utilization of such Engine in the Maintenance Rent Adjustment Period in respect of which the adjustment is made.

5.5.2 LESSEE acknowledges and agrees that (a) Maintenance Rent constitutes additional rent to LESSOR for the lease, possession and operation of the Aircraft, will be fully earned when received by LESSOR and is and will remain the sole and exclusive property of LESSOR upon payment thereof by LESSEE, (b) LESSEE has no right, title or interest therein and (c) LESSOR will be entitled to retain absolutely any Maintenance Rent paid without any obligation to pay interest thereon to LESSEE. LESSOR may commingle the Maintenance Rent with its general or other finds or transfer any such amounts to any other Person, and LESSOR will not hold such amounts as agent or in trust for LESSEE or in any similar capacity.

ARTICLE 12 – MAINTENANCE OF AIRCRAFT

12.1 General Obligation. During the Lease Term and until the Termination Date, LESSEE alone will, at its expense, maintain and repair (or cause to be maintained and repaired) the Aircraft, Engines, APU and all Parts (a) in accordance with the Maintenance Program, (b) in accordance with the rules and regulations of the Aviation Authority, (c) in accordance with Manufacturer's type design, (d) in accordance with any other regulations or requirements necessary in order to maintain a valid Certificate of Airworthiness for the Aircraft and meet the requirements at all times during the Lease Term and upon return of the Aircraft to LESSOR for issuance of a Certificate of Airworthiness for transport category aircraft issued by an EASA Member Country in accordance with EASA Part 21 (except during those periods when the Aircraft is undergoing maintenance or repairs as required or permitted by this Lease, (e) in the same manner and with the same care as used by LESSEE with respect to similar aircraft and engines operated by LESSEE and without in any way discriminating against the Aircraft and (f) in accordance with the recommendations of Manufacturer and Engine Manufacturer.

ARTICLE 23 – RETURN OF AIRCRAFT

23.1 Date of Return. LESSEE will return the Aircraft, Engines, APU, Parts and Aircraft Documentation to LESSOR on the Expiration Date, unless a Total Loss of the Aircraft occurred prior to the Expiration Date and the leasing of the Aircraft under this Lease was terminated early in accordance with Article 19.3. If an Event of Default occurs hereunder by LESSEE failing to return the Aircraft on the Expiration Date or if an Event of Default occurs prior to or after the Expiration Date and LESSOR repossesses the Aircraft, the return requirements set forth in this Article 23 nonetheless must be met on the date the Aircraft is actually returned to LESSOR or repossessed by LESSOR.[…]

23.3 Technical Report. No later than 14 months prior to the Expiration Date (and in an updated form at return of the Aircraft), LESSEE will provide LESSOR with a Technical Evaluation Report.
23.4 Return Location. LESSEE at its expense will return the Aircraft, Engines, APU, Parts and Aircraft Documentation to LESSOR at an airport in Western Europe or at such other location as may be mutually agreed to by LESSEE and LESSOR.
23.5 Full Aircraft Documentation Review. For the period commencing at least 30 days prior to the proposed return date and continuing until the date on which the Aircraft is returned to LESSOR in the condition required by this Lease, LESSEE will provide for the review of LESSOR, its representatives and a next Aircraft lessee all of the Aircraft records and historical documents described in Exhibit O […]

23.7 Aircraft Inspection.

23.7.1 During the maintenance checks performed prior to the proposed return date and at the actual return of the Aircraft, LESSOR, its representatives and a next Aircraft lessee will have an opportunity to observe functional and operational system checks, perform a visual inspection of the Aircraft (taking into account the Aircraft type, age, use and other known factors with respect to the Aircraft) and perform a full inspection of the Aircraft Documentation (including records and manuals), all to LESSOR'S satisfaction. Any deficiencies from the Aircraft return condition requirements set forth in this Article 23 will be corrected by LESSEE at its cost prior to return of the Aircraft.

23.7.2 Following the performance of the Return Check (pursuant to Article 23.10.1) and immediately prior to the video borescope (pursuant to Article 23.10.6) and the return of the Aircraft to LESSOR, LESSEE will carry out for LESSOR and/or LESSOR's representatives an Aircraft acceptance flight […]

23.8 Certificate of Airworthiness Matters.

23.8.1 The Aircraft will possess a current Certificate of Airworthiness issued by the Aviation Authority […]

23.8.2 At LESSOR'S request, LESSEE at its cost will demonstrate that the Aircraft meets the requirements for issuance of an EASA Certificate of Airworthiness for transport category aircraft issued by an EASA member country as specified in Article 23.8.1 […]

23.9 General Condition of Aircraft at Return.

23.9.1 The Aircraft, Engines, APU and Parts will have been maintained and repaired in accordance with the Maintenance Program, the rules and regulations of the Aviation Authority and this lease.[…]

23.9.5 All hard time and life limited Parts which are installed on the Aircraft will have an FAA Form 8130-3 or EASA Form 1 evidencing the airworthiness of such Part at the time of installation on the Aircraft. […]

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

23.9.14 All Airworthiness Directives which are issued prior to the date of return of the Aircraft and which require compliance prior to return of the Aircraft to LESSOR or within 6 months after the Termination Date (the "LESSEE AD Compliance Period") will have been complied with on the Aircraft at LESSEE's cost […]

23.10 <u>Checks Prior to Return.</u> Following removal of the Aircraft from revenue service and prior to return of the Aircraft to LESSOR, LESSEE at its expense will do each of the following:

23.10.1 LESSEE will have the Return Check performed by a Maintenance Performer. LESSEE also agrees to perform during the Return Check any other work reasonably requested by LESSOR […]

23.10.7 With LESSOR and/or its representatives present, LESSEE will accomplish a power assurance run on the Engines in accordance with Manufacturer's aircraft maintenance manual. LESSEE will record the Engine power assurance test conditions and results on the Return Acceptance Receipt.

