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Case No: BL-2018-002348

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 10 July 2020

Before :

John Kimbell QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

CATHAY PACIFIC AIRWAYS LIMITED	**Claimant**
- and -	
LUFTHANSA TECHNIK AG	**Defendant**

- -
- -

Mr Steven Thompson QC and **Ms Emma Hughes** (instructed by **Bird & Bird LLP**) for the Claimant
Akhil Shah QC and **Mr Richard Blakeley** (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for the **Defendant**

Hearing dates: 25, 26, 27 February 2020

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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.

.....

JOHN KIMBELL QC SITTING AS A DEPUTY HIGH COURT JUDGE

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m on 10 July 2020.

Introduction

1. In May 2007 the Claimant ('**CX**') and the Defendant ('**LHT**') entered into a long-term aircraft engine maintenance contract ('**the Agreement**'). Under the Agreement, LHT agreed to provide maintenance, repair and overhaul ('**MRO**') services to CX for a period of ten years in respect of 27 new Pratt & Whitney engines ('**the Engines'**). The engines were deployed by CX on its 'freighter' fleet of six Boeing 747-400ER aircraft (i.e. four on each aircraft and three spares) ('**the Fleet'**).

2. Following the expiry of the ten-year term in May 2018, LHT sought payment of US$35,815,325.17 in End of Term Charges as defined in the Agreement. CX admits that this sum is due. However, CX says that it is entitled to claim two sums from LHT under the Agreement which leave it as the net payee. The two sums are: (1) US$42,912,534.19 due under Schedule 13 to the Agreement ('**the Schedule 13 Reconciliation**') and (2) a Reconciliation Charge of US$4,200,210.95 due under Part 3 of Schedule 4 to the Agreement ('**the Schedule 4 Reconciliation**').

The Option

3. The Schedule 13 Reconciliation arises from the exercise by CX of an option under clause 21.2 of the Agreement to remove all of the engines from the "Flight Hours Services Programme" ('**the Option')**. The relevant part of clause 21.2 relied upon by CX provides:

> "*CX may at its option remove Engines from the Flight Hour Service programme prior to the completion of the Term. A financial reconciliation will be performed with respect to each engine removed from the Flight Hour Service programme in accordance with Schedule 13 …*"

4. LHT says that no sum is due under Schedule 13 because the Option was not validly exercised by CX. LHT advances three main arguments:

    a. On its true construction, alternatively by way of necessary implication, the Option only applied if CX were to remove engines for operational reasons from the Fleet. It is common ground the Engines were not removed for operational reasons from the Fleet. They continued to be operated.

    b. The Option is subject to a 'Braganza / Socimer' type limitation (named after Braganza v BP Shipping [2015] UKSC 17 and Socimer International Bank v Standard Bank London [2008] 1 Lloyd's Rep 558) that it may not be exercised in an arbitrary and/or unreasonable manner and the Option was in fact exercised in such a manner by CX.

    c. The Agreement is a relational contract and therefore the Option is subject to a more general good faith limitation. LHT says that the Option could only be exercised in a

way that would be regarded as commercially acceptable by reasonable and honest people and that it was in fact not exercised in such a manner.

5. LHT has a fourth argument which arises out of an amendment to the Agreement in 2011. This amendment arose from an agreement to improve the efficiency of the Engines by adding advanced performed kits ('**APU Kits'**) to them. The Engines fitted with these kits were referred to as the APU Engines. As a result of the amendment, clause 21.2 was replaced with a new version which added the following words to the existing two sentences quoted above:

> "*When exercising its option to remove the Engines from the Flight Service programme prior to the completion of the Term, CX will use commercially reasonable endeavors to remove the pre-APU Engines prior to the removal of the APU Engines, and will allow LHT a reasonable opportunity to present commercial proposals to prevent the removal of APU Engines and give reasonable consideration to such proposals*."

6. LHT alleges that CX failed to allow it a reasonable opportunity to present such commercial proposals.

7. CX's case is that the Option is a straightforward unilateral option which is not restricted to removal from the Fleet for operational purposes. CX denies that the that the Option is subject to a good faith restriction of any kind and says that the Option was exercised for perfectly reasonable commercial reasons. CX says it gave LHT ample opportunity to make commercial proposals to prevent the removal of APU Engines but none were forthcoming.

