Neutral Citation Number: [2022] EWHC 88 (Comm)

Case No: CL-2019-000562

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

Royal Courts of Justice

7 Rolls Buildings, Fetter Lane

London, EC4A 1NL

Date: 19 January 2022

Before :

MRS JUSTICE MOULDER DBE

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Between :

OLYMPIC COUNCIL OF ASIA

Cla

- and –

NOVANS JETS LLP

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- -

Michael McLaren QC and **Deborah Horowitz** (instructed by **The Air Law Firm LLP**) for the **Claimant**

John Kimbell QC and **Joseph Gourgey** (instructed by **Bargate Murray Limited**) for the **Defendant**

Hearing dates: 13-16 December 2021

- -

Approved 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.

.....

MRS JUSTICE MOULDER DBE

Mrs Justice Moulder DBE:

Introduction

1.

This is a dispute concerning the termination of an "aircraft lease to purchase" agreement entered into between the claimant and the defendant following non-payment of an invoice GL112/19 for US$282,138.43 (the "Disputed Invoice").

2.
The claimant ("OCA") is an independent non-governmental not-for-profit organisation based in Kuwait. OCA's primary purpose is the promotion and organisation of sporting events throughout Asia and to act as a representative authority for the National Olympic Committees of Asian countries.

3.
The defendant ("Novans") is an English aircraft broking and consultancy company.

Remote hearing

4.
Due to COVID and the witnesses being abroad, the parties requested a remote hearing and this was approved by the court in the circumstances. Both parties were represented by leading counsel and the court had the benefit of both written and oral submissions.

Background

5.
The parties entered into the Aircraft Lease to Purchase Agreement ("ALPA") on 31 August 2018, pursuant to which Novans agreed to charter an aircraft to OCA, by providing 1,515 block hours ''for priority usage" of the aircraft from 1 October 2018 to 31 December 2022.

6.
The price per block hour was stated in the ALPA to be US$9,505 per block hour (a “Block Hour”) such that the "Total Price" for 1515 Block Hours was USD14,400,000.

7.
The Total Price included certain expenses identified in the ALPA but excluded other expenses ("Excluded Expenses") such as "scheduled and unscheduled maintenance and crew accommodation". These Excluded Expenses were payable by OCA in addition to the amount payable for the Block Hours.

8.
The terms of payment of the Total Price for the Block Hours were by instalments such that by the time the Disputed Invoice was raised in April 2019, OCA had made the first two instalments comprising an initial payment of US$8,100,000 and a further instalment of US$1,575,000 i.e. a total of US$9.675m of the total US$14.4m

9.
When OCA was not using the Aircraft, it could be used by Novans to offer charter flights to third parties, on the basis that pursuant to the ALPA Novans agreed to share (on an unspecified basis) with OCA the net profit generated from those aircraft charter sales.

10.
Under the ALPA Novans also purported to grant to OCA a "priority right" to purchase the Aircraft either during the lease term (but after 31 December 2020) or at the end of the lease term at a price to be mutually agreed. OCA additionally had the option, at the end of the lease term, to extend the lease term subject to mutual agreement of the terms and conditions for such extension.

11.
The Aircraft was operated under the Air Operator Certificate of ACASS San Marino S.r.l. ("ACASS") as the Licensed Operator. There was a separate agreement between Novans and ACASS under which Novans was obliged to reimburse ACASS for expenses incurred.

12.
There were two invoices issued for the Excluded Expenses in the quarter to 31 December 2018. These were cancelled and replaced by an invoice issued in January 2019 which covered all expenses for the previous quarter: on 21 January 2019, Novans issued to OCA invoice number GL111/19 for US$112,928.24.

13.
Novans also sent a December 2018 “statement of account” and supporting documents to OCA which included an ACASS invoice to Novans dated 17 December 2018 for US$158,532.34.

14.
On 19 March 2019, OCA paid the sum of US$158,532.34 to Novans.

15.
Novans responded by email pointing out that the invoice was not payable by OCA and informed OCA that OCA's payment of US$158,532.34 had been applied towards invoice number GL111/19, and that the excess amount (a credit balance of US$45,604.10) would be credited to Novans' next invoice to OCA for expenses.

16.
On 8 April 2019, Novans issued to OCA the Disputed Invoice (GL112/19 for US$282,138.43). The due date was stated to be 12 April 2019. The cover email made reference to a surplus and the statement showed a credit of US$45,000.

17.
The Disputed Invoice was not paid. The events that followed are considered in detail in relation to the issues for determination. The key dates for the purposes of this section are as follows.

18.
From 12 to 13 April 2019, meetings were held in Lausanne between Mr Al Musallam, the Director General of OCA, and Mr Gringuz, the Managing Director of Novans.

19.
In May 2019 Mr Banna, the Finance Director of OCA, travelled to Kiev to meet with Novans. However no-one from Novans was available to meet him.

20.
Novans sent a letter on 11 June 2019 giving OCA until 14 June 2019 to make payment of the Disputed Invoice.

21.
OCA did not make the payment and by letter dated 14 June 2019 Novans purported to suspend the ALPA and the use of the aircraft.

22.

In correspondence lawyers for OCA challenged Novans' right to suspend the contract. A “without prejudice” meeting was held in August 2019 which was unsuccessful and on 18 September 2019 Novans served notice purporting to terminate the ALPA for non-payment of the Disputed Invoice.

23.
As at the date operations were suspended by Novans, OCA had utilised 281.9 block hours with a contract value of US$2,679,459.50, despite by then having paid for 1,017.88 block hours with a contract value of $9,675,000 (these are the amended utilisation figures now claimed by OCA).

Issues for the court

24.
In summary OCA brings the following claims:

i)
a claim that Novans has breached the ALPA, in (a) failing to co-operate in relation to OCA's queries as regards the Disputed Invoice, (b) suspending OCA's use of the Aircraft, (c) purporting to terminate the ALPA and (d) failing to share profits from third-party charters; and

ii)
a claim in unjust enrichment, seeking restitution of the US$6,995,540.50 paid by OCA in respect of unused block hours (this is the lower amount now sought by OCA following the reduction to the unused block hours)

25.
Novans' case is that:

i)
the sums invoiced under the Disputed Invoice were duly payable and OCA's failure to pay amounted to a repudiation of the ALPA which Novans duly accepted in reliance on its rights under common law and the termination provisions in the ALPA in particular clause 10(b) and/or 10(c).

ii)
OCA cannot rely on unjust enrichment because this would contradict the clear wording of clause 3 that any payments made by OCA would be "non-refundable". Novans was entitled to suspend OCA's use of the aircraft as OCA had no right to call upon Novans to perform without having its expenses reimbursed.

26.
In this judgment I have dealt primarily with those issues which in my view were necessary to resolve the claim and accordingly have not addressed all the issues raised by the parties. Where I have referred expressly to submissions on a particular issue, I have included only those submissions which in my view were necessary to deal with expressly. I have however considered the entirety of the submissions both written and oral and the omission of a reference to a particular submission should not be taken to be a failure to consider the relevant submission.

ALPA-Relevant provisions

27.
There is no clause numbered 1 or 2 in the ALPA but prior to numbered clause 3 the following paragraphs appear after the section which clearly amount to “recitals” to the operative sections and are preceded by a heading "CLAUSES":

“a) Lease Term, Priority and Block Hour Amount

The Lessor agrees to provide Lessee, or any other natural or legal person appointed, the requested total amount of 1515 (One Thousand Five Hundred Fifteen hours) block hours for priority usage on aforementioned Aircraft starting from 01st October 20-18 until 31st December 2022. Lessor is obliged to perform flight operations for requested flight schedule of Lessee under certain terms and conditions stated below. The lease term starts on 01.10.2018 until 31.12.2022 when this agreement extinguishes. An extension of the period of service is to be agreed not later than six months prior to end of this agreement.

b) Price per Block Hour and Total Price

9,505 USD (nine thousand five hundred five US Dollar) per block hour whereby total amount for 1515 block hour is 14,400,000 USD (fourteen million four hundred thousand US Dollar).

c) Block Hour Utilisation

Each flight leg shall be minimum 4 hours unless several flight legs are performed over a period of 5 days whereby the total shall average 4 hours.

d) Price includes

The Block Hour Prices includes aircraft, crew consisting of 2 pilots and 1 flight attendant, AOC expenses, flight planning, navigation fees fuel, insurance, aircraft wifi, crew remuneration, airport landing/take-off and handling fees of 1000 USD per leg, flight preparation.

e) Price excludes

All Expenses, not expressly mentioned as being included in clause 2E shall be payable by the Lessee and include, but are not limited to, the following: parking, catering, overnight fees, scheduled and unscheduled maintenance, crew accommodation, crew transportation, crew visas, schedule changes, aircraft de-Icing and/cold weather hangarage charges, VIP lounges, war risk insurance, Italian luxury tax, UK Air passenger duty, passenger transfers, special overflight or landing permits.

f)…”

28.
The ALPA then continues with numbered clauses of which the material ones are set out below:

“3. Payment

On 03rd September 2018 the Lessee shall make an initial payment of 8,100,000 USD (Eight Million One Hundred Thousand US Dollar) of the total 14,400,000 USD to Lessor. The remainder amount shall be paid in four partial payments equal to 1,575,000 USD (One Million Six Hundred Thousand US Dollar) not later than 15.01.2019, 15.01.2020, 15.01.2021, 15.01.2022, respectively or payable as per operational demand upon mutual agreement between Lessor and Lessee.

Payment by Lessee to Lessor shall be made upon issuance of an invoice within two (2) working days after invoice is received. Payment paid to Lessor is non-refundable and non-transferable to any other private aviation service or alternative aircraft, even in case of force majeure events (including but not limited to acts of civil unrest or adverse weather).

Any payment made by the Lessee to Lessor under this Agreement shall be made in compliance with all applicable laws.

Payments shall be conducted to the corporate bank account stated below. The Lessor reserves the right to change the designated corporate bank account at any time throughout the term of this agreement.

…

7. Third party charters

7.1. Whenever Lessee will not use the assigned aircraft, it may be used by Lessor to offer charter flights, charged at charter market prices to international third parties. The Lessor agrees to share with Lessee partial net profit margin that has been generated from aircraft charter sales at market prices. Aforementioned profit share can be executed as per below options:

a. Discount on the Price per Block Hour specified in clause B Price per Block Hour and Total Price

b. Transfer of Net Profit Margin share sixty (60) days after the completion of 3rd party charter operation.

…

Clause 10

10. Termination of Agreement

a) A termination notice may not be given within the first two (2) years of this Agreement; the Agreement may not be cancelled before 31.12.2020.

b) The hereby agreement shall be deemed canceled by the Lessee's fault in case of (i) any breach of the payment obligations set forth in section "Payment" (clause 3) of the hereby agreement.

c) In the event of any negligent or intentional breach by either party of any provision of this agreement, such breach remaining uncured four for a period of (4) weeks, then the other party shall be entitled to terminate this agreement with the expiration of minimum term duration, unless another exit solution is agreed on. If either Party becomes insolvent, goes into liquidation or is declared bankrupt, the other party shall have the right to terminate this Agreement immediately and seek compensation within insolvency, liquidation or bankruptcy proceedings. In the event of a force majeure event not attributable to a party and beyond a party's reasonable control, parties shall discuss forthwith any amendments required to the terms of this agreement in order to reach an equitable solution, failing which either party may terminate this agreement with immediate effect upon a four (4) weeks' notice.