23.12 <u>Export and Deregistration of Aircraft.</u> At LESSOR's request, LESSEE at its cost will (a) provide an Export Certificate of Airworthiness and a valid airworthiness review certificate […] (b) assist with the deregistration of the Aircraft from the register of aircraft in the State of Registration, […] (d) provide Lessor with certified copies of any customs declaration, waiver, certificate, release or equivalent evidencing the full payment of any duties due by LESSEE to the customs authorities in the State of Registration or the Habitual Base […].

23.14 <u>LESSEE's Continuing Obligations.</u> In the event that LESSEE does not return the Aircraft to LESSOR on the Expiration Date and in the condition required by this Article 23 for any reason (whether or not the reason is within LESSEE's control):

23.14.1 The obligations of LESSEE under this Lease will continue in full force and effect on a day to day basis until such return. This will not be considered a waiver of LESSEE's Event of Default or any right of LESSOR hereunder. […]

23.14.3 Without limiting LESSOR's rights and remedies under Article 25 and except for a delay in return of the Aircraft for the reason set forth in Article 23.11, until such time as the Aircraft is returned to LESSOR and put into the condition required by this Article 23, instead of paying the Base Rent specified in Article 5.4, LESSEE will pay twice the amount of the Base Rent in effect on the Expiration Date for each day from the day immediately following the Expiration Date until and including the Termination Date. [**"Default Rent"**] […].

23.14.4 LESSOR may elect, in its sole and absolute discretion, to accept the return of the Aircraft prior to the Aircraft being put in the condition required by this Article 23 and thereafter have any such non conformance corrected at such time

as LESSOR may deem appropriate and at commercial rates then charged by the Person selected by LESSOR to perform such correction. […]

23.15 Airport and Navigation Charges. LESSEE will ensure that at return of the Aircraft any and all airport, navigation and other charges which give rise or may if unpaid give rise to any lien, right of detention, right of sale or other Security Interest in relation to the Aircraft, Engine, APU or any Part have been paid and discharged in full and will at LESSOR'S request produce evidence thereof satisfactory to LESSOR. […]

23.19 Ferry Flight. LESSOR may require LESSEE to operate a ferry flight of the Aircraft at the time of return to a location other than the location set forth in Article 23.4. If the Aircraft is not at the location set forth in Article 23.4 at the time that LESSOR advises LESSEE of the need for such ferry flight, LESSEE will be responsible for the costs of such ferry flight only to the extent of the costs that would have been incurred if the Aircraft had been flown to the location determined in accordance with Article 23.4.

ARTICLE 25 – DEFAULT OF LESSEE

25.1 LESSEE Notice to LESSOR. LESSEE will promptly notify LESSOR if LESSEE becomes aware of the occurrence of any Default or Event of Default.

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

(a) Delivery. LESSEE fails to take delivery of the Aircraft when obligated to do so under the terms of this lease;

(b) Non-Payment. (i) LESSEE fails to make a payment of Basic Rent, Security Deposit, Maintenance Rent or Agreed Value within two Business Days after the same has become due or (ii) LESSEE fails to make a payment, of any other amount due under this Lease or any of the other Operative Documents (including amounts expressed to be payable on demand) after the same has become due and such failure continues for four Business Days;

(c) Insurance. LESSEE fails to obtain or maintain (or cause to be obtained or maintained) the insurance or reinsurance required by Article 18 or a notice of cancellation is given with respect to any such insurance or reinsurance;

25.3 LESSOR'S General Rights. Upon the occurrence of any Event of Default, LESSOR may do all or any of the following at its option (in addition to such other rights and remedies which LESSOR may have by statute or otherwise):

(a) if such Event of Default occurs prior to Delivery, and by written notice to LESSEE, terminate LESSEE'S right to lease the Aircraft and terminate LESSOR'S obligations hereunder (but without prejudice to the indemnity obligations and any continuing obligations of LESSEE under this lease and any other Operative Document, including the obligations set forth in Article 16 and Article 17);

(b) by written notice to LESSEE, terminate the leasing of the Aircraft whereupon (as LESSEE hereby acknowledges and agrees) all rights of LESSEE to possess and operate the Aircraft will immediately cease and terminate and in which case

LESSEE'S obligations under this lease will continue in full force and effect (including the obligations set forth in Article 10.5, Article 16, Article 17 and Article 18); provided, however, that upon the occurrence of an Event of Default under any of Articles 25.2(m), 25.2(n) or 25.2(o), such termination will occur automatically and with immediate effect without any notice or further action from LESSOR;

(c) by written notice to LESSEE, require that LESSEE immediately cease operating the Aircraft and leave it parked in its then current location, in which case LESSEE'S obligations under this Lease will continue in full force and effect (including the obligations set forth in Article 10.5, Article 16, Article 17 and Article 18);

(d) by written notice to LESSEE, require that LESSEE immediately move the Aircraft to an airport or other location designated by LESSOR and park the Aircraft there, in which case LESSEE'S obligations under this lease will continue;