8. As to the Schedule 4 Reconciliation Charge, LHT says that the correct sum to be set off is US$2,654,968.83 not US$4,200,210.95.

The parties

9. CX is the flag carrier of the Hong Kong Special Administrative Region of the People's Republic of China. It was founded in 1946. It is one of the leading carriers of air freight in the world.

10. LHT is a subsidiary of the Lufthansa Group based at Hamburg Airport. It consists of 32 companies and employs around 25,000 employees. It provides MRO services to many international airlines.

Factual Background

11. The PW4000 is a range of turbofan jet engines developed by Pratt & Whitney in the 1980s for use on long haul aircraft, including the Boeing 747. Two of the engine types in the 4000 range are the PW4056-3 engine and the slightly newer and more powerful PW4062. The engines contain certain life limited parts and need a complete overhaul after a stipulated number of hours in use (flight hours). Scheduled overhauls require what is called 'shop visits'. This is when the engine has to be removed from the aircraft and worked on by the MRO provider.

12. In 2005, CX was considering acquiring a fleet of six second-hand Boeing 747-400 aircraft together with 26 used PW4056-3 engines ('**the 4056 engines'**). In March 2005, CX invited expressions of interest from MRO providers for the provision of MRO services to the 4056 engines. LHT expressed an interest but was not initially selected to participate in negotiations. However, in early 2006, CX approached LHT to see if they were still interested in becoming an MRO provider for the 4056 engines. They were. Negotiations duly commenced.

13. By the time the negotiations with LHT got underway in respect of a potential MRO contract for the 4056 engines in March 2006, CX had decided that it wished to purchase a further five new 747-400s to use exclusively as air cargo carriers (generally known as 'freighters'). These new aircraft would be powered by twenty PW4062A engines ('**the 4062 engines'**) and two spares. This later became six aircraft and 27 engines.

14. In May 2006, LHT were invited to submit a proposal to become the MRO provider for the 4062 engines. The letter made clear that the proposal was to be a stand-alone proposal for the 4062 engines. The letter stated that each 4062 engine was expected to be used in flight for 5700 hours per aircraft per year. The average duration of each flight was stipulated as being 6.9 flight hours. The corresponding figures for the 4056 engines were 4500 and 6.5 flight hours respectively.

15. CX stipulated that it wanted a ten-year MRO contract for both the 4056 and 4062 engines.

16. One of the background facts known to both CX and LHT was that some of the aircraft on which the 4056 engines were installed were on leases which would expire in the course of the ten-year term. This meant that the aircraft might be returned to the owners and the number of engines requiring MRO services would reduce. That was not the case with the 4062 engines because the freighter aircraft were being purchased by CX as new aircraft. The other difference which was clear to the parties was that the 4056 engines themselves were used and therefore would enter into any maintenance program with a variety of expired flight hours (and therefore proximity to the next scheduled shop visit). The 4062 engines by contrast were all new and therefore entered into the maintenance programme with zero flight hours on the clock.

17. The negotiations in respect of the two engine types proceeded in parallel for the rest of 2006. In a letter dated 19 October 2006 CX informed LHT of its updated requirements for the 4056 and 4062 engines. The letter included the following (with emphasis added):

> *"We specifically would like to draw your attention to the PW4056-3, 10 year request in that a total of 4 lease aircraft schedule return dates fall within the 10 year period. Whilst extension options with the lessors take the aircraft beyond the 10 years from 1/1/07, CX need to have the option to retire the aircraft from the fleet on the dates specified. Please state the impact, if any, of the lease aircraft returning to the lessor on the dates specified".*

18. An attachment to that letter set out CX's requirements for the 4056 and 4062 contracts. Amongst the requirements for the 4056 engine contract was an "individual early exit clause, in addition to specified lease return aircraft".

19. The list of requirements for the 4062 contract was much shorter and contained only three bullet points:
    - 10 Year FHA contract commences 1st EIS aircraft
    - Similar requirements as in PW4056-3 except that the engines are new and purchase so there is no half-life assumption and lease return.
    - Please specify if any particular previous discussion holds not valid.