11. Extension of Lease Term and Aircraft Purchase Option

It has been agreed that Lessee receives· the priority option to extend the aircraft lease term and priority right to purchase the Aircraft

a) Purchase During Lease Term

Lessee shall have the option, at any time after the 31.12.2020 and prior to 31.12.2022, to purchase the Aircraft. To purchase the aircraft Lessee shall inform Lessor not less than sixty (60) days prior to the commencement of third (3rd} year by written notice of its intent to purchase the Aircraft,

specifying the proposed purchase date. After delivery of such notice, Lessor and Lessee shall engage in the sales and acquisition process. The Lessor and Lessee will mutually agree the aircraft sales price. Beside the sales price, an allowance for will legal, marketing and other professional fees will be mutually agreed.

b) Purchase At End of Lease Term

Lessee shall have the option, at the end of lease term on 31.12.2022, to purchase the Aircraft. To purchase the aircraft Lessee shall inform Lessor not less than sixty (60) days prior to the end of lease term by written notice of its intent to purchase the Aircraft, specifying the proposed purchase date. After delivery of such notice, Lessor and Lessee shall engage in the sales and acquisition process. The Lessor and Lessee will mutually agree the aircraft sales price. Beside the sales price, an allowance for will legal, marketing and other professional fees will be mutually agreed.

…"

Evidence

Documentary record

29.
It was submitted for Novans (paragraphs 2-3 of its Closing Submissions) that the issues which the court has to determine can be answered almost exclusively by construing the relevant clauses of the ALPA and by reference to the contemporaneous documentation. It was submitted that the court should place little reliance on the witnesses' recollections and should base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestmin v Credit Suisse[2013] EWHC 3560 (Comm) at [22]).

30.
In my view the best evidence in this case is the contemporaneous documentary record and I propose therefore to set that out, so far as relevant to the issues, before considering the evidence of the witnesses and the weight to be given to that evidence.

Meetings in Lausanne in April 2019

31.
I have set out above in outline the invoices and payments which were raised and made respectively prior to the issue of the Disputed Invoice in April 2019.

32.
Although the events that preceded the issue of the Disputed Invoice are not irrelevant, on the evidence the first occasion on which the issue of the payment of the Disputed Invoice was discussed between the parties was the meetings at Lausanne on 12 and 13 April 2019.

33.
There is a factual dispute between the parties as to what was said at that meeting. There is no meeting note and I consider below the conflicting accounts of the two witnesses who attended the meeting, Mr Al-Musallam and Mr Gringuz.

34.

So far as the documentary record is concerned, the evidence as to what was discussed at those meetings is set out in the correspondence in the period after the meetings in Lausanne up to the abortive trip to Kiev by Mr Banna:

35.
On 18 April 2019, Mr Gringuz sent an email to Mr Al-Musallam following the meetings in Lausanne. That email referred to the meetings in Lausanne but made no reference to the Disputed Invoice. It "re-confirm[ed]" the "mutual agreement" concerning third-party charter flights and stated that it had "blocked" (as to which I infer allocated) future bookings for May and June 2019. It also referred to continuing negotiations as to how profit and loss from third-party charters would be shared.

36.
Mr Al-Musallam responded the same day. In his email he referred to the third-party charter flights, the dates on which OCA wish to use the aircraft and that OCA must approve all requests for third-party charters. He also stated that the "OCA lawyer" would contact Novans "regarding the transfer of the aircraft title" from Novans to OCA and in the final substantive paragraph stated:

“6) I agreed that OCA finance director will visit your office in Kiev to discuss and understanding all about the financial issuer [sic] related to the aircraft operation, management and others, ((Mr. Fadi will Contact you soon about his arrival to Kiev))”

37.
On 30 April 2019, Novans (Ms Khyzha) sent an email to OCA (Nayaf Sraj), with a reminder about the Disputed Invoice, asserting that the due date was 12 April 2019. The email read:

"Dear Nayaf, I would like to thank you for fruitful cooperation.

Kindly remind you about the Invoice for Excluded fees, period January - March 2019.

It is currently unpaid, due date was the 12th of April.

Kindly be noticed that surplus payment was considered. All the supporting documentations are attached to this email…"

38.
Mr Al-Musallam responded the following day:

"Thank you for the e mail.

OCA need to check the balance and Mr. Fadi with Mr. Lucien will visit your office in Kiev soon to discuss all the financial issues.

the date will be send to you soon"

39.
On 3 May 2019, Novans sent to OCA a document on Novans-headed notepaper entitled "OCA Balance April 2019".

40.
On 14 May 2019, Mr Al-Musallam sent an email to Mr Gringuz referring to the meeting in Lausanne and listing the points said to have been discussed. There were 5 points identified: a request to transfer the title of the aircraft to OCA; the "account" related to the aircraft; the division of the profit

from third-party charters; the amount of third-party charters and the upcoming charters for OCA in May 2019.

41.
In particular the email read:

“Reference to our meeting in Lausanne last month now Mr. Fadi will be with you soon in Kiev. The following points was discussed with you during our last meeting:

OCA request to transfer the Aircraft title from NOVANS to OCA ((Fadi will discuss this point with you in Kiev)) And also OCA lawyer will Contact you in this regard since OCA paid all the amount of Buying the Aircraft and the Aircraft Must be included in OCA Asset At the OCA Financial report and audit.

Mr. Fadi will also look in to the account ((Flying Hours + Sale of the Hours + Expenditure + and all other issues)) related to the Aircraft T7 MSK, We count on you to request NOVAS Finance Department to cooperate with Mr. Fadi…”.

42.
On the following day (15 May 2019), Mr Gringuz replied that Novans would be "available for a meeting to discuss and review OCA operational expenses with Mr Fadi" in mid-June and stated:

"I will be able to communicate you exact dates of availability by end of May".

43.
OCA responded that Mr Banna would be in Kiev from 16-18 May not June. Mr Gringuz replied that a meeting needed to be scheduled and he would revert with dates. Mr Al-Musallam then pressed Mr Gringuz for a meeting in a further email of 15 May 2019:

“I have informed you during our last meeting that OCA Finance Director will visit your office in Kiev, to look for and learn about OCA investment and property which is T7 MSK Aircraft, and to understand from you about NOVAS financial management in relation to T7 MSK .

Now Mr. Fadi will arrive as plan to Kiev on 17 May early morning and it will be highly appreciated to meet with You and your team at NOVAS office in Kiev, if you are not available please ask your NOVAS Finance Director to meet with Mr. Fadi.”

44.
On 16 May 2019, Novans responded that it would not be able to meet then as Mr Gringuz was in Europe and Ms Khyzha on leave but that Novans would be happy to reply to questions:

"…no precise dates were ever suggested and no dates have been confirmed by Novans Jets for a meeting to review the operational expenses of OCA flights…"

45.
Again OCA pressed for a meeting responding by email of 16 May 2019:

"The meeting was decided during our last meeting in Lausanne last month where I informed you that Mr. Fadi will in Kiev around mid-May, the exact day will be depend on Mr. Fadi Ukrania VISA which was issued on 14 May. Now Mr. Fadi on the plane departed to Kiev.

OCA cannot understand your position that you postponed such important meeting for such important client (OCA) with NOVAS.

… OCA want and request you to carry out check on it own propert (sic) and investment (T7 MSK) as plan.

Mr. Fadi [Banna] and Mr. Lucien will Contact you today and I really hope that you respect OCA wish and meet with OCA Representatives.

OCA count in your cooperation".

46.
Mr Gringuz replied that no date had been agreed and they were unavailable.

47.
Mr Banna nevertheless travelled to Kiev on 16 and 17 May 2019 but was unable to meet anyone from Novans.

Events following the abortive trip to Kiev- demands for payment on 21 May and 11 June 2019

48.
On 21 May 2019, Ms Khyzha wrote to OCA, attaching a letter, the Disputed Invoice and "supporting documentation" comprising invoices and receipts.

49.
In the attached letter Mr Gringuz demanded payment of the Disputed Invoice:

"…We have previously requested payment of the Invoice and the Invoice has remained outstanding for more than four weeks and the Lessee is therefore in breach of the terms of the Agreement.

Without prejudice to our rights under the Agreement or generally, we hereby demand that the Lessee pays the Invoice in full on or before Friday 24 May 2019.

We remind you that, pursuant to Clause 10(c) of the Agreement, we have the right to terminate the Agreement if a Lessee breach of contract remains uncured for a period of four (4) weeks…".

50.
Mr Al-Musallam responded to Ms Khyzha on the same day:

"Fadi and Lucien was in Kiev to review and understand about the calculation of the cost from NOVANS Accounting.

OCA have paid and cover all and we are still paying.

Therefore OCA Finance Director must meet with Mr. July [Gringuz] and yourself…".

51.
On the following day Mr Banna responded to the letter from Mr Gringuz referring to the statements of account for March and April sent by Novans indicating that the invoice had been settled by set off of amounts already paid and referring to the visit to Kiev and the need for a meeting date to be set by Novans. The email read, so far as material:

"…I would like to comment on your request for the payment of Invoice No. GL112/19 issued by Novans amounting to US$ 282,138.43. Kindly note that this request contradicts with the statement of accounts sent by you earlier. Specifically, the statement of accounts for the month of March 2019 and the month of April 2019 (copies attached) state that the invoice was settled by utilizing monies OCA

previously paid to Novans earlier this year (US$ 1,575,000 on 15 January 2019 and US$ 158,577 on 19 March 2019 in addition to the US$ 8,100,000 on 03 Sept. 2018).

Also, in line with article 13 of the Lease, which entitles OCA to audit and verify the invoices and the accounts, our General Director has emailed you requesting a meeting to review and finalize the accounts with Novans. Accordingly, we have visited Kiev on 16/17 May 2019 to meet with you and your financial department team to verify the documents received from Novans and to understand clearly (1) the statement of accounts; (2) the invoices and (3) the cost and payments to Novans versus the hours actually flown. We also need to review the promised contribution to OCA from the charter operation as per article 7 of the signed agreement. Unfortunately, neither you nor your financial department were available to meet and we are still awaiting confirmation of a date to discuss. Your letter and its contents are not acceptable nor appreciated in this context and we wholly dispute your position

Therefore, and according to the statement of accounts received from you earlier, the mentioned invoice has been settled and an amount of US$ 210,964.33 is still in your accounts in OCA favour as of 30 April 2019. We are looking forward to meet with you to discuss, verify, and finalize the financial matters and all other pending issues." [emphasis added]

52.
Although correspondence took place subsequently between the parties in relation to both other expenses and the availability of the aircraft, on 11 June 2019, Novans wrote to OCA rejecting any right of set off and notifying OCA of Novans' intention to suspend OCA's use of the Aircraft if the Disputed Invoice was not paid by 14 June 2019.

Suspension and events post suspension to termination in September 2019

53.
On 14 June 2019, Novans purported to suspend OCA's use of the aircraft and ceased to make the aircraft available on charter to OCA.

54.
OCA responded through its lawyers on 13 June 2019 (a letter which is not before the court as it was on a without prejudice basis) and on 20 June 2019 rejecting any right to suspend and noting that Novans had not responded to an invitation to attend a meeting at the offices of OCA's lawyers.

55.
It would appear from the letter of 9 July 2019 from OCA's lawyers that no response was made by Novans to the letters from OCA's lawyers inviting Novans to meet. With the letter of 9 July 2019 OCA sent a schedule setting out its detailed queries (the "Appendix") in relation to the costs claimed by Novans under the ALPA.

56.
Novans responded by letter of 2 August 2019 confirming that they were available for a meeting in August and that "in due course" they would address the audit issues raised in the letter of 9 July 2019.