(e) enter upon the premises where the Airframe, the APU or any or all Engines or any or all Parts or Aircraft Documents are (or are believed to be) located without liability and take immediate possession of and remove them or cause the Aircraft to be returned to LESSOR at the location specified in Article 23.4 (or such other location as LESSOR may require) or, by serving notice require LESSEE to return the Aircraft to LESSOR at the location specified in Article 23.4 (or such other location as LESSOR may require) and LESSEE hereby irrevocably by way of security for LESSEE'S obligations under this Lease appoints LESSOR as LESSEE'S attorney and agent in causing the return or in directing the pilots of LESSEE or other pilots to fly the Aircraft to an airport designated by LESSOR and LESSOR will have all the powers and authorizations necessary for taking that action, with the foregoing power of attorney being granted by LESSEE as a deed;

(f) instruct any maintenance or repair facility which is in possession of the Aircraft, any Engine, the APU or any Part as to its disposition or release;

(g) require LESSEE to (i) provide LESSOR with unlimited access to the Aircraft at such location and at such time as LESSOR may specify, and (ii) provide LESSOR all information required by LESSOR as to the location and status of any Engine or Part not installed on the Aircraft;

(h) require LESSEE to immediately provide the originals of the Aircraft Documentation to LESSOR;

(i) with or without taking possession of the Aircraft, sell all or any part of the Aircraft at public or private sale, with or without advertisement, or otherwise dispose of, hold, use, operate, lease to another Person or keep idle all or any part of the Aircraft as LESSOR in its sole discretion may determine appropriate, all free and clear of any rights of LESSEE and without any duty to account to LESSEE with respect to such action or inaction or for any proceeds thereof, all in such manner and on such terms as LESSOR considers appropriate in its absolute discretion, as if LESSOR and LESSEE had never entered into this Lease;

(j) for LESSEE'S account, do anything that may be necessary or advisable to cure any default and recover from LESSEE all costs and expenses (including legal fees and expenses incurred) in doing so;

(k) proceed as appropriate to enforce performance of this Lease and the other Operative Documents and to recover any damages for the breach hereof and thereof, including the amounts specified in Article 25.6;

(1) apply all or any portion of the Security Deposit and any other security deposits or other amounts held by LESSOR or any Affiliate of LESSOR pursuant to any of the Operative Documents or any Other Agreements to any amounts due by LESSEE and/or any Affiliate of LESSEE pursuant to any Operative Document or any Other Agreement; or

(m) set off all or any portion of the MRA Maintenance Rent Balance against any amounts due by LESSEE or any Affiliate of LESSEE to LESSOR or any Affiliate of LESSOR pursuant to any Operative Agreement or any Other Agreement.

25.4 Deregistration and Export of Aircraft. If an Event of Default has occurred and is continuing, LESSOR may take all steps necessary to deregister the Aircraft in and export the Aircraft from the State of Registration, the Habitual Base and/or any other applicable jurisdiction.

APPENDIX 2 – RELEVANT TERMS OF THE SALE AGREEMENT

ARTICLE 4: DISCLAIMER

4.1 Disclaimer.

WITHOUT LIMITING THE WARRANTY SET FORTH IN ARTICLE 11.1.5, EACH AIRCRAFT AND EACH PART THEREOF IS SOLD IN "AS IS, WHERE IS" CONDITION WITH ALL FAULTS, WITHOUT ANY REPRESENTATION, WARRANTY OR GUARANTEE OF ANY KIND BEING MADE OR GIVEN BY ANY SELLER ENTITY, THEIR RESPECTIVE SERVANTS OR AGENTS, EXPRESS OR IMPLIED, ARISING BY LAW OR OTHERWISE.

WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, SELLER SPECIFICALLY DISCLAIMS, AND EXCLUDES HEREFROM (a) ANY WARRANTY AS TO THE AIRWORTHINESS, VALUE, DESIGN, QUALITY, MANUFACTURE, OPERATION, OR CONDITION OF THE AIRCRAFT; (b) ANY EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY OF MERCHANTABILITY OR FITNESS FOR USE OR FOR A PARTICULAR PURPOSE; (c) ANY EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY OF FREEDOM FROM ANY RIGHTFUL CLAIM BY WAY OF INFRINGEMENT OR THE LIKE; (d) ANY IMPLIED REPRESENTATION OR WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OF TRADE; (e) ANY EXPRESS OR IMPLIED WARRANTY REGARDING THE CONDITION OF THE AIRCRAFT; AND (f) ANY OBLIGATION OR LIABILITY OF ANY SELLER ENTITY ARISING IN CONTRACT OR IN TORT (INCLUDING STRICT LIABILITY OR SUCH AS MAY ARISE BY REASON OF NEGLIGENCE BY ANY SELLER ENTITY ACTUAL OR IMPUTED, OR IN STRICT LIABILITY, INCLUDING ANY OBLIGATION OR LIABILITY FOR LOSS OF USE, REVENUE OR PROFIT WITH RESPECT TO THE AIRCRAFT OR FOR ANY LIABILITY OF BUYER TO ANY THIRD PARTY OR ANY OTHER DIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGE WHATSOEVER. DELIVERY BY BUYER TO OWNER OF AN ACCEPTANCE CERTIFICATE WILL BE CONCLUSIVE PROOF AS BETWEEN SELLER AND OWNER (ON THE ONE HAND) AND BUYER (ON THE OTHER HAND) THAT BUYER'S TECHNICAL EXPERTS HAVE EXAMINED AND INVESTIGATED SUCH AIRCRAFT AND EACH PART THEREOF AND THAT SUCH AIRCRAFT AND EACH PART THEREOF IS AIRWORTHY AND IN GOOD WORKING ORDER AND REPAIR, WITHOUT DEFECT (WHETHER OR NOT DISCOVERABLE ON THE RELEVANT SALE DATE) AND IN EVERY WAY SATISFACTORY TO BUYER. BUYER HAS MADE ITS OWN INDEPENDENT INVESTIGATION OF EACH LESSEE AND ITS OPERATIONS AND FINANCIAL CONDITION AND OF THE PROVISIONS OF THE LEASE AND NO SELLER INDEMNITEE WILL HAVE ANY LIABILITY (IN CONTRACT, TORT OR OTHERWISE) WITH RESPECT TO SUCH MATTERS.