20. In early 2007, CX and LHT switched to concentrate on finalizing terms for the 4056 contract.

21. On 1 March 2007 both parties engaged lawyers to advise and assist with finalizing the agreements. CX engaged Johnson Stokes & Master, a leading Hong Kong Firm (now part of Mayer Brown LLP). LHT engaged WilmerHale, a well-known global commercial law firm.

22. The MRO agreement for the 4056 engines ('**the 4056 Contract'**) was signed on 29 March 2007.

23. The Agreement for the 4062 engines was signed on 9 May 2007 without further significant negotiations. I set out the terms insofar as they are significant to the disputes in these proceedings below.

The express terms of the Agreement

24. The Agreement contains 29 clauses and 14 schedules. It runs to 89 pages in total.

25. Clause 1 contains a number of defined technical terms, which are important to understanding how the agreement was intended to function. These included the following:

Term	Definition
"Additional Work"	The Fixed Price Services; and The Time and Material Services
"Aircraft"	The Boeing 747-400 aircraft which comprise the CX Freighter Aircraft
"CX Freighter Aircraft "	Each Boing 747-freighter aircraft powered by PW4062A engines listed in Part 1A of Schedule 1 (as updated from time to time) which has Entered into Service
"Engines"	The Powerplants listed in Part 1 of Schedule 1 (as updated from time to time) comprising: Powerplants installed on the CX Freighter Aircraft and the Spare Engines …
"First Reconciliation Period"	The period of five 95) years commencing on the date that the first Aircraft delivered to CX Enters into Service and expiring at 11;59 on the day immediately preceding the firth anniversary date of that first EIS date (or, if earlier, upon the termination of the Term).
"Fixed Price Service Charges"	With respect to each Fixed Price Service, the applicable amount set

	forth in Part 1 of Schedule 5
"Fixed Price Services"	the services required to be performed on an Engine as a consequence of Out-of-Limits Operation and/or as a consequence of that Engine suffering Accidental Damage, Mishandling, Incidental FOD, Catastrophic Failure or Foreign Object Damage; and any Pre-EIS Overhaul, in each case as more particularly described in part 1 of Schedule 5.
"Fleet"	A[s] the context may require, the fleet of Boeing 747-400 aircraft comprising the CX Freighter Aircraft. To the extent that the Powerplants on a Boeing 747 aircraft which is not on an Aircraft entitled to receive Flight Hour Services, that aircraft will be deemed to constitute a separate sub-fleet.
"Flight Cycle"	one Aircraft take off and subsequent landing.
"Flight Hours"	the cumulative number of airborne hours during which an Engine is operated and is computed from the time the Aircraft on which it is installed leaves the ground until it touches the ground again at the end of the flight.
"Flight Hour Services"	The services to be provided by LHT for each Engine as specified in paragraph 1 of Part 1 of Schedule 3.
"JPM"	The joint procedure manual agreed between the Parties as updated from time to time, the framework of which is set forth in Schedule 10
"Reconciliation Charges"	The amount calculated and is either credited or debited by LHT to CX in accordance with Part 3 of Schedule 4
"Restored Flight Hour Charges"	The Shop Visit Charges; The End of Term Charges The Reconciliation Charges (if any) payable by CX; less any Reconciliation Charges to be credited by LHT to CX
"Restored Flight Hour Rate"	The per Flight Hour rate set forth in Part 2 of Schedule 4 as adjusted in accordance with Part 2 of Schedule 4
"Second Reconciliation Period"	The period of five (5) years commencing upon the expiry of the First Reconciliation Period and expiring upon the expiry (or early termination) of the Term.
"Service or Services"	The Flight Hour Services, the Fixed Price services and/or the Time and Material Services provided or to be provided by LHT under this Agreement for each Engine and/or item of Equipment.
"Service Charges"	with respect to the Flight Hour Services, the Restored Flight Hour Charges payable in accordance with Clause 4.1 with respect to each Fixed Price Service, the Fixed Price Service Charges payable in accordance with Clause 4.2 with respect to each Time and Material Service the Time and Material Charges payable in accordance with Clause 4.3
"Shop Visit"	A shop visit (scheduled or unscheduled) for an Engine at which Services are performed.
"Shop Visit Charges"	With respect to each Engine undergoing a Shop Visit for the performance of Flight Hour Services, the amount calculated by multiplying the Relevant Flight Hours by the Restored Flight Hour Rate applicable at the time that Engine is inducted for the relevant Shop Visit
"Term"	The period commencing on the date on which the first Aircraft delivered to CX Enters into Service and expiring at 11.59 pm on the day immediately preceding the 10th anniversary date of the first EIS date of the Aircraft (unless otherwise terminated in accordance with this Agreement)
"Time and Material Service	With respect to each Time and Material Service the amounts set