57.
A meeting was proposed for mid-August. However by letter of 6 August 2019 Mr Gringuz said that to address the detailed accounting points raised in the letter of 9 July Mr Gringuz would need to be accompanied by Ms Khyzha who could not obtain a visa by the proposed August dates and accordingly a meeting which involved a detailed discussion would need to be "deferred until September 2019".

58.
It would appear that a “without prejudice” mediation meeting occurred in August 2019 which was unsuccessful.

59.
By letter of 3 September 2019 the solicitors for OCA referred to an intention to file a claim against Novans. However it also indicated that OCA was willing to pay the disputed funds into escrow whilst the issues were resolved through discussions. This was followed by a letter of 11 September 2019 from OCA's lawyers offering to defer the service of proceedings for seven days to explore settlement.

60.
In response the lawyers for Novans wrote on 18 September 2019 accepting OCA's failure to pay the invoice "as a serious and repudiatory breach" rendering it cancelled pursuant to clause 10(b) of the ALPA or in the alternative terminating the ALPA in accordance with clause 10(c).

61.
Subsequently Novans provided a response to the queries raised in the Appendix and OCA has provided its response as set out in an updated version of that Appendix which is before the court.

Witnesses

General

62.
As referred to above, it was submitted for Novans that the court should place little reliance on the witnesses' recollections and should base factual findings on inferences drawn from the documentary evidence and known or probable facts.

63.
This is a case where the events in issue are relatively recent having occurred in 2019. It might be expected therefore that the witnesses could recollect events and could be expected to have relevant evidence: although (as set out below) the issue of construction is an objective question, the commercial context is a relevant consideration. Further (as also set out below) even though the issue of repudiatory breach is assessed objectively by reference to conduct, the evidence of the witnesses may have been of assistance in interpreting the events. There is also a factual dispute between the parties as to what was said at the meetings at Lausanne on 12 and 13 April 2019 concerning payment of the Disputed Invoice.

64.
However the evidence of each of the 3 witnesses that were called was unsatisfactory to a greater or lesser degree as set out below.

Husain Al-Mussalam

65.
Mr Al-Mussalam is the Director General of OCA.

66.
Mr Al-Mussalam gave his account of what happened at the Lausanne meetings. It was common ground that the Disputed Invoice was one of the points discussed. Mr Al-Mussalam 's evidence was that he told Mr Gringuz that OCA was ready to pay the invoice but only after OCA had an opportunity to audit the costs by sending Mr Banna to look at the books of Novans.

67.
Mr Al-Mussalam gave evidence in cross examination to the effect that by May 2019 he had lost confidence in Novans but failed to give a satisfactory explanation as to why this was the case.

68.
He said in cross examination that he was paying money to Novans but he was "swimming in the dark". He said that Novans "took the money he took the aircraft and we are in the dark". Mr Al-Musallam's explanation to the court was that it was because OCA was not receiving its block hours but on the evidence of the flight log which was before the court this was not the case. When this was put to Mr Al-Mussalam in cross examination he appeared to accept this but insisted that he still needed to see what he was paying for and to check the invoice:

"A. … and I tried to tell him "You got the money, you are supposed to give us the service, and we don't get the service, we don't get the aircraft -- the aircraft. At least choose which direction you want to go".

Q. What on earth are you talking about, Mr Al-Musallam? We have looked at the flight log. Every single -- on every single week, since the beginning of the ALPA, the president and others from OCA are flying backwards and forwards in the aircraft -

A. For their duty, for their duty, yes, yes. For their duty.

Q. It is -

A. But when you come and send me an invoice, today 200 and something, tomorrow 100, even if it's a legitimate request, but I have also to know that this is -- to know for what I am paying." (Day 2, 14/12/2021, 51:19-52:10) [emphasis added]

69.
Later in his oral evidence, Mr Al-Mussalam indicated that he was very unhappy with the costs that were being sent to OCA but again it was unclear what it was he was unhappy about. He said again that it was because OCA did not know what they were paying for:

"…paying, you must pay. But for what we pay? You must pay or I have the stick in my hand, chop all your money and chop all your privilege, what you pay. This is what he's doing: must pay. You use the -- this is not the way: must pay, must pay. He never say for what we paid, he never even showed us one statement of account." (Day 2, 14/12/2021, 64:17-64:22) [emphasis added]

70.
However it is clear from the documentary evidence before the court that statements of account were provided to OCA and supporting documentation was provided for the invoices for the Excluded Expenses (the complaint of Mr Banna in his evidence in cross examination was that there was too much documentation for OCA to check).

71.
In cross examination Mr Al-Mussalam appeared unwilling to explain the significance of the discussions referred to in the correspondence about the transfer of title to the aircraft and why it was important to get the aircraft into the financial accounts of OCA. His evidence was that he had lost confidence in Novans but it is unclear why this was the case:

A. No, look, you have to go to your question before. We pay money for hours, and then we don't get the hours and we don't get the aircraft. At least I want something, since it is in our report, financial

report, that this money went for the lease of the hours; based on that contract we signed in Jakarta, okay?

Q. Why did you need to transfer (overspeaking) -

A. This -

Q. Why do you need to transfer -- the way I read this -

A. Because I lost the confidence, I lost the confidence of Novans. When I asked -- look, you asked me: how many --(Day 2, 14/12/2021, 54:7-54:17) [emphasis added]

72.
Again the explanation that OCA was not getting the hours it had contracted for is not borne out by the evidence.

73.
In re-examination Mr Al-Mussalam was given an opportunity to change his evidence and extend this answer to third party hours:

“Q. Can I just try to understand that answer. When you were saying "we are not getting the hours", do you mean you were not getting the third-party charter hours that you were expecting to get, or were you referring to OCA's own block hours?”

74.
Mr Al-Mussalam responded:

“A. It's both. We need to know what is the third party and we need to know that our request, it has priority for the aircraft.” (Day 2, 14/12/2021, 80:15-80:15)

75.
In my view this was a clear attempt to change the evidence he had already given in cross examination where the thrust of his evidence as referred to above was that OCA were not getting the hours they were entitled to. I do not accept it.

76.
It was put to Mr Al-Mussalam in cross examination that at the meetings in Lausanne he asked for the aircraft to be transferred. His evidence was that he demanded title to the aircraft if he did not get the financial information:

“No, I didn't say it simply like that. I said: if you continue not to provide us with enough evidence of expenditure in relation to the finance and not giving us a chance to do the audit, okay, then we go to this, let's say, final removal of things. It's to go and transfer the title. This was -- it came, if he tell. And this is what it's about. It's not: hello, Mr July, transfer the title to us. No, absolutely it was not like that. It was: give us the finance evidence.If you fail, you cannot do it, then please understand, you need to transfer at least the aircraft to OCA”. (Day 2, 14/12/2021, 59:8-59:18) [emphasis added]

77.
Again it is unclear what financial information about the expenditure OCA were lacking at this point. The evidence is that both with the statements of account and the invoices OCA were sent supporting documentation and invited to raise any questions. There is no contemporaneous documentary evidence before the court which shows any complaints made by OCA prior to the meetings in Lausanne as to what information they were lacking.

78.
It was submitted for OCA in its closing submissions that Mr Al-Mussalam was both "forthright" in his evidence and "agitated" due to linguistic difficulties/barriers. There was no indication in my view that his evidence was the result of misunderstanding arising from any linguistic difficulties/barriers: rather the evidence was that on the one occasion when he did not understand a word ("concocted") he asked for an explanation before answering the question posed. I am not satisfied that he was "forthright" in his evidence to the court and find his explanations for the actions of OCA contradictory both within his own evidence and when viewed against the contemporaneous documentary evidence. For these reasons I attach little weight to his evidence except to the extent that it is consistent with the contemporaneous documentary record.

Fadi Banna

79.
Mr Banna is the Finance Director of OCA.

80.
In cross examination Mr Banna was unable to give a satisfactory explanation as to why the original invoices in the first quarter were not paid although it appears to be the case that the original invoices were replaced by a single invoice (GL111/19) for the quarter to 31 December 2018 dated 21 January 2019 (the "January Invoice").

81.
His evidence was that the delay in paying the January Invoice was due to the time taken to check the supporting documentation and yet on the evidence of the contemporaneous documents, no detailed queries were raised until July 2019 apart from one query raised by Mr Sraj, an accountant at OCA, by email of 24 January 2019 which was answered.

82.
In his evidence in cross examination Mr Banna sought to distance himself from that email sent by Mr Sraj suggesting that Mr Sraj had not discussed it with him and he had not seen the email. This was not credible: the evidence was that they were a small department (of just himself and Mr Sraj) and if emails were sent to Lucien Alvarez at OCA, he passed them on.

"…in my department. We have only me and Nayaf as accountants for OCA stationed in the office, in the headquarters. So actually, it's Nayaf who is reviewing this, my colleague, Mr Sraj, he is reviewing this, and this is his job." (Day 2, 14/12/2021, 108:7-108:11)

83.
On 19 March 2019 OCA made a transfer to Novans for US$158,577.34. On 21 March 2019 in response to the payment by OCA, Ms Khyzha responded:

"…I would like to clarify the situation with the current transfer. You paid for Invoice #10327120 dated 17 December 2018 billed by ACASS, the flight operator, the amount is 158,577.34 USD. This Invoice was sent you as a part of our monthly report to you (December 2018). The purpose of this report is to show you how we spend funds for aircraft operating and management needs. Kindly be informed that your todays transfer we count as a payment for our Invoice #GL111/19 dated 21 January 2019 billed for Extra expenses according to Lease Agreement. The amount is 112,928.24 USD.

The rest of sum, namely 45,604.10 USD would be credited from the next Invoice for Extra expenses. It is during the preparation process right now…" [emphasis added]

84.
However, Mr Banna was unable to explain to the court why notwithstanding the explanation provided by Ms Khyzha in that email, he thought that the Disputed Invoice of US$282,000 had in fact been paid. I bear in mind that this was not an invoice paid by a trading company in the ordinary course of its operations but a significant amount of money paid by a non-profit making organisation in respect of the charter of an aircraft and not part of its core operations of sport. Whilst it is clear on the evidence set out above, that OCA had been told it had a credit as a result of the previous overpayment, it had been told the amount of the credit (approximately £45,000) and it is unclear why Mr Banna would have believed that a credit existed sufficient to discharge the entire Disputed Invoice. Further the covering email for the Disputed Invoice made reference to the "surplus payment" and attached as part of the supporting documentation a statement as follows:

"EXCLUDED FEES, SETTLEMENT PAYMENTS

DATE TRANSACTION AMOUNT

21.01.2019 Invoice # GL111/19 for Extra Expenses $ -112 928,24

21.03.2019 OCAsia PAYMENT $158,532,34

BALANCE (in favor of OCAsia) $45,604,10"

85.
As he holds a senior finance role within OCA and is an accountant by profession, I found it difficult to accept as credible Mr Banna's evidence in cross examination that he was unable to check the supporting documentation for approximately 3 months given the volume of supporting documents provided to OCA and that (in substance) he was confused as to the payments that he had to make to Novans. Mr Banna painted a picture in his evidence of a disorganised and inept finance function which could not keep track of the payments due under the invoices for the Excluded Expenses and which did not understand the partial credit which it was told had resulted from its erroneous payment of the ACASS invoice and would be carried forward.

86.
It was submitted for OCA in oral closings that the court should infer that Mr Banna already had in mind the detailed queries in April 2019 prior to submitting them to Novans in July 2019: there is no documentary evidence which indicates what those detailed queries were in April 2019. In his email of 16 May 2019 about the meeting in Kiev being postponed to June 2019 Mr Gringuz wrote:

"...should Mr Fadi have some questions in the meantime prior to our meeting in June, we will be most happy to reply and comment..."