APPENDIX 3 – RELEVANT TERMS OF THE NOVATION AND AMENDMENT AGREEMENT

2. NOVATION

2.1 Releases and Assumptions

As of and with effect from the Effective Time, and subject to the provisions of Article 2.3 (Pre-Effective Time Rights and Remedies; Indemnities).

2.1.1 The Existing Lessor releases and discharges the Lessee from all of its obligations, duties, undertakings and liabilities to the Existing Lessor under the Lease Documents, and the Existing Lessor agrees that it has no further rights, benefits and interests against the Lessee under the Lease Documents;

2.1.2 The Lessee releases and discharges the Existing Lessor from all its obligations, duties, undertakings and liabilities under the Lease Documents, and the Lessee agrees that it has no further rights, benefits and interests against the Existing Lessor under the Lease Documents;

2.1.3 The New Lessor agrees to assume the rights, benefits, interests and obligations, duties and liabilities of "Lessor" under the Novated Lease Documents arising from and after the Effective Time and to perform the obligations of "Lessor" under the Novated Lease Documents arising from and after the Effective Time (for the avoidance of doubt, other than the obligations, duties and liabilities required to be performed, or attributable to the period, prior to the Effective Time), save that the New Lessor shall also be responsible for (i) the application, and reimbursement of MRA Maintenance Rent Balances paid by the Lessee to the Existing Lessor pursuant to the Lease prior to the Effective Time, such MRA Maintenance Rent Balances being, as at the date of this Agreement, set out in Article 8.4 and (ii) the Lessor's supplemental payments for certain maintenance tasks pursuant to Paragraph 2(a) through (f) of the Side Letter #01 (collectively the "Relevant Claims"), whether or not such Relevant Claims balances are attributable to periods arising prior to or after the Effective Time;

2.1.4 Subject to Article 2.1.3, the Lessee consents to and accepts the assumption by the New Lessor of the rights, benefits, interests, obligations, duties and liabilities of "Lessor" under the Novated Lease Documents and the New Lessor's agreement to perform the obligations of "Lessor" under the Novated Lease Documents;

2.1.5 Without prejudice to Article 2.1.3, the Lessee agrees that it will not assert against the New Lessor any claim or defence which it may have or have had against the Existing Lessor under the Lease Documents prior to the Effective Time; and

2.1.6 The Lessee acknowledges that its obligations, duties, undertakings and liabilities to "Lessor" under the Novated Lease Documents arising from and after the Effective Time are owed to, and are to be performed for the benefit of, the New

Lessor, and agrees with the New Lessor to perform such obligations under the Novated Lease Documents in favour of the New Lessor.

Each of the foregoing events and agreements is conditional upon the happening of the others and shall occur simultaneously at the Effective Time.

5 . CONDITIONS PRECEDENT

5.1 New Lessor's Conditions Precedent

The obligation of the New Lessor to execute and deliver the Effective Time Supplement shall be subject to: (i) the Buyer having acquired title to the Aircraft at the Effective Time; and (ii) the receipt by the New Lessor of the following in form and substance reasonably satisfactory to the New Lessor:

5.1.1 an executed copy of the Novation Documents (other than the Effective Time Supplement) duly executed by the parties hereto and thereto (other than the New Lessor);

5.1.2 a certificate signed by an authorised officer of the Existing Lessor attaching copies of the constitutional documents of the Existing Lessor and all necessary corporate authorisations, including corporate resolutions, powers of attorney, etc. required by the Existing Lessor, in the appropriate form, to authorise the execution and performance of this Agreement and the other Novation Documents to which it is a party;

5.1.3 evidence of the appointment by the Existing Lessor of an agent for service of process in accordance with Article 16 of this Agreement;

5.1.4 copies of all back to birth bills of sale;

5.1.5 the Bill of Sale duly executed by the Existing Owner;

5.1.6 in respect of the Lessee:

(i) certified copies of all constitutional documents, corporate consents, authorizations and approvals which are required in connection with the execution, delivery and performance of the Novation Documents, including without limitation the current business license, articles of association and a legal representative certificate or resolution of other competent authority approving the transaction contemplated by the Novation Documents;

(ii) evidence of the appointment by the Lessee of an agent for service of process in accordance with article 27.3.3 of the lease and Article 16 of this Agreement;

(iii) incumbency certificates or powers of attorney, as the case may be, in respect of the person or persons authorised to execute and deliver the Novation Documents; and

(iv) a copy of the certificate issued by the Lessee's competent tax office in early 2018, proving the generation of its income, during the previous year, in excess of 50% from international flights, thus exempting Lessee from VAT and, in particular, from transfer tax as provided in the Circular nr 1246/November 24, 2014 of the Ministry of Finance;

(v) a copy of the approved Maintenance Program and the approval thereof by the Aviation Authority;

(vi) evidence that the Existing Security Assignment has been or will at the Effective Time be reassigned and a copy of the Revocation of the Existing Deregistration Power of Attorney;