Charges"	forth in part 1 of Schedule 6
"Time and Material Services"	Work required to be performed on any Component or Accessory of an Engine during the course of conducting Flight Hour Services or Fixed price Services to the extent that such work is not covered by the scope of the Flight Hour Services or the Fixed Price Services (as applicable)

26. According to the definitions of 'the Aircraft' and the 'CX Freighter Aircraft', the relevant aircraft were supposed to be listed in part 1A of Schedule 1 but this was never in fact filled in. However, it is common ground that the CX Freighter Aircraft / the Aircraft for the purposes of the Agreement were the 747-400ER aircraft with registrations B-LIA, B-LIB, B-LIC, B-LID, B-LIE, B-LIF.

27. The schedule intended to define the Engines covered by the Agreement was also left blank. However, it is common ground that the 27 engines whose serial numbers are listed in Schedule A to the Particulars of Claim dated 21 March 2019 are the Engines for the purposes of the Agreement.

28. The 4062 Contract contained the following clauses which are relevant to the issues in dispute:

> ***2.1 Flight Hour Services***
>
> *LHT agrees to provide the Flight Hour Services, and CX agrees to appoint LHT as its sole provider of the Flight Hour Services, throughout the Term for:*
>
> *(a) the Engines from time to time installed on the CX Freighter Aircraft; and*
>
> *(b) the Spare Engines,*
>
> *in each case, subject to the terms and conditions contained in this Agreement.*
>
> *For the avoidance of doubt, this Agreement, in so far as it relates to Flight Hour Services to be performed on the Engines, shall, subject to the arrangements contemplated by Clauses 21 and 23.2, be exclusive and CX shall not enter into any other arrangement, agreement or contract with a third party for the performance of services similar or identical to the Flight Hour Services on the Engines during the Term.*
>
> ***2.2 Fixed Price Services and Time and Material Services***
>
> *In addition to the Flight Hour Services, LHT agrees to provide the Fixed Price Services and the Time and Material Services, and (subject to the exception in relation to Line Removed Components below) CX agrees to appoint LHT as its sole provider of the Fixed Price Services and the Time and Material Services, throughout the Term for:*
>
> *(a) the Engines from time to time installed on the CX Freighter Aircraft; and*
> *(b) the Spare Engines,*
>
> *in each case, subject to the terms and conditions contained in this Agreement.*

For the avoidance of doubt, this Agreement, in so far as it relates to Fixed Price Services or Time and Material Services to be performed on the Engines, shall, subject to the arrangements contemplated by Clauses 21 and 23.2, be exclusive and CX shall not enter into any other arrangement, agreement or contract with a third party for the performance of services similar or identical to the Fixed Price Services and the Time and Material Services on the Engines during the Term, EXCEPT THAT nothing in this Clause 2.2 shall prevent CX from sending Line Removed Components to other service providers for Maintenance.

2.3 Sub-leasing

If CX decides to sub-lease an Engine to a third party, then LHT agrees to provide the Services for each Engine regardless of the fact that, during the period of sub-lease, CX does not operate the relevant Engine or the Aircraft upon which that Engine is installed, provided that and as long as:

(a) CX retains an interest in the relevant Engine or Aircraft (either as owner, lessee or otherwise);

(b) the operational obligations and restrictions which apply to CX under this Agreement shall continue to apply in relation to the sub-leased Engine; and

(c) T shall only be obliged to deal with CX in respect of such sub-leased Engine; shall have no contractual obligations to the third party sub-lessee in relation thereto; and shall only be obliged to provide Services in relation to such sub-leased Engine to CX in accordance with the terms and conditions of, and in the circumstances provided by, this Agreement.

3.1 Term of Services

LHT agrees to:

(a) provide the Flight Hour Services; and

(b) undertake all Additional Work

requested by CX in each case throughout the Term.