87.
However there is nothing to indicate that any detailed questions were raised by Mr Banna in response to this email. The letter of 9 July 2019 from OCA's lawyers stated:

"Our client has now undertaken a full audit of all costs claimed by Novans under the Aircraft Lease to Purchase Agreement" [emphasis added]

88.
In assessing the weight to be given to Mr Banna’s evidence I bear in mind that despite (or indeed by reason of) his relatively senior position at OCA he is likely to wish to support the evidence advanced by Mr Al-Mussalam.

89.
It was submitted for OCA in closing submissions that Mr Banna was open and honest in his answers. I found his evidence confused and on occasions not credible. Except where his evidence is supported by the contemporaneous documentation, I give little or no weight to his evidence.

July Gringuz

90.
Mr Gringuz is the ultimate beneficial owner and Managing Director of Novans.

91.
Mr Gringuz' evidence is of particular relevance to what was said at the meetings in Lausanne, why after the abortive trip to Kiev by Mr Banna meetings between the parties subsequently did not happen and why Novans suspended the contract in June. Further once Novans had purported to suspend the contract and lawyers were involved on both sides his evidence would be relevant to understand why there was no response by Novans to the detailed queries raised in July 2019 by OCA and why the proposal of an escrow was not accepted.

92.
In relation to the meetings in Lausanne his evidence in cross examination was that:

"... I said to Husain at the time -- to Mr Al-Musallam at the time that the invoice needs to be paid, literally now; and he said not to worry about it and for this to be paid next week." (Day 3, 15/12/2021, 32:7-32:10)

"...I remember very well that I have said, that this invoice needs to be paid immediately, and that I was promised this by Husain, that I should not worry -- I am reciting his words -- and that the invoice is going to be paid latest next week, that is ASAP." (Day 3, 15/12/2021, 35:9-35:13) [emphasis added]

93.
However the veracity of this evidence has to be assessed in light of his overall credibility. Mr Gringuz gave the impression of a witness who did not wish to answer questions which he thought would harm Novans' case (although, as referred to below, the evidence that he did give was on occasions not in line with the case advanced in Novans' pleadings and by his counsel).

94.
For example he refused to give details of how Novans could have funded the purchase of the aircraft absent receiving the money from OCA. The relevant section of the cross examination was as follows:

"Q. And you used OCA -- the monies that OCA had paid you under this ALPA to purchase the aircraft, didn't you?

A. You are referring to the balance of the purchase price?

Q. Yes.

A. Yes, indeed. It was not from another counterparty.

Q. And I put to you that unless you'd had those monies from OCA to pay that balance of the purchase price, you would have been -- you, Novans, would have been in difficulty in paying the purchase price of the aircraft, the balance of the purchase price, on 5 September?

A. I would not comment this, because this is your assumption, not knowing any of Novans' group financial positions.

Q. So that was a diplomatic "no comment" answer. You are not prepared to answer the question; is that right?

A. That is correct, yes." (Day 2, 14/12/2021, 172:1-172:16) [emphasis added]

95.
Mr Gringuz insisted in his oral evidence that OCA had consulted lawyers in entering into the ALPA and that Novans had run the draft agreement past lawyers for ACASS even though this evidence ran contrary to Novans' Amended Defence where it was pleaded that:

"The lease was put together in haste and without the professional assistance of lawyers."

96.
His evidence in cross examination in relation to Novans was as follows:

“Q. So Mr Gringuz, it seems to have been your understanding, when you were giving information for the preparation of the defence, that at the time of the Jakarta negotiations, neither party had any legal input into the ALPA; is that correct?

A. Not entirely correct. So to be fully transparent: in my case, i.e. Novans, we did not instruct any external lawyers. The only -- the only thing we have actually done is sent the draft ALPA agreement, which we have compiled, to the lawyers, to the legal department of ACASS. These lawyers had then looked through the ALPA and said that this looks all alright, and within reason, and something that they have also seen before..." (Day 3, 15/12/2021, 4:1-4:13)

97.
Mr Gringuz also insisted in cross examination that OCA had lawyers involved:

“A. Lawyers were not present. However, I was told that there were internal and external lawyers from OCA's side involved; yes, this is correct; and that at some point of time, these lawyers, whoever, internal or external, have given the green light, so this agreement can be signed”. (Day 3, 15/12/2021, 5:16-5:21)

98.
Mr Gringuz' evidence in this regard was also contrary to the position advanced before the court on the summary judgment application where it was common ground that lawyers were not involved. It was also not credible evidence in light of the drafting of the agreement which as discussed below in relation to the issues of construction raised in this litigation, speaks for itself and supports the pleaded position: it is clearly not drafted by (competent) lawyers and if any advice was received it cannot have been comprehensive.

99.
Another example of where Mr Gringuz' position in oral evidence was at odds with the pleaded position of Novans (that the lease was put together in haste) was in relation to the negotiations of the ALPA. In his witness statement he said it was negotiated over 48 hours; in oral evidence he said the discussions took place over the whole time he was in Jakarta and that there were 10 or more meetings.

100.

When asked in cross examination why he did not meet with OCA after the meetings in Lausanne in April 2019, his evidence was that he offered to discuss the queries by phone/video. This evidence appears to be at odds with the documentary evidence that a meeting was to be held (albeit that Novans' position is that no date was fixed).

101.
He also said in cross examination that he had raised with Mr Al-Musallam at Lausanne the option of an escrow arrangement. The relevant exchange was as follows:

“Q. Forgive me. Maybe I misunderstood. I thought you were saying that in the Lausanne meeting you gave to Mr Al-Musallam this proposal that the money should be paid into escrow. Is that what you are saying?

A. No, it was only said as a potential option. It was not a definite request from my end. The definite request from my end was one and only, that is that the invoice is paid ASAP within a few days. I even asked him to pay the invoice by the end of the week. He said: this may not be possible, but this will be paid next week, and I should not worry about this whatsoever.

Q. So you were saying that the topic of payment into escrow was raised at the Lausanne meeting; is that correct?

“A. I had said that if nothing else, if nothing else will be able to be constructed, we may revisit this topic in the future with some alternative arrangement like an escrow.” (Day 3, 15/12/2021, 53:3-53:18) [emphasis added]

102.
This is not a matter which was in his witness statement and appeared to be an attempt to address a perceived criticism that Novans had not agreed to the escrow arrangement later proposed by OCA. It was not credible evidence in the circumstances.

103.
Given the matters discussed above I find that Mr Gringuz sought to tailor his evidence to fit what he perceived would suit Novans’ case. I attach little weight to his evidence except to the extent that it is consistent with the contemporaneous documentary record.

Viktoriia Khyzha

104.
Ms Khyzha is the Financial Director of Novans.

105.
After Mr Gringuz had given evidence to the court Novans indicated that it did not intend to call Ms Khyzha to give evidence.

106.
In the light of the fact that this was not anticipated or foreshadowed, the court gave permission for the parties to submit a written note following the conclusion of the trial on the issue of whether in the circumstances the court should draw adverse inferences from the failure to call Ms Khyzha. OCA also provided a note (the "Note") of the points that OCA would have sought to establish from her evidence. This judgment takes into account the submissions that were made on both sides in relation to the issue of adverse inferences and the Note.

107.
The law on adverse inferences was common ground. The defendant referred to the recent decision of the Supreme Court in Efobi v Royal Mail Group Ltd[2021] UKSC 33; [2021] at [41]:

"The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

108.
It was submitted for OCA that the court should draw the following adverse inferences in this case:

i)
That Ms. Khyzha would have given evidence in line with that Note as follows:

a)
that there was confusion in the Statements of Account and would have referred to examples of the incorrect inclusion of Excluded Expenses in the March and April Statements of Account.

b)
that expenses identified in paragraph 33 of the Appendix and meteorological services were incorrectly included in the Disputed Invoice; answers to the detailed queries and why Novans failed to provide an explanation as to why it did not respond to the detailed queries in the Appendix until September 2021; queries on the flight log;

ii)
That Novans' accounting documentation did contain the inconsistencies and errors to the extent set out in the last column of the Appendix;

iii)
That OCA's accounting queries in the Appendix were reasonable and genuinely held;

iv)
That it was reasonable for OCA to have been confused by Novans' accounting documentation, to the extent set out in the last column of the Appendix.

v)
That Novans would have been able to respond to OCA's queries prior to termination of the ALPA but that Novans chose not to do so.

109.
As set out above, whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Whilst this is not a case where the witness was not available to give evidence, the court has to consider whether Ms Khyzha would have given relevant evidence and the significance of that evidence in the context of the case.

110.
In my view once Novans accepted at trial that it could not dispute that the statements of accounts contained both Excluded and Included Expenses, any cross examination of Ms Khyzha in relation to that matter would have been unlikely to elicit any further relevant evidence (Point (i)(a)). The issue (Point (iv)) of whether it was reasonable for OCA to be confused by Novans' accounting documentation is in my view not relevant to the issues the court has to decide: (as set out below) the test for repudiatory breach is to ascertain whether the actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions and thus involves an assessment of the conduct of OCA not whether the beliefs which lay behind such conduct was reasonable. Even if the court were minded to form a view on the motive of OCA behind the conduct this is not a matter on which Ms Khyzha could give direct evidence.

111.
Further it is in my view largely irrelevant whether the accounting queries raised in July 2019 were reasonable and genuine (Point (iii)), since as found below the contract did not permit OCA to defer payment of the Disputed Invoice even for legitimate queries. Again the reasonableness of the behaviour of OCA does not in my view go to the issue of repudiatory breach if in fact such accounting queries were genuinely advanced as to which the court has regard to the contemporaneous documentary evidence and of Mr Banna and as set out below is able to make findings.

112.
It also seems to me that it is clear from the contemporaneous documentation that Novans could have responded to the detailed queries raised in July 2019 (Point (v)) and indicated an intention to do so. However it was Mr Gringuz' evidence that following the (failure of the) "without prejudice" meeting in August 2019 Novans was no longer prepared to discuss the accounting queries. This accords with the contemporaneous documentation where no positive reason for not responding is advanced. It is therefore unlikely that any further material evidence would have been obtained from Ms Khyzha on this issue.

113.
The only issue which in my view Ms Khyzha could have been expected to give material evidence is in relation to any detailed queries on the Disputed Invoice (Point (i)(b)). I cannot see that her evidence in relation to those detailed queries which related to the statements of account (Point (ii)) would have had any relevance to the issue of repudiatory breach in the period to June 2019 as they were not advanced during that period (and, as already stated, I reject the submission for OCA that the court should infer that OCA had in mind these particular queries as there is no evidence to support such an inference) and for the period to July to September 2019 it is accepted that no responses were given by Novans.

114.
In relation to the flight logs (Point (i)(b)) Novans has not advanced any substantive objection to the revised claim by OCA for unused Block Hours (which in any event OCA seeks by its revision to reduce)

and the reason why the flight log was not produced earlier does not go to any relevant issue in this judgment. There is no need for any adverse inferences in this regard.

115.
Insofar as there remains an issue between the parties as to whether items were properly claimed in the Disputed Invoice (Point (i)(b)), I accept the submission for Novans that it is a matter of construction whether "flight planning" includes meteorological services but as to any other expense which remains in dispute in relation to the Disputed Invoice such as the business class flights that is a matter on which I do draw an adverse inference as no good reason has been advanced as to why Ms Khyzha could not have given evidence, as the Financial Director she would in my view be likely to have had material evidence on the detailed issues in relation to the Disputed Invoice and these were matters of financial detail on which Mr Gringuz could not give relevant evidence.