(vii) certificate of the Lessee signed by a duly authorised officer of the Lessee attaching and certifying to be true copies, up-to-date, in full force and effect and not amended or rescinded, of the corporate documents and licenses of the Lessee previously provided to the Existing Lessor to be accompanied by the relevant General Commercial Registry certificates, recently issued, certifying the above, as well as specific board resolutions for entering into and executing the Novation Documents to which Lessee is a party;

(viii) copies of certificates of insurance and reinsurance and a broker's letter of undertaking relating to the insurances and reinsurances in compliance with the insurance and reinsurance requirements of the Novated Lease;

(ix) copies of the certificate of airworthiness, review certificate of airworthiness, existing certificate of registration, the Lessee's radio license, the exploitation license and the Lessee's air operator certificate; and

(x) a legal opinion dated as of the Effective Time in form and substance satisfactory to New Lessor;

5.1.7 The conditions precedent to Buyer accepting the delivery of and title to the Aircraft from the Existing Owner described in clause 5.1 (*Conditions to Buyer's Obligations*) of the Aircraft Sale Agreement; and each of the representations and warranties of the Existing Lessor and the Lessee in this Agreement shall be true and accurate at the Effective Time, in each case as to the facts and circumstances then existing and as if made at the Effective Time.

10. EFFECTIVE TIME

Subject to the satisfaction or waiver or deferral, in accordance with Article 5.4 (Waiver or Deferral of Conditions Precedent), of the conditions precedent set out in Articles 5.1 (New Lessor's Conditions Precedent), 5.2 (Lessee's Conditions Precedent) and 5.2.6 (Existing Lessor's Conditions Precedent), the novation of the Lease Documents contemplated by Article 2 (Novation) and the amendments to the Lease Documents so novated shall become effective at a time (the "Effective Time"), as evidenced by the Effective Time Supplement duly executed by each of the parties thereto and substantially in the form of Schedule 1 (Form of Effective Time Supplement) hereto. At any time before the Effective Time, the Existing Lessor and the New Lessor may serve notice on the Lessee that this Agreement is to be cancelled and not have any effect and upon service of such notice this Agreement shall terminate and be of no effect; provided that Article 13.3 hereof shall survive any such termination.

APPENDIX 4 – THE EFFECTIVE TIME SUPPLEMENT

To: (1) Olympus Airways S.A. ("Lessee")
From: (1) ALS Leasing UK Limited ("Existing Lessor")
(2) FTAI AIROPCO UK LTD ("New Lessor")

Existing Lessor, New Lessor and Lessee hereby agree as follows:
This Supplement is entered into for purposes of the Novation and Amendment Agreement dated 5 October 2018 between the parties to this Supplement (the "Agreement") relating to the one Airbus A319-100 aircraft bearing manufacturer's serial number 1612 together with two (2) CFM56-5B6/P engines with manufacturer's serial numbers 575280 and 779311 (the "Aircraft").
Terms used in this Supplement shall have the meanings given them in the Agreement and the Novated Lease.
Lessee, Existing Lessor and New Lessor confirm that the conditions precedent for its benefit contained in the Agreement have been satisfied, deferred or waived and that the novation and amendment contemplated in the Agreement has occurred and the Effective Time was 11.30 a.m. local time on this 5th day of October 2018 the Aircraft was located at Athens, Greece.
Lessee, Existing Lessor and New Lessor confirm that the representations and warranties made by it in the Agreement are true and correct at the Effective Time.
New Lessor and Existing Lessor hereby notify Lessee that at the Effective Time ownership in the Aircraft has been transferred to Buyer.

This Effective Time Supplement and all non-contractual obligations arising from or in connection with it are governed by and shall be construed in accordance with the Laws of England.

APPENDIX 5 - CHRONOLOGY

Date	Event
22 January 2016	Date of original Lease Agreement (between ALS as lessor and the Defendant as lessee)
10 March 2016	Delivery Date of the Aircraft under the Lease Agreement
18 July 2018	Aircraft sold by ALS to WWTAI
30 July 2018	ALS serves notice requiring the Defendant to ground the Aircraft
15 September 2018	Maintenance Rent of $223,897.12 allegedly due under the lease Agreement
5 October 2018	Acceptance Certificate states that purchase took place at 8.30am.
5 October 2018	Date of entry into the Novation Agreement and Effective Time Supplement.
10 October 2018	Base Rent of $125,000.00 allegedly due under the Lease Agreement
19 October 2018	Maintenance Rent of $30,545.00 allegedly due under the Lease Agreement
26 October 2018	Notice of Event of Default sent by the Claimant to the Defendant
1 November 2018	Notice of Default and Termination sent by the Claimant to the Defendant
1 November 2018	Vedder Price request redelivery of the Aircraft to Athens International Airport.
2 November 2018	Second Notice of Default and Termination sent by the Claimant to the Defendant, requiring the return of the Aircraft to the Claimant at Athens International Airport
6 November 2018	Claimant requests return of the Aircraft to the UK

23 November 2018	Claimant requests return of Aircraft to Cirencester Airport
13 November 2018	Inspection of the Aircraft by Meton Skies
2 May 2019	Defendant provides Claimant with information regarding the skin perforation to the Aircraft
May 2019	Claimant seeks repair design approval sheet ("RDAS") from Airbus
15 May 2019	Sales Agreement and Escrow Agreement for the Airframe executed between Claimant and Magellan Group for sale of Airframe for $2.05m (subject to inspection)
31 May 2019	Cut out of skin perforation performed by Apella
12 June 2019	Inspection of the Aircraft conducted by Meton Skies
19 July 2020	Airbus issues RDAS
1 August 2019	Defendant provides Meton Skies with a list of issues with the Aircraft, compiled by Athens Aeroservices
3 September 2019	Claimant sends permit to fly request to European Union Aviation Safety Agency("EASA")
16 September 2019	Claimant sends updated permit to fly request to EASA
24 September 2019	EASA rejects permit to fly application, requiring further information about MPD tasks and Airworthiness Directives, and a No Technical Objection letter from Airbus
10 October 2019	Airbus issues commercial offer for a flight condition document
24 October 2019	Airbus declines to provide No Technical Objection letter
4 November 2019	Claimant informs Defendant that it will disassemble the Aircraft in situ