4.1 Restored Flight Hour Charges

(a) In return for LHT performing the Flight Hour Services under this Agreement, CX agrees to pay LHT on a deferred basis, the Restored Flight Hour Charges for Flight Hours operated by each Engine installed on a CX Freighter Aircraft, with effect from the date upon which the relevant Aircraft Enters Into Service. The Restored Flight Hour Charges will become due and payable only:

(i) upon the induction of each Engine at the commencement of a Shop Visit at which Flight Hour Services are performed and

(ii) at the expiry (or earlier termination) of the Term, in

*each case in accordance with **Schedule 8**.*

(b) (i) The amount of Shop Visit Charges and the End of Term Charges payable by CX during the Term is calculated by reference to the Restored Flight Hour Rate. The parties set the Restored Flight Hour Rate based on the assumption that each Engine is operated throughout the Term within certain operational parameters.

*(ii) The Parties acknowledge that in practice the Engines (or part of them) may operate out of the assumed operation parameters and therefore agree to make a reconciliation at the end of each Reconciliation Period in accordance with **Part 3** of **Schedule 4** to reflect the actual operation parameters during the relevant Reconciliation Period.*

*(iii) If the Reconciliation Charge calculated under **paragraph 3**, **Part 3** of **Schedule 4** is positive, then CX will have paid more Shop Visit Charges and End of Term Charges than it would have if the Restored Flight Hour Rate had been adjusted from time to time to reflect the actual operational parameters of the Fleet. Accordingly, LHT will credit the Reconciliation Charge to CX in accordance with **Schedule 8**.*

*(iv) If the Reconciliation Charge calculated under **paragraph 3**, **Part 3** of **Schedule 4** is negative, then CX will have paid less Shop Visit Charges and End of Term Charges than it would have if the Restored Flight Hour Rate had been adjusted from time to time to reflect the actual operational parameters of the Fleet. Accordingly, LHT will debit the Reconciliation Charge to CX in accordance with **Schedule 8**.*

4.2 Fixed Price Service Charges

In return for LHT performing each Fixed Price Service, CX agrees to pay LHT the Fixed Price Service Charge applicable to that Fixed Price Service. LHT confirms that the applicable Fixed Price Service Charges will apply to any Fixed Price Service commenced prior to the expiry (or the earlier termination) of the Term.

4.3 Time and Material Service Charges

In return for LHT performing the Time and Material Services, CX agrees to pay LHT the Time and Material Service Charges. LHT confirms that the Time and Material Service Charges will apply to any Time and Material Service commenced prior to the expiry or the earlier termination of the Term.

5.1 Exclusive Adjustment Arrangements

The Service Charges will be adjusted only in accordance with the express terms of this Agreement. In particular, the Service Charges will not be adjusted as a consequence of extraneous event, including without limitation, any unexpected increase in the volume of Shop Visits and/or the early removal of Engines.

5.2 Restored Flight Hour Charge Adjustments

The Restored Flight Hour Charges will be calculated by reference to the Restored Flight

*Hour Rate set forth in **Part 2** of **Schedule 4** throughout the Term, except that an adjustment shall be made, from time to time, to the Restored Flight Hour Rate (and/or from time to time the Restored Flight Hour Charges), by mutual agreement of the Parties, to reflect the adoption of new (or the withdrawal of approval for use of) PMA Parts and DER repair schemes in accordance with Clause 12.5.*

For the avoidance of doubt, no adjustment shall be made to the Restored Flight Hour Rate to reflect any change in the labour costs, material costs or currency exchange rates.

21.2 Removal of Engines from the Flight Hour Services Programme

*CX may at its option remove Engines from the Flight Hour Service programme prior to the completion of the Term. A financial reconciliation will be performed with respect to each Engine removed from the Flight Hour Service programme in accordance with **Schedule 13**.*

When exercising its option to remove the Engines from the Flight Service programme prior to the completion of the Term CX will use commercially reasonable endeavors to remove the pre-APU Engines prior to the removal of the APU Engines, and will allow LHT a reasonable opportunity to present commercial proposals to prevent the removal of APU Engines and give reasonable consideration to such proposals.