Termination of the contract

116.
In closing submissions Novans advanced as its primary case that OCA was in repudiatory breach. I propose therefore to address this issue before addressing the issues of construction of the ALPA as a basis for termination of the ALPA by Novans.

Was OCA in breach of the ALPA by failing to make payment of the amount owed under the Disputed Invoice? Implied terms

117.
Before considering the issue of repudiatory breach there is a preliminary issue of whether OCA was in breach of the ALPA by failing to make payment of the amount owed under the Disputed Invoice.

118.
OCA accepted before the court that clause 3 of the ALPA (set out above) applied to fix the due date for payment of Excluded Expenses and therefore the due date for payment of the Disputed Invoice was 2 working days after it was received. Even if that were not the case, the Disputed Invoice was not paid either within 2 working days or within a reasonable time.

119.
Having regard to my assessment of the witnesses above, I do not accept as reliable Mr Gringuz' evidence concerning what was said by Mr Al-Musallam concerning payment of the Disputed Invoice at the meetings in Lausanne in April 2019. I also take into account that there is nothing in the contemporaneous documentation to support the evidence of Mr Gringuz on this issue.

120.
I find that the parties did not reach an agreement at the meetings in Lausanne that OCA would pay the invoice the following week or as soon as possible. However I also find on the evidence that there was no agreement reached at the meeting to defer payment of the invoice. The contemporaneous documentation (set out above) following the meetings at Lausanne which refers to the points discussed at the meetings makes no reference to any such agreement having been reached.

121.
I find that there was no agreement reached at the meetings held in April 2019 that affected the rights of the parties in relation to the ALPA.

122.

OCA's case is that there was an implied term (implied for reasons of business efficacy) that Novans was required to engage and co-operate with OCA in relation to any legitimate queries that OCA had in respect of the amounts of expenses invoiced, and/or to use reasonable endeavours to resolve any such issues.

123.
It was submitted for OCA that such an implied term was required to make the invoicing of expenses commercially practicable. It relied on an implied term of co-operation, that it was incumbent on Novans to engage cooperatively "to enable discussion and resolution of invoicing queries". It referred to the decision of the Privy Council in Ali v Petroleum Company of Trinidad and Tobago[2017] UKPC 2 in which Lord Hughes referred to the following statement of principle from Mackay v Dick:

32 "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances".

Discussion

124.
OCA accepted that the conditions for implication of a term are as set out by Lord Neuberger in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd[2016] AC 742 at [19]:

"for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

125.
I also note Lord Neuberger at [21]:

"…Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

126.
In my view the term which OCA say should be implied does not meet the test as set out in Marks and Spencer. The invoicing of the Excluded Expenses will work without an implied term to engage and cooperate over queries. The contract does not lack commercial or practical coherence without it; it was as submitted for Novans a provision which obliged OCA to settle invoices within 2 working days and thereafter it was open to the parties to discuss or dispute invoices if necessary. The parties could have provided a longer period for settlement or included a dispute mechanism in the contract but did not do so.

127.
In my view the evidence of Mr Gringuz in cross examination to the effect that he would have agreed if someone had asked, that Novans would do all it could to cooperate with OCA in carrying out the

contract and would have agreed to answer promptly any queries which might be raised by OCA about accounting issues or accounting documents does not mean that the proposed term satisfied the legal test for such a term to be implied.

128.
Applying the approach of the Privy Council in Ali, in my view it cannot be said in relation to the invoicing of the Excluded Expenses that the parties

"have agreed that something shall be done, which cannot effectually be done unless both concur in doing it".

In my view the expenses can be invoiced and the contract is workable.

129.
Accordingly I find that there was no express or implied term which allowed OCA to defer payment of the Disputed Invoice which was due and unpaid as at 14 June 2019. Even if OCA had "legitimate queries" there was no express or implied contractual provision which entitled it to delay paying the invoice pending resolution of those queries and I find that OCA was in breach of the ALPA by failing to pay the Disputed Invoice.

Repudiatory breach

Relevant legal principles

130.
The relevant legal principles on repudiatory breach were not in issue. The court was referred to Chitty on Contracts (34th edition). The relevant sections are [27-048]- [27-051]. I note in particular the following extracts from those sections:

“A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to terminate further performance of the contract, as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive. Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct. Also the party in default:”

"… may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations,"

or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms. In such a case, there is little difficulty in holding that the contract has been renounced. Nevertheless, not every intimation of an intention not to perform or of an inability to perform some part of a contract will amount to a renunciation. Even a deliberate breach, actual or threatened, will not necessarily entitle the innocent party to terminate further performance of the contract, since it may sometimes be that such a breach can appropriately be sanctioned in damages. If the contract is entire and indivisible, that is to say, if it is expressly or impliedly agreed that the obligation of one party is dependent or conditional upon complete performance by the other, then a

refusal to perform or declaration of inability to perform any part of the agreement will normally entitle the party in default to treat himself as discharged from further liability. But in any other case:

"It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his side of the contract."

[27-051] "… The test that is applied by the courts can, however, be set out in straightforward terms: it is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contact. It is the application of this test to the facts of individual cases which has proved to be less than straightforward. All of the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. Thus, in an appropriate case, a court may have regard to the motive of the contract breaker where it reflects something of which the innocent party was, or a reasonable person in his position would have been, aware…" [emphasis added]

131.
In closing submissions it was accepted for Novans that the actions of the party in default must be such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The court was also referred to Spar Shipping A/S v Grand China Logistics Holding (Group) Co Ltd[2015] EWHC 718 (Comm) as support for the submission that in the context of a failure to pay hire under a charterparty, a repudiation will be found if it is reasonable to infer an unwillingness on the party of the contract breaker to pay. However I note that in that case Popplewell J found at [212] that the contract breaker was:

"objectively evincing an intention not to perform the charters in a way which deprived [the owners] of substantially the whole benefit of the contract." [emphasis added]

OCA submissions

132.
It was submitted for OCA that:

i)
OCA was not in repudiatory breach, having never evinced an intention not to perform its obligations under the ALPA, since it had legitimate disputes/queries on the Disputed Invoice (and other statements of account) which it was seeking to resolve with Novans (who never engaged with OCA on this).

ii)
OCA was not refusing to perform, unless the other party complied with certain conditions; OCA wanted to perform but wanted to resolve the issues by means of a discussion of Novans' response to Mr Banna's Appendix queries.

iii)
the law on renunciation is not that every breach automatically gives right to the innocent party to accept that breach as a repudiation. The breach has to be sufficiently grave and sufficiently unexplained as to amount to an intention, or the evincing of an intention, not to be bound by the contract.

Novans submissions

133.
It was submitted for Novans that:

i)
OCA were in repudiatory breach because OCA continually and deliberately failed to pay the Disputed Invoice and that this amounted to a clear intention to no longer be bound by the ALPA; there were multiple requests for payment (on 8 April, 30 April, 21 May and 11 June 2019) and OCA refused to make payment providing different excuses none of which had any merit.

ii)
there was no agreement at the meetings in April 19 that payment of the Disputed Invoice would be delayed pending a meeting with Mr Banna: there is no reference to such an agreement in the email of 30 April 2019.

iii)
Novans now accept that the Balance Statements do include some items of Excluded Expenses as well as Included Expenses but submitted that balance statements were for information purposes only and any confusion was confined to those statements.

iv)
There were no real issues about expenses: the issue for OCA was about transfer of title to the aircraft.

Discussion

134.
It was submitted for Novans that there were multiple requests for payment and OCA refused to make payment. However it is clear that responses were made immediately to such requests seeking meetings and clarification as set out below.

135.
There were the meetings in Lausanne on 12 and 13 April 2019 shortly after the Disputed Invoice had been issued. I have already stated that I do not accept Mr Gringuz' evidence that at the meetings in Lausanne Mr Al Musallam promised to pay the invoice "latest next week". I find that it was agreed between Mr Al-Musallam and Mr Gringuz that there would be a meeting to discuss various matters including the invoices. This is consistent with the contemporaneous documentary record as set out above, in particular the email of 1 May 2019 from Mr Al-Musallam and the email exchange of 14 May 2019 and 15 May between Mr Al-Musallam and Mr Gringuz.

136.
In response to the chasing email on 30 April 2019 from Ms Khyzha, Mr Al-Musallam responded the following day:

"OCA need to check the balance and Mr Fadi with Mr Lucien will visit your office in Kiev soon to discuss all the financial issues".

137.
Mr Gringuz in his email of 15 May 2019 replied that Novans would be "available for a meeting to discuss and review OCA operational expenses with Mr Fadi". He made no reference in his emails to any agreement having been reached at the meetings in Lausanne to pay the Disputed Invoice.

138.
Whilst I accept that no date appears to have been fixed for the meeting with Mr Banna in Kiev, Mr Banna travelled to Kiev to try and meet with Novans. This suggests that OCA wanted to meet with Novans. By contrast the documentary evidence suggests that Novans were in no hurry to meet with OCA. In his email of 15 May 2019 Mr Gringuz referred to arranging a meeting in mid-June and said that he would communicate an available date by the end of May. There is no correspondence to indicate that Novans proposed dates for a meeting in June by the end of May or at all; rather on 21 May 2019 Novans demanded payment of the Disputed Invoice sending a formal letter demanding payment on or before 24 May 2019.

139.
OCA did not ignore that letter of 21 May 2019 but responded on the same day with an email sent by Mr Al-Musallam insisting that there should be a meeting between Mr Banna and Mr Gringuz. The following day, 22 May 2019, Mr Banna sent his own email to Novans pointing out that he was still awaiting confirmation of the date for the discussion and referring to the statement of accounts received from Novans and suggesting that the Disputed Invoice had been settled using monies previously paid to Novans.

140.
On the contemporaneous documentation it is clear that Novans in effect ignored the request for a meeting and despite having previously indicated that it would offer a date for such a meeting, Novans only responded by a further letter of 11 June 2019 rejecting any right of set-off and giving a further deadline of 14 June 2019. Thereafter on 14 June 2019 Novans purported to suspend OCA's use of the aircraft.

141.
It was submitted for Novans that Mr Banna accepted in cross-examination that he understood that the Balance Statements were for information purposes only and there was no action for OCA to take in relation to these:

“Q. So insofar as there are items listed and payments being made and references to bank transfers, you understood that that was information being supplied to you, to inform you what sums had been paid by Novans to third parties?

A. Yes.

Q. And there was therefore nothing for the accounts department to process?

A. Yes.

Q. And therefore no action was required, other than to say "Thank you very much for the information"?

A. Yes" [T2/94-95/21-7] [emphasis added]

142.
It was therefore submitted for Novans that any confusion OCA may have over the Balance Statements (and whether or not they contained any errors or excluded expenses) is irrelevant: OCA never had to pay the sums listed, they were never asked to, and they knew from the beginning that the Balance Statements were for information purposes only.

143.

However it appears from the evidence of the contemporaneous documentation that OCA was confused by the invoice forwarded by Novans from ACASS in that OCA paid to Novans an amount equal to that invoice rather than treating it as only as supporting information for the relevant statement of account.

144.
Further Novans has now accepted that the statements of account sent by it to OCA were confusing in that they contained both Included and Excluded Expenses. In his letter of 11 June 2019 Mr Banna said that from the statements of account issued by Novans he thought the Disputed Invoice had been settled. This is contemporaneous documentary evidence of his apparent understanding at the time.