November 2019	Magellan Group withdraws from purchase of Airframe
19 November 2019	Defendant sends the Logbooks for the Engine ESN 779311; APU R-2587 to Claimant.
5 December 2019	Athens International Airport Company prevent the removal of the Engines from the Aircraft on the basis of unpaid parking fees from 2018
13 December 2019	Athens International Airport Company file request with the State Airport Authority for the detention of the Aircraft (as a result of unpaid parking fees)
16 December 2019	Athens International Airport Company files application for security measures with One Member First Instance Court of Athens against the Claimant and the Defendant.
January 2020	Claimant applied to the Greek Customs Office in relation to the unpaid VAT on the Base Rent
17 January 2020	Athens International Airport Company file application with One Member First Instance Court of Athens against the Claimant and the Defendant requesting the issuance of a provisional court order prohibiting any change to the legal and factual status (including deregistration) of the Aircraft
23 January 2020	Claimant pays the Athens Airport Authorities €150,519.49 in respect of parking charges from 1 November 2018
24 January 2020	Aircraft detention lifted
February 2020	Claimant submits Deregistration Power of Attorney and Irrevocable Deregistration and Export Request Authorisation (“IDERA”) to the Hellenic Civil Aviation Authority
20 February 2020	Defendant instructs Athens Aeroservices to stop taking steps to remove the Engines from the Aircraft on the basis it remained registered in the Greek registry under the Defendant’s name
21 February 2020	Avtrade agree to purchase the Airframe for $1m
26 February 2020	Claimant pays €119,590.74 to the Customs Office in respect of VAT on Base Rent under the Lease Agreement claimed by Customs
6 March 2020	Claimant and Owner apply to General Directorate of Customs for permission to disassemble the Aircraft

10 March 2020	Expiration Date of the Lease Agreement
May 2020	Claimant approached Kaycee Aerospace with details of the Airframe
22 June 2020	Greek Directorate of Customs issued its decision and confirmed that the Owner of the Aircraft was entitled to proceed with the disassembly of the Aircraft subject to the decision and issuance of a permit from Customs at Athens Airport
July 2020	Avtrade withdraws from purchase of Airframe
8 July 2020	Owner of the Aircraft enters into Memorandum of Agreement with Polyeco S.A., in respect of the disassembly of the Aircraft
15 July 2020	Customs at Athens Airport gives permission for disassembly subject to the condition that the Owner of the Aircraft undertakes to provide a statement detailing the location and time schedule of the works
15 July 2020	Sales Agreement for Airframe signed with Kaycee Aerospace
21 July 2020	Claimant begins disassembly of the Aircraft
7 August 2020	Engines shipped to storage location in the UK
2 October 2020	Airframe sold for USD750,000 to Kaycee Aerospace

APPENDIX 6 – CLAIMANT'S CALCULATION OF CLAIM

Claim for unpaid Base Rent

Total principal sum: $2,125,000
Total interest due: $573,469.82
Total due (including interest): $2,698,469.82

Claim for unpaid Maintenance Rent

Total principal sum: $948,629.96
Total interest due: $249,323.85
Total due (including interest): $1,197,953.81

Claim for Default Rent

Total principal sum: $1,101,370.12
Total interest due: $139,377.76
Total due (including interest): $1,240,747.88

Claim for Enforcement Costs

Total principal sum: $1,009,143.24
Total interest due: $205,463.19
Total due (including interest): $1,214,606.43

Claim for Diminution in Value

Either (based on "Agreed Value" of Aircraft)
Total principal sum: $11,517,000
Total interest due: $1,234,826.46
Total due (including interest): $12,751,826.46

Or (based on Expert Report Actual Value)
Total principal sum $3,337,000
Total interest due: $357,785.52
Total due (including interest): $3,694,785.52

APPENDIX 7 – ENFORCEMENT COSTS

	Date	Provider	Description	Principal Sum	Interest	Total	Recoverable?
1.	19.11.18	Meton Skies	Technical Representation	$5,225.00	$1,882.47	$7,107.47	Yes
2.	4.12.18	Meton Skies	Technical Representation	$5,415.16	$1,842.25	$7,257.41	Yes
3.	11.12.18	Vedder Price	Legal fees	$637.20	$218.05	$855.25	No – FG[23] invoice
4.	20.12.18	Meton Skies	Technical Representation	$4,332.25	$1,494.14	$5,826.39	Yes
5.	26.2.19	Vedder Price	Legal fees	$6,994.90	$2,246.37	$9,241.27	No – FG invoice
6.	27.2.19	Meton Skies	Technical Representation	$10,657.13	$3,381.68	$14,038.81	Yes
7.	12.3.19	Wright Aero	Payment for part	$7,355.00	$2,277.66	$9,632.66	No – no proof of who was invoiced or who paid
8.	13.3.19	Skyline Avionics	Payment for repairs	$5,604.96	$1,734.80	$7,339.76	Yes
9.	13.3.19	Athens Aeroservices	Payment of maintenance support	$32,801.22	$10,152.35	$42,953.57	Yes
10.	13.3.19	Aeolian Services	Parking fees, fuel and administrative services	$83,575.80	$25,867.65	$109,443.45	Yes
11.	14.3.19	Vedder Price	Legal fees	$584.00	$180.72	$764.72	No – FG invoice
12.	20.3.19	Meton Skies	Technical Representation	$7,600.00	$2,354.04	$9,954.04	Yes
13.	5.4.19	Meton Skies	Technical Representation	$5,767.35	$1,717.40	$7,484.75	Yes
14.	20.4.19	Meton Skies	Technical Representation	$4,750.00	$1,415.87	$6,165.87	Yes
15.	17.5.19	Papapetros, Papangelis, Tatagia & Partners	Legal advice	$9,513.74	$2,717.47	$12,231.21	Yes
16.	20.5.19	Meton Skies	Technical Representation	$8,621.48	$2,461.05	$11,082.53	Yes
17.	5.6.19	Meton Skies	Technical Representation	$5,700.00	$1,556.91	$7,256.91	Yes
18.	13.6.19	Airbus	Design approval	$6,795.00	$1,865.54	$8,660.54	Yes
19.	20.6.19	Meton Skies	Technical Representation	$5,225.00	$1,428.61	$6,653.61	Yes
20.	5.7.19	Meton Skies	Technical Representation	$5,225.00	$1,365.96	$6,590.96	Yes
21.	20.7.19	Meton Skies	Technical Representation	$5,225.00	$1,350.49	$6,575.49	Yes
22.	5.8.19	Meton Skies	Technical Representation	$3,800.00	$937.74	$4,737.74	Yes
23.	12.8.19	Athens Aeroservices	Services	$45,455.76	$11,183.57	$56,639.33	Yes
24.	15.8.19	Vedder Price	Legal fees	$2,776.00	$682.00	$3,458.00	No – FG invoice
25.	20.8.19	Meton Skies	Technical Representation	$4,512.50	$1,107.17	$5,619.67	Yes

[23] Meaning Fortress Group throughout this Table.

26.	23.8.19	Hellenic Aviation Fuel	Fuel	$19,309.37	$4,721.92	$24,031.29	Yes
27.	23.8.19	World Fuel Services	Fuel	$9,015.86	$2,204.74	$11,220.60	Yes
28.	23.8.19	World Fuel Services	Fuel	$10,288.93	$2,516.06	$12,804.99	Yes
29.	27.8.19	Athens Aeroservices	Services and fuel	$19,049.00	$4,646.22	$23,695.22	Yes
30.	28.8.19	PDQ Airspares	Parts	$1,873.30	$456.72	$2,330.02	No – addressed to Defendant but no proof who paid.
31.	28.8.19	PDQ Airspares	Parts	$1,925.00	$469.32	$2,394.32	No – addressed to Defendant but no proof who paid.
32.	28.8.19	PDQ Airspares	Parts	$7,782.10	$1,897.32	$9,679.42	No – addressed to Defendant but no proof who paid.
33.	29.8.19	PDQ Airspares	Parts	$25.80	$6.01	$31.81	No – addressed to Defendant but no proof who paid.
34.	29.8.19	PDQ Airspares	Parts	$346.40	$80.75	$427.15	No – addressed to Defendant but no proof who paid.
35.	5.9.19	Apella	Parts	$1,802.07	$417.42	$2,219.49	Yes
36.	19.9.19	Vedder Price	Legal fees	$584.00	$135.33	$719.33	No – FG invoice
37.	20.9.19	Meton Skies	Technical Representation	$7,429.67	$1,719.89	$9,149.56	Yes
38.	5.10.19	Meton Skies	Technical Representation	$2,137.50	$469.95	$2,607.45	Yes
39.	15.11.19	Vedder Price	Legal fees	$3,723.00	$760.17	$4,483.17	No – FG invoice
40.	18.11.19	PDQ Airspares	Freight charges	$1,260.00	$256.99	$1,516.99	No – addressed to Defendant but no proof who paid.
41.	5.12.19	Meton Skies	Technical Representation	$475.00	$92.15	$567.15	Yes
42.	11.12.19	Vedder Price	Legal fees	$2,701.00	$525.76	$3,226.76	No – FG invoice
43.	23.1.20	Athens International Airport	Parking fees	$168,802.49	$30,957.74	$199,760.23	Yes
44.	26.1.20	Jetway Technical Services	Technical Representation	$10,769.62	$1,974.80	$12,744.42	No – FG invoice
45.	28.1.20	SPC Aviation		$162.50	$29.77	$192.27	No – FG invoice
46.	30.1.20	Papapetros, Papangelis, Tatagia & Partners	Legal Advice	$30,645.68	$5,616.60	$36,262.28	No – FG invoice
47.	30.1.20	Athens Aeroservices	Maintenance	$16,821.99	$3,083.06	$19,905.05	Yes
48.	31.1.20	Athens International Airport	Parking fees	$2,311.40	$423.95	$2,735.35	Yes
49.	31.1.20	Eurocontrol	Route charges (July 2018)	$680.57	$124.83	$805.40	No - no proof of who was invoiced or who paid
50.	2.2.20	Jetway Technical Services	Technical Representation	$8,003.12	$1,392.26	$9,395.38	No – FG invoice