145.
I also accept that Mr Banna referred in his letter of 22 May 2019 to the abortive trip to Kiev which he said was (in part) in order to understand the invoices:

"…Accordingly, we have visited Kiev on 16/17 May 2019 to meet with you and your financial department team to verify the documents received from Novans and to understand clearly (1) the statement of accounts; (2) the invoices and (3) the cost and payments to Novans versus the hours actually flown…"

146.
On the evidence I find that OCA was confused by the invoicing process as demonstrated by the fact that it paid the ACASS invoice and by the statements of account which Novans now accepts contained both Excluded and Included Expenses. Whilst the statements of account did not render the invoices invalid, the confusion in relation to the statements of accounts appears from the contemporaneous correspondence to have been (at least in part) behind the delay in paying the Disputed Invoice. It also explains (at least in part) the continued insistence on the part of OCA that a face-to-face meeting should take place.

147.
Whilst therefore OCA was in breach of the obligation to pay the Disputed Invoice, I find that the actions of OCA in the period from April to June 2019 were not such as to lead a reasonable person to conclude that it no longer intended to be bound by the provisions of the ALPA.

148.
Whilst I accept that the payment of the Excluded Expenses (notably the maintenance charges) was important to the operation of the aircraft and payment of the Disputed Invoice was not made, on the evidence before the court I find that viewed objectively OCA had not evinced an intention to abandon and not to perform the contract. Rather as set out above, the documentary evidence shows that OCA and Novans continued to operate the contract (for example, the correspondence relating to the chartering dates for the aircraft after the chasing letter of 21 May 2019 and prior to the letter of 11 June 2019) whilst at the same time seeking to discuss the various issues which were outstanding between the parties including the profit share, the transfer of title to the aircraft and the invoices for Excluded Expenses. It is not necessary for me to decide which of these issues was ultimately driving the behaviour of the parties.

149.
OCA had made the instalment payments which were due and it cannot be said that non-payment of the Disputed Invoice of some US$200,000 evinced an intention not to perform the contract in a way which deprived Novans of substantially the whole benefit of the contract.

150.
After the purported suspension, lawyers were involved on both sides. As set out above, OCA provided Novans in July 2019 with a list of detailed queries. Novans said it would respond "in due course" but did not do so (until September 2021). Further Novans did not apparently respond to the requests for a meeting until the unsuccessful “without prejudice” meeting took place in mid-August. I find that even after the suspension in June 2019, OCA continued to seek to maintain the contract.

151.
As referred to above, it was Mr Gringuz’ evidence that following the (failure of the) “without prejudice” meeting in August 2019 Novans was no longer prepared to discuss the accounting queries.

152.
Accordingly on the evidence, after the “without prejudice” discussions failed Novans was no longer interested in engaging with OCA and this led it to serve the termination notice on 18 September 2019. By contrast as referred to above, in September 2019 the solicitors for OCA continued in correspondence to try and engage Novans, indicating that OCA was willing to pay the disputed funds into escrow whilst the issues were resolved through discussions and offering to defer the service of proceedings for seven days to explore settlement.

Conclusion on repudiatory breach

153.
As set out above, the test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and to refuse to perform the contact.

154.
In my view for the reasons discussed above, on the evidence, that test has not been met. OCA did not show an intention to abandon the contract nor did it refuse to perform the contract. Novans was not entitled in the circumstances to treat the contract as having been repudiated.

Contractual right to terminate under 10(b) or 10 (c)

155.
The alternative basis on which Novans says that it was entitled to terminate the ALPA is pursuant to clause 10(b) or 10(c) of the ALPA. The relevant provisions are set out above. The issue for the court to determine in relation to the right to terminate under clause 10(b) is whether as a matter of construction, clause 10(b) applies to any failure of the claimant to meet its payment obligations or is limited to a failure to pay the price for the Block Hours. In relation to clause 10(c) the issue for the court is whether the sub clause permits termination for an intentional or negligent breach (which remained uncured after four-week period) within the minimum term of the agreement.

OCA submissions

156.
It was submitted for OCA that:

i)
clause 10(a) "sets the scene" and provides that there is no termination of the ALPA before 31 December 2020; clause 10(a) does not itself provide a right to terminate;

ii)

clause 10 (b) relates to payment obligations "set forth" in clause 3 and payment of expenses is not "set forth" in clause 3;

iii)
it is accepted for OCA that the bank details and obligation to make payment within two days set out in clause 3 extend to the payment of Excluded Expenses but it is submitted that clause 10(b) is only triggered by the Block Hour price payments and that this is a different category from the relatively small amount of the expenses; it was submitted that clause 10(b) was the "nuclear option";

iv)
clause 10(b) was triggered automatically and without notice and thus was appropriate only for predefined amounts and not for expenses;

v)
clause 10(c) covers three different situations: insolvency where there is an immediate right to terminate; force majeure where there is a right to terminate with immediate effect with four weeks' notice and intentional/negligent breach where the right to terminate is only "with the expiration of minimum term duration". This language must mean after the expiry of the minimum term since otherwise subclause (a) would have no meaning.

Novans submissions

157.
It was submitted for Novans that in relation to clause 10(b), clause 3 covers all payments including expenses and "payment" in Clause 3 is broad enough to apply to any payment; there is no commercial rationale to limit clause 10(b) as OCA contend since the timely reimbursement of expenses is crucial for Novans' cash flow - Novans was obliged to reimburse ACASS for its expenses and was therefore standing in the middle between ACASS and OCA.

158.
In relation to clause 10(c) it was submitted that something has gone wrong with the language and the error needs to be corrected to allow termination within the minimum term; it would be absurd to interpret clause 10(c) such that there could be no termination within the first two years for an intentional breach of the agreement.

Relevant legal principles

159.
The principles to be applied on construction were common ground. OCA referred the court to Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] 1 Lloyd's Rep. 654 at [8] where Popplewell J summarised the authorities on construction as follows:

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary

exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each." [emphasis added]

Discussion

160.
Applying those principles and dealing first with Clause 10(b) I start by looking at the language used in Clause 10(b). In my view the natural meaning of the words "set forth" would suggest that the parties were seeking to identify the payment obligations which are set out in clause 3 and that if the parties had intended to catch all payments under the agreement, they could simply have used the words "any breach of the payment obligations…of the hereby agreement" without needing to refer expressly to clause 3. The obligation to pay the Excluded Expenses is contained in subparagraph (e) which precedes clause 3: this expressly provides for the Excluded Expenses and states that they "shall be payable by the lessee". By contrast the payment obligations which are expressly set out in clause 3 are the initial payment of US$8.1 million followed by the four instalments of US$1.575 million amounting to the total $14.4 million in respect of the Block Hours.

161.
However in reaching a view as to the objective meaning of the language the court takes into account the fact that this contract was clearly not drafted by lawyers. It was common ground on the summary judgment application and it is Novans' pleaded case that the lease was put together "without the professional assistance of lawyers". The court has already considered Mr Gringuz' evidence to the contrary in cross examination and found that it was not credible. As well as the issues of construction that have arisen out of the flaws in the drafting and which are the subject of this litigation, other drafting deficiencies are apparent on the face of the ALPA:

i)
as set out above, the agreement has no numbered clauses 1 and 2 rather it has recitals followed by paragraphs under the heading "Clauses and then continues starting with a numbered clause 3;

ii)
in paragraph (e) dealing with Excluded Expenses there is a reference to expenses which are "not expressly mentioned as being included in clause 2E". This is clearly an error -there is no numbered clause 2 and it is clearly a cross reference to paragraph D which precedes it;

iii)
Further examples of errors appear in relation to clause 5(h) force majeure where the clause does not appear to be complete:

"Lessor shall assume no responsibility if, for reasons of force majeure or for circumstances beyond its control and possibilities, especially those resulting from war or similar events, breach of a country's neutrality, insurrection, civil war, civil unrest, riots, sabotage, strikes, blockades, closures, quarantine,

kidnapping, terrorist acts, requisition, seizure, confiscation, expropriation, unrest, adverse weather conditions or force majeure of any nature ("Force Majeure Event"), failure of the aircraft, failures or technical reasons , temporary incapacity of the entire or part of the crew, arrest or similar measures, air accidents, unforeseen events, or crew is in danger, at the discretion of the Commander or of Lessor personnel ("Act of God").

iv)
Errors of law appear to have been made in the grant of the option to purchase: the evidence of Mr Gringuz was that he believed that the option was valid when he entered into the agreement; it is now common ground that it is merely an agreement to agree and as such unenforceable. In the Amended Defence (paragraph 4h) Novans pleads:

"The two option to purchase clauses (clause 11 (a) and (b)) are both void and/or unenforceable for uncertainty. They are nothing more than aspirational agreements to seek to agree terms for purchase."

162.
Despite his evidence in cross examination as to the involvement of lawyers, Mr Gringuz appeared to accept that Mr Goldman, not a lawyer, had written the contract with assistance from Mr Gringuz (whose first language is not English). His evidence in cross examination was as follows:

“A. Why are there so many errors? Because unfortunately the main construct of the ALPA was written by Adrian Goldman and was also, to some part, corrected, amended by myself”. (Day 3, 15/12/2021, 12:10-12:13)

163.
The significance of the fact that the agreement was not drafted by lawyers is that on the one hand in balancing the indications given by the language used against the context and the commercial ramifications less weight in my view should be placed on the precise language used. On the other hand, the court has to take into account that, particularly without the benefit of professional advice, the parties may have agreed something which with hindsight did not serve its interest.

164.
Novans relied on the previous agreement between OCA and Novans as part of the matrix for the construction of clause 3. The previous contract was entered into on 13 June 2018 and was of limited duration providing for the charter of an aircraft until 23 July 2018. Its relevance was said to be principally in relation to the construction of "non-refundable" in the relation to the unjust enrichment claim. However to address the submission for Novans (paragraph 112 of its Closing Submissions) that it is admissible to look at a prior contract as part of the matrix, I set out the relevant extract from the judgment of Rix LJ in HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co [2001] 2 Lloyd's Rep. 161 in full:

"In principle, it would seem to me that it is always admissible to look at a prior contract as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any, assistance. Where the later contract is identical, its construction can stand on its own

feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law." [emphasis added]

165.
As is clear from this extract, whilst it is correct that Rix LJ accepted that in principle such a prior contract is admissible, where the later contract replaces the earlier one, the earlier contract is unlikely to be of much if any assistance for the reasons set out in that extract. The earlier contract in this case was for a very limited period (just over a month) and was superseded by the ALPA which was intended to last for over three years. Whilst it is the case that there was a distinction in the earlier contract between excluded and included expenses, the division of expenses was different (maintenance for example being included in that contract) and there was no minimum term. Given its short duration the amount paid for the charter (other than excluded expenses) was also of an entirely different order of magnitude at US$620,000. In my view it is impossible to say that the parties did not wish to alter the terms of the earlier bargain and it provides no assistance in the construction of Clause 10 (or Clause 3).

166.
Turning then to consider the other provisions of the contract and the implications of the rival interpretations, I take into account the commercial distinction between the Excluded Expenses and the Block Price. I accept the evidence of Mr Gringuz that the timely payment of invoices is crucial (or at least important) to ensure the smooth operation of aircraft. I note (as pointed out in his cross examination) that his witness statement at paragraph 21 referred to crew salaries which are included within the Block Price; however the Excluded Expenses include maintenance of the aircraft both scheduled and unscheduled. Notwithstanding this significant element of Excluded Expenses, Excluded Expenses also included other expenses such as parking, catering, crew accommodation and crew visas which by comparison with the Total Price and the instalments were of a far smaller order of magnitude and thus it could be said to be unlikely from a commercial perspective that these were intended to trigger automatic termination without any cure period.

167.
Further it seems to me that it would be an uncommercial result to interpret clause 10(b) such that any breach of the payment obligations including non-payment of Excluded Expenses resulted in "deemed cancellation" of the agreement without any notice of termination being required. In clause 10(a) and clause 10(c) the parties contemplated termination notices being given either immediately upon an event occurring or with a period of notice. It would be surprising and uncommercial in my view to provide for a deemed cancellation of the agreement for non-payment of Excluded Expenses which depending on the precise nature of the particular expense could be relatively minor in amount. It would also run contrary to the approach adopted in the other provisions of clause 10 which provide that even where a serious event such as the liquidation of a party occurred, there would be a termination notice rather than automatic termination.

168.
OCA accepted that the reference to "payment" in clause 3 was wide enough to capture the obligation to make payment of the Excluded Expenses within two working days after receipt of the invoice and to require payment of the Excluded Expenses to the bank account specified in clause 3. In weighing the

rival interpretations of the words "payment obligations set forth in… clause 3", it seems to me unlikely that the fact that clause 3 set out the mechanism for payments was sufficient for the parties to have meant in Clause 10(b) to catch the Excluded Expenses (which are expressly set out in paragraph (e)) in this indirect way. This conclusion is reinforced in my view by the fact that the contract was not professionally drafted.

169.
Balancing the factual background and the implications of the rival constructions against the relevant language of Clause 10(b), I find that the objective meaning of the language is that Clause 10(b) does not extend to a breach of the payment obligation in respect of Excluded Expenses.

Clause 10(c)

170.
Turning then to consider Clause 10(c) it is clear that clause 10(c) covers 3 distinct situations which can be separated out as follows:

i)
any negligent or intentional breach by either party of any provision of the ALPA, where such breach remained uncured for a period of 4 weeks, gave rise to a right for the other party to terminate the ALPA “with the expiration of minimum term duration”.

ii)
if either party became insolvent, went into liquidation or was declared bankrupt, this gave rise to a right for the other party to terminate the ALPA immediately.

iii)
in the event of a force majeure event not attributable to a party and beyond a party's reasonable control, the parties were obliged to discuss forthwith any amendments required to the terms of the agreement in order to reach an equitable solution, failing which either party could terminate the ALPA with immediate effect upon 4 weeks' notice.

171.
Applying the principles of construction summarised above and considering first the language of the relevant provision, the issue between the parties is whether the phrase "with the expiration of minimum term duration" is a mistake and should be construed so as to reverse the natural meaning of that language. It was accepted for Novans that for the court to reach that conclusion it has to be clear that something has gone wrong with the language and clear what a reasonable person would have understood the parties to have meant (KPMG LLP v Network Rail Infrastructure Ltd[2007] EWCA Civ 363).

172.
When the natural meaning of the language at issue is considered against the other provisions of clause 10 it is clear from clause 10(a) that the parties intended the agreement to have a minimum term and no termination notice could be given before 31 December 2020. The structure of clause 10 is then that there are exceptions which provide for termination within the minimum term: the exception for payments of the Block Price in 10(b), the exception for insolvency (and similar events) and the exception for force majeure (subject to prior negotiation and a notice period). This overall structure would suggest that 10(c) provided for termination of other breaches which had not been remedied after a cure period but not within the initial minimum term.

173.
When one then considers the commercial consequences of the rival interpretations, on the one hand it was submitted for Novans that it is uncommercial to have no right to terminate for intentional breaches for two years. On the other hand, as submitted for OCA if there is a right to terminate for any other breach (not being one which is a serious as insolvency or force majeure) during the minimum period it seems to make the minimum period of little or no real effect.

174.
In striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest. As discussed above this was not a case where the contract was drafted by lawyers and it is possible that the parties with hindsight might have reached a different agreement.

175.
The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. It was accepted by counsel for Novans in closing submissions that in order to succeed in relation to clause 10(c) Novans had a high hurdle to persuade the court to interfere with the language of the contract

176.
In my view I am not satisfied that there has been an obvious mistake and balancing the natural meaning of the language “with the expiration of minimum term duration” against the implications of the competing constructions I find that Novans was not entitled to terminate the contract within the minimum term by reason of non payment of the Disputed Invoice.

Conclusion on 10(b) and 10 (c)

177.
For the reasons set out above I find that Novans was not entitled to terminate the ALPA in September 2019 for breach of contract pursuant to clause 10(b) or 10(c).

Suspension of the contract

178.
In addition to considering whether Novans was entitled to terminate the ALPA in September 2019, the court has to consider whether Novans was entitled to suspend the use of the aircraft in June 2019. I have already found that Novans was not entitled to terminate the ALPA however the issue of whether Novans was entitled to suspend the contract in June 2019 is relevant to the quantum of damages to which OCA is entitled.

179.
This matter can be dealt with shortly. In its opening skeleton for trial Novans advanced no express or implied contractual or other legal basis for a right to suspend the use of the aircraft. In closing submissions it was submitted for Novans that although the case does not fit within "the currently recognised circumstances" in which an innocent party may suspend performance, the class of circumstances is not closed. Novans cited Chitty at [27 – 065] as follows:

"Nevertheless, it may be that there are certain circumstances in which the innocent party may be released from performance of one or more of his obligations under the contract, notwithstanding the fact that he has not terminated further performance of the contract as a result of the wrongdoer's breach. The first arises where the party in breach has, by words or conduct, represented to the innocent party that he will no longer require performance of a particular obligation under the contract, and the innocent party acts upon that representation. In such a case the party in breach will be estopped from contending that the innocent party still remains bound by that obligation"

180.
However the example given in the extract above by Chitty does not apply in the circumstances of this case and no further submissions were advanced for Novans other than the commercial disadvantage that Novans was obliged to pay ACASS whilst the expenses continued to be unpaid by OCA. In my view there is no legal basis which has been identified and established for Novans to suspend the contract in June 2019.

181.
For these reasons I find that Novans was in breach of contract in suspending the use of the aircraft in June 2019.

Unjust enrichment

182.
In the light of my findings above, it is not necessary to consider whether Novans has been unjustly enriched at OCA's expense such that OCA is entitled to restitution. However for completeness I will consider briefly the position which would have resulted if in fact the ALPA had been validly terminated by Novans.

183.
OCA's case was that it had, to date, made payments to Novans in respect of block hours totalling US$9,675,000, of which it has received the benefit of 281.9 block hours with a monetary value of only US$2,679,459.50 up to the date of suspension of the Aircraft (these are the amended utilisation figures now claimed by OCA). As a result, it was submitted for OCA that Novans has been unjustly enriched at OCA's expense.

184.
OCA therefore sought payment of an amount equal to the difference between the value of the block hours paid for and those ultimately received on the basis that if Novans were permitted to retain that sum, it will have been unjustly enriched at OCA's expense.

Relevant legal principles

185.
The questions which the court must ask itself when faced with a claim for unjust enrichment appeared to be common ground as set out in Menelaou v Bank of Cyprus UK Limited 1 [2016] AC 176 at [18]:

"the court must ask itself four questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?"

186.

It also appeared to be common ground that the real issues were whether in the circumstances of this case, there has been a failure of consideration, as that has been interpreted in the authorities, and whether there are any defences.

Failure of consideration

OCA submissions

187.
It was submitted for OCA that:

i)
The traditional position is that the failure must be total, but that principle "does not apply where a claimant's contractual obligations to benefit the defendant can be apportioned and there is a total failure of basis of an apportioned part".

ii)
It:

"may be possible to sever the payment and allocate parts of it to distinct elements of the benefit in return for which the payment was made; if only part of that expected benefit has been conferred, it is said that there has been a total failure of basis in relation to the severable part of performance which has not been achieved". Goff & Jones, The Law of Unjust Enrichment (9th edn, 2016) at [12-24].

iii)
"The clearest examples are provided by cases where the total amount paid has been calculated as a cost per unit". For example, in Biggerstaff v Rowatt's Wharf Ltd, a payment for 7,000 barrels of oil was described, in the parties' contract, to be 3s. 6d. per barrel, but fewer than 3,000 barrels were delivered. The court held that there had been a total failure as regards the price attributable to the outstanding barrels.

iv)
It is not necessary that the contract should expressly apportion the consideration. All that is required is that the court must be able to identify distinct elements of payment in respect of which there has been a failure of basis: Goff & Jones at [12-27]

v)
Once such a contract has been terminated, that opens the way to a claim in restitution, even if it is the contract-breaker who brings the claim:

"If a contract has been terminated for breach, it is no longer subsisting, and, therefore, no longer prevents a claim in unjust enrichment from being brought. The fact that a party has committed a breach of contract does not deprive him of the right to claim in unjust enrichment. This holds true even where the claimant has committed a repudiatory breach, which has led to the contract being terminated." Goff & Jones at [3-36].

Novans submissions

188.
It was submitted for Novans that the issue is whether there has been a failure of a severable consideration not that there has been a total failure of consideration.

189.

Novans relied on Stadlen J in Giedo Van der Garde BV v Force India Formula One Team Ltd[2010] EWHC 2373 (QB) and in particular at [297]

"...Indeed his conclusion that the law will allow partial recovery at least in those cases in which apportionment can be carried out without difficulty suggests, in my view, that the question whether apportionment can be carried out turns not on whether apportionment is provided for either expressly or even by implication by the contract but rather on whether as a matter of practical common sense the court considers that it is able to apportion on objective analysis of the nature of the contract and the consideration." [emphasis added]

190.
It was submitted that if the nature of the services is “uneven” the consideration is not apportionable: Van der Garde at [305]:

"...Although in Whincup v Hughes the contract provided for a payment of £25 for the 6-year apprenticeship, the court's reasons for concluding that the contract was not severable and the consideration was not in its nature apportionable did not turn on that fact or on the fact that it was not expressed as a rate per year. Rather it was based on an analysis of the services to be provided by the watchmaker and the usefulness to the watchmaker of the services to be provided by the apprentice. It was the uneven nature of those services throughout the term of the contract during which they were to be provided that led to the conclusion that the consideration was not apportionable. It was for that reason that Bovill CJ held that apportionment could not properly be made by reference to the proportion which the period during which the apprentice was instructed bore to the whole term. In the early part of the term the teaching would be most onerous and the services of the apprentice of little value, whereas as time went on the value of the services provided by the apprentice would probably be greater and he would require less teaching. Thus in contrast to the hypothetical sacks of wheat, where there was no reason to suppose that the burden to the seller of providing sack five would be any greater or lesser than the burden of providing sack one, it was intrinsic to the nature of the apprenticeship that the burden of teaching the apprentice would be likely to be greater in year one than in year five and the usefulness of the apprentice to the watchmaker would be greater in year five than in year one..." [emphasis added]

Discussion

191.
In my view this is a clear case where the consideration can be apportioned. The Total Price was calculated by reference to the Block Hour price of US$9505 which was expressly set out in the contract (paragraph (b)).

192.
Although it was submitted for Novans that the nature of the services provided was "uneven" in that it had to maintain the aircraft at all times and to keep it airworthy, in my view it has not established that the services were uneven. The Block Hour price included the matters to keep the aircraft airworthy and ready to go: the crew, fuel, insurance, handling fees. The cost of maintenance (which could be significant in amount and could be said to be uneven) is excluded from that Block Hour price.

193.
Novans also placed reliance in its submissions on the option to purchase which it submitted accrued from the outset. However unlike the position in the authority relied upon by Novans (Kelly v Lombard

Banking [1959] 1 WLR 41), here there was no existing right to purchase for which consideration had been given.

Defences

Contractual provision-"non-refundable"

194.
The heart of Novans' resistance to the unjust enrichment claim centred on the construction of clause 3 of the ALPA and in particular the provision that payments were "non-refundable". The relevant sentence in Clause 3 provided:

“Payment paid to Lessor is non-refundable and non-transferable to any other private aviation service or alternative aircraft, even in case of force majeure events (including but not limited to acts of civil unrest or adverse weather).”