51.	3.2.20	SPC Aviation	Expenses relating to aircraft records	$60.00	$10.44	$70.44	No – FG invoice
52.	9.2.20	Jetway Technical Services	Technical Representation	$7,422.50	$1,291.74	$8,714.24	No – FG invoice
53.	16.2.20	Jetway Technical Services	Technical Representation	$7,218.40	$1,255.24	$8,473.64	No – FG invoice
54.	23.2.20	Jetway Technical Services	Technical Representation	$6,826.90	$1,245.93	$8,072.83	No – FG invoice
55.	24.2.20	Customs	Banking fees	$27.63	$4.78	$32.41	No - no proof of who was invoiced or who paid
56.	24.2.20	Customs	Customs charges	$132,175.13	$22,876.46	$155,051.59	No – not related to Defendant's default
57.	29.2.20	Matheson, Ormsby, Prentice	Legal Fees	$3,383.65	$547.84	$3,931.49	No - no proof of who was invoiced or who paid
58.	1.3.20	Jetway Technical Services	Technical Representation	$7,336.62	$1,187.86	$8,524.48	No – FG invoice
59.	4.3.20	Papapetros, Papangelis, Tatagia & Partners	Legal Advice	$22,572.50	$3,449.86	$26,022.36	No – FG invoice
60.	4.3.20	Athens International Airport	Parking fees	$9,162.46	$1,400.34	$10,562.80	Yes
61.	4.3.20	?		$24,495.68	$3,743.78	$28,239.46	Not pursued
62.	8.3.20	Jetway Technical Services	Technical Representation	$8,031.96	$1,205.23	$9,237.19	No – FG invoice
63.	12.3.20	Jetway Technical Services	Technical Representation	$2,657.94	$391.25	$3,049.19	No – FG invoice
64.	31.3.20	Athens International Airport	Parking fees	$9,794.35	$1,492.77	$11,287.12	Yes
65.	13.4.20	Papapetros, Papangelis, Tatagia & Partners	Legal advice	$6,024.22	$796.12	$6,820.34	No – FG invoice
66.	1.5.20	Athens International Airport	Parking fees	$9,478.41	$1,255.69	$10,734.10	Yes
67.	4.6.20	Athens International Airport	Parking fees	$9,794.35	$1,123.94	$10,918.29	Yes
68.	6.7.20	Athens International Airport	Parking fees	$9,478.41	$1,014.97	$10,493.38	Yes
69.	9.7.20	Athens Aeroservices	Dismantling	$88,852.90	$9,529.66	$98,382.56	Yes
70.	19.7.20	Jetway Technical Services	Technical representation	$13,977.40	$1,499.42	$15,476.82	No – FG invoice
71.	22.7.20	Safco	Defueling	$3,599.10	$386.05	$3,985.15	Yes

72.	9.9.20	Air Salvage International	Collection and shipping of engines	$14,697.91	$1,352.14	$16,050.05	No – not related to Defendant’s default
				$1,009.143.24	$205,463.19	$1,214,606.43	

APPENDIX 8 – LIST OF DEFINED TERMS AND ABBREVIATIONS IN THE JUDGMENT

Abbreviation/Defined Term	Meaning
AD	Airworthiness Directive, a notification to operators of aircraft that a known safety deficiency exists and must be corrected in order for the aircraft to be considered airworthy
Aircraft	The Airbus 319-100 registration SX-BHN, with manufacturer's serial number 1612 and two Engines with engine serial numbers 575280 and 779311 which is the subject matter of the action.
Airframe	The Aircraft excluding the engines
ALS	ALS Leasing UK Limited, part of the AerCap group of companies
AOC	Aircraft Operator Certificate
ARC	Airworthiness Review Certificate
Base Rent	Rent payable until the Termination Date under the Lease Agreement
CAMO	Continuing Airworthiness Maintenance Organisation
CoA	Certificate of Airworthiness
CoR	Certificate of Registration
Default Rent	The rent payable between the Termination Date and
EASA	European Union Aviation Safety Agency
Effective Time	The date and time as of which the Claimant succeed ALS as Lessor under the Lease Agreement pursuant to the Novation Agreement
Effective Time Supplement	The document identifying the Effective Time
Fortress Group	The group of companies ultimately controlled by Fortress Investment of which the Claimant forms a part
Fortress Investment	Fortress Investment Group LLC
Fortress Transportation	Fortress Transportation and Infrastructure Investors LLC
Grounding Notice	The notice served by ALS on 30 July 2018 specifying that the Defendant was in default and requiring it to ground the aircraft forthwith.
HCAA	Hellenic Civil Aviation Authority
IDERA	Irrevocable Deregistration and Export Request Authorisation
lease Agreement	The lease agreement dated 22 January 2016 between ALS and the Defendant by which the Defendant leased the Aircraft
Maintenance Rent ("MR")	Rent as defined in Article 5.5 of the Lease Agreement relating to scheduled maintenance events
Maintenance Rent Activity ("MRA")	The activities of maintenance which may generate the Lessee's entitlement to payment of sums from the Maintenance Rent
MPD	Maintenance Planning Document
MR	Maintenance Rent
MRA	Maintenance Rent Activity
MRO	Maintenance Repair Organisation

Novation Agreement	The agreement dated 5 October 2018 by which the Lease Agreement was novated to the Claimant as new lessor.
RDAS	Repair design approval sheet
Return Condition	The condition of the Aircraft as required by Article 23 of the Lease Agreement
Sale Agreement	The contract in July 2018 by which the Aircraft was sold to WWTAI
Security Deposit	The sum of $375,000 as defined in a Article 5.1 of the Lease Agreement
Termination Date	The date defined in accordance with Article 4.3 of the Lease Agreement, during which Base Rent is payable
WWTAI	WWTAI AirOpCo DAC II (Ireland)