Novans submissions

195.
It was submitted for Novans (in summary) that:

i)
the meaning of the words "non-refundable" is clear and is to be read separately from "non-transferable";

ii)
the provision that the payment was "non-refundable" reflected the contractual allocation of risk;

iii)
it would be odd if payments were non-refundable if the event is outside its control but refundable through unjust enrichment if Novans is entitled to terminate the contract for breach;

iv)
this was regarded by the parties as a hire purchase agreement and in a hire purchase agreement it is common for hire instalments to be retained upon breach;

v)
it is not uncommon in the context of aircraft leasing to provide that payment of rent should continue in all circumstances even where the lessee cannot use the aircraft;

vi)
OCA did not obtain physical possession of the aircraft, as such the contract was more akin to a time charter, that strict conditions in wet leases were not unusual;

vii)
The commercial rationale was that Novans used part of the initial payment to purchase the aircraft and incurred up front expenses/commitments.

OCA submissions

196.
OCA referred the court to the passage in Lukoil Asia Pacific Pte Ltd set out above as to the correct approach to construction.

197.
It was submitted (in summary) having regard to those principles that:

i)
it would be an uncommercial result if Novans could retain $7.45m because OCA had not paid $282k in expenses;

ii)
the commercial context is as set out in the evidence of Mr Al-Musallam:

“During negotiations in Jakarta, Novans conveyed to me the following examples of situations that it wished to avoid: a. The Aircraft is unavailable, needing maintenance. Therefore, an alternative aircraft would be needed from a third party to perform a flight. Novans did not want any monies paid under the ALPA to be used to fund a third-party charter. b. The Aircraft could not be positioned to an airport requested by OCA to start a charter. For example, due to bad weather. Any alternative arrangements made by OCA would need to be at OCA's costs.”

In other words the provision was in the context that if the aircraft became unavailable, amounts paid were not reimbursable to OCA.

iii)
the court should take into account the (poor) quality of the drafting;

iv)
the court should read the phrase "non-refundable and non-transferable" together as meaning that Novans would not refund payments where OCA had to spend money on a 3rd party charter and would not transfer funds already paid to Novans to 3rd party;

v)
the phrase dealing with "even in case of force majeure" referred to the fact that Novans would not refund money paid to third parties even in the most extreme circumstances where neither party to blame (i.e. force majeure events).

Discussion

198.
As set out above the task of the court is:

"to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant".

199.
Whilst the ordinary meaning of the word "non-refundable" is clear the court has to consider the context and the word is not used in isolation but in the context of the phrase "Payment paid to Lessor is non-refundable and non-transferable to any other private aviation service or alternative aircraft…"

Viewed in context the meaning for which OCA contends is a possible interpretation.

200.

The court then has to consider the fact that (as discussed above) the ALPA was not professionally drafted. Although Mr Al-Mussalam had entered into charter agreements previously, I am not persuaded that as a result he would have had in mind the law concerning operating leases for aircraft, hire purchase agreements or charterparties. I therefore do not accept that, whatever the position may be in these particular markets, the parties in this case had these in mind at the time of entering into the ALPA. I have already considered whether the previous agreement entered into between the parties in June 2018 formed part of the relevant context and for the reasons set out above in my view it provides no assistance.

201.
I turn then to consider the commercial rationale. It seems clear that there could be specific occasions when the aircraft was unavailable and as a result OCA had to resort to another operator to provide an aircraft. In this situation the payments were non-refundable and non-transferable. However I do not accept that the parties intended that payments of the Total Price were non-refundable. Even if Novans used the initial payment to purchase the aircraft, it would in my view be an uncommercial result to allow Novans to retain the benefit of the aircraft and thus to earn money from 3rd party charters whilst not providing any benefit to OCA.

202.
Further the rival constructions have to be considered against the other provisions of the contract. As discussed above, the provision that invoices should be paid within 2 working days extends to all invoices including Excluded Expenses. If Novans were correct that all payments were non-refundable that would mean that although, the invoices for Excluded Expenses were payable within 2 working days irrespective of any queries, any subsequent adjustment of an invoice following a query would not result in a refund. That does not appear to be consistent with the structure of the agreement.

203.
Weighing the competing interpretations, had it been necessary to decide the issue, I would have found that there was no defence available to Novans based on the construction of Clause 3 and the term "non-refundable".

Penalty

204.
OCA also raised the issue that any finding that the contract provided that the payments were non-refundable would amount to a penalty. In the light of my findings it is not necessary to consider this alternative submission.

Change of position defence

205.
In its opening submissions Novans also relied on a change of position defence. It was submitted for Novans that Novans spent significant funds in reliance on payments being non-refundable: the purchase of a depreciating asset, engaging ACASS and keeping the aircraft airworthy and crewed. It was submitted that it was unfair for Novans to bear these as losses.

206.
It was submitted for OCA that for the defence to work the benefit must have been irretrievably lost and this is not the case here as Novans still has the aircraft.

207.

Goff & Jones at [27-03] states:

"...The defence generally applies where the benefit transferred from the claimant to the defendant has been irretrievably lost so that the courts must choose which of the parties should bear this loss..."

208.
In my view Novans has failed to establish on the evidence that it changed its position in reliance on the payments being non-refundable. Further it retains the aircraft so the benefit has not been irretrievably lost and although it has incurred expenditure in engaging ACASS and keeping the aircraft airworthy Novans has not shown that this is expenditure that it would not have incurred but for the enrichment (Goff & Jones at [27-08]).

209.
Accordingly this defence to the claim in unjust enrichment has not been made out.

Conclusion on unjust enrichment

210.
Had it been necessary to decide this issue, for the reasons discussed above, I would have found that OCA was entitled to claim on the basis of unjust enrichment for the unused block hours.

Relief

211.
OCA no longer seek by way of relief the "resumption of use of aircraft" but damages and an order for an account.

212.
As to the quantum of damages OCA has sought to reduce its claim in respect of unused Block Hours. As at termination, OCA now accepts that it had used 281.9 Block Hours with a contract value of US$2,679,459.50, despite by then having paid for 1,017.88 Block Hours with a contract value of $9,675,000. Accordingly the difference in value between the Block Hours paid for and those ultimately received is US$6,995,540.50 (lower than the figure pleaded in the Particulars of Claim). No objection to that reduction has been advanced for Novans and I accept the reduced amount.

213.
In addition OCA is entitled to damages for the costs incurred following the suspension of the aircraft in June 2019 prior to termination in September 2019. The sum claimed (giving credit for Block Hours that would have been used) which has not been disputed before the court is the sum of US$83,544.

214.
Novans counterclaimed for the amount of the Disputed Invoice. It appears to me to be the case that the only matters in dispute from the Appendix in relation to the Disputed Invoice are those set out at paragraphs 33 and 34 of the Appendix. The other complaints raised in the Appendix related to the Balance Statements and not to invoices for Excluded Expenses. Of the points raised in those paragraphs it appears from the evidence of Mr Banna in cross examination (who has had an opportunity to consider the response which Novans has now provided to the queries), that he accepted the explanation that expenses were included where they related to an earlier period if in fact, they were charged to Novans by ACASS in the relevant quarter. Mr Banna also accepted that in relation to crew costs, the roaming payment of Adrian Goldman of $36.43 are costs that are not

included in the Block Hour price and therefore are properly claimable from under the Disputed Invoice. [Day 2 p133-134]

215.
That leaves the issue of two tickets (Mr Goldman, the pilot and for Captain Polyakov, for flights from Madrid to Dubai in one case and from Kiev to Dubai) and flight planning. As discussed above, insofar as the matters which remain in dispute in relation to this invoice, I draw an adverse inference from the failure by Ms Khyzha to give evidence. I note the question that was put to Mr Banna and the observation by counsel for Novans that Ms Khyzha would establish in her evidence that this was a repositioning flight. Since she did not give evidence, I find in favour of OCA and disallow this expense.

216.
Further insofar as the Disputed Invoice includes a figure for meteorological services, I note the evidence of Mr Gringuz in cross examination who was clear that the cost of obtaining meteorological information, which forms part of the flight planning should be treated as being included within the Block Hour price and should therefore be excluded from the amount of the Disputed Invoice. I note in passing that this item which was the subject of submissions on both sides is worth less than US$400.

217.
I therefore find that Novans is entitled to be paid by OCA the amount of the Disputed Invoice which is outstanding (giving credit for the amount already paid by OCA which I understand to have resulted in a credit balance of US$45,604.10) and subject to adjustment for the items referred to above. The resulting amount should be set off against the amount due from Novans to OCA as a result of this judgment.

218.
OCA also seeks an order for an account in relation to the profit share on third party charters on the basis that Novans has failed to share with OCA the profit obtained from Novans' charter of the aircraft to third parties.

219.
It was submitted for OCA that on the basis that Ms Khyzha was not called to give evidence, an order for an account in relation to the profit share on third party charters is now sought; it was submitted that absent adequate disclosure of material pertinent to establishing the profit margin of the third-party charter, OCA was solely reliant on the evidence of Ms Khyzha to establish the same. Novans' refusal to call her for cross-examination deprived OCA of the opportunity to elicit the necessary evidence from her.

220.
It is common ground that no percentage was agreed at the time of entering into the ALPA or was set out in the ALPA.

221.
OCA contended for a 90%/10% split of both profits and losses and submitted that this is evidenced/ corroborated by a near-contemporaneous document from Mr. Al-Musallam, to which Mr. Gringuz never replied objecting that this was not agreed.

222.
In his email of 14 May 2019 referring to the Lausanne meetings Mr Al-Musallam stated:

"as we both agreed that the sale of the Hours ((Aircraft Lease)) to third part OCA will keep 90% of the Sale and NOVAS will keep 10%, it goes same with the lost OCA will cover 90% and NOVAS will cover 10 %"

223.
Whilst I accept that there was no response from Mr Gringuz the correspondence was then focussed on the trip to Kiev rather than a substantive response to the points raised by Mr Al-Musallam in correspondence at that point. Further I note that in his earlier email of 17 April 2019 immediately after the Lausanne meetings, Mr Gringuz wrote:

“As agreed we will continue our negotiations as to how we will share commercial profit and loss from 3rd party commercial charters and finalise our negotiations as soon as possible.” [emphasis added]

224.
In cross examination it was put to Mr Al-Musallam:

“Q. ..What I put to you was that wasn't in fact agreed, and that what Mr Gringuz was saying was that he wanted 50/50, and all you agreed was to pursue the further discussions, but you never actually agreed anything?

A. We agreed that OCA will take a share.

Q. Yes. That's the extent of it?

A. Yes.” [Day 2 P41 15-21] [emphasis added]

225.
I find on the evidence that no agreement was reached at the meetings in Lausanne or subsequently by conduct as to the percentage share.

226.
The parties did not seek to argue that the court should find that there was no agreement to share profits/losses and the issue is therefore the appropriate percentage. OCA asked the court to make a finding as to what the default position should be if no percentage figure was agreed in order to enable the taking of an account to proceed.

227.
In my view the issue of what the default position should be has yet to be properly addressed and the court is not in a position to reach a reasoned decision on the appropriate percentage. The claim for a share of profits/losses will therefore need to be pleaded in order for an account to be taken. I would invite the parties to seek to agree appropriate directions for such a course (unless the parties are able to reach an agreement on the profit share without bringing the matter back to court).

228.
I also invite the parties to seek to agree any other matters consequent upon the findings in this judgment failing which the court will determine any outstanding issues at a hearing consequential upon hand down of the judgment.