29.6 No Agency

Nothing in this Agreement or any other circumstances associated with it or its performance shall be interpreted or construed or gives rise to any relationship of partnership, agency, joint venture or employer and employee, between CX and LHT or between CX and any personnel of LHT and (except as expressly provided in this Agreement) LHT has no right to assume or create any obligations of any kind, express or implied, in the name of or on behalf of CX.

29.8 Entire Agreement & Amendment

*This Agreement, together with **Schedules 1** to **14**, contain and constitute the entire understanding and agreement between the Parties respecting the subject matter hereof, and supersedes and cancels all previous negotiations, agreements, commitments, and writings in connection herewith. This Agreement may not be released, discharged, abandoned, supplemented, changed, or modified in any manner, orally or otherwise, except by a written instrument of concurrent or subsequent date signed and delivered by a duly authorised officer or representative of each of the Parties making specific reference to this Agreement and the provisions hereof being released, discharged, abandoned, supplemented, changed, or modified.*

29.11 Set Off

Each Party will be entitled to off-set amounts payable by it under this Agreement against amounts payable to it by the other Party under this Agreement.

29.13 Governing Law

This Agreement shall be subject to and interpreted and construed in accordance with English law (excluding the conflict of law provisions thereof).

The restored flight hour rate

29. The concept of the restored flight hour rate requires some explanation.

30. The most straightforward way for an air carrier to pay for engine maintenance is by way of ad hoc event-based payments. If work is required to an aircraft engine, it is booked in with a MRO service provider and when completed the service provider invoices on a time and materials basis. This type of service brings a cash flow advantage to the air carrier because it only pays after the work is done and the engine is ready for service but it is less attractive from a planning perspective. This is because the carrier does not know how much the overhaul is going to cost in advance and each service has to be negotiated individually.

31. A common alternative model is for the carrier and maintenance provider to enter into a contract containing a fixed rate for MRO services payable on a flat 'per flight hour' basis. This fee is spread over the life of the contract and is payable in regular (usually monthly) instalments and then balanced at the end of each year according the actual flight hours flown. This is commonly referred to in the airline industry as 'power by the hour' model. It has the advantage of simplicity and predictability. The disadvantage is that the carrier pays in advance for work which has not yet been done by the MRO provider.

32. Against the background, LHT proposed a new model to CX for the 4056 engines. It called this new model, the 'restored flat rate' concept. It was described in the email sent by Erwin Stillhard of LHT to Stephen Teague of CX on 23 March 2006 as follows:

> *"At the time of a major shop visit, the actual on-wing time [since installation/last overhaul] (TSI) accumulated on the individual engine is recorded. The on-wing hours recorded are then multiplied by the Engine Flight Hour ('EFH') Rate…*
>
> *This restored Flat Rate Concept provides a predictable flight hour cost over the full period an engine is on wing. The incentive for LHT to apply this concept is a powerful customer benefit. After a shop visit, the TSI of a respective Engine will be reset to zero, and the EFH count starts until the next engine removal."*

33. The cost of the next shop visit thus accumulates in a uniform predictable manner. The cost of the scheduled shop visit is fixed but nothing is actually paid until the shop visit happens. At this point the notional flight hours clock since the last overhaul is restored to zero (thus giving the concept its name). This payment model was said by LHT to combine the simplicity and predictability of the classic fixed rate agreement with the cash flow benefit of an event-based payment model.

34. A second document attached to the same LHT email contained a worked example and contained the following further information (and included a reference to flexible termination):

> *"[I]n this calculation model, the Customer will be charged all engine flight hours accumulated from time of installation until the next removal i.e. up to the next shop*

visit. This model is perfectly variable and allows the Customer to terminate the contract before every renewal with any administrative burden because no money is paid constantly but only upon the occurrence of a shop visit. The Customer is hence not charged for any engine flight hours flown since last shop visit before the contract comes to a (final) end (no prepayments nor constant payments).

Note: the full risk of the number of removals and the full risk for the ship visit cost lies with [LHT]. This fact provides the Customer with an additional certainty that the MRO provider is interested to provide as much air time and as little ground time and as few shop visits as possible."

35. The restored flat rate hour concept was also offered to CX for the 4062 engines and was incorporated into the Agreement (see Schedule 4).

36. The agreed flight hour rate for the 4062 engines was US$108.27. Its constituent parts were listed on page 57 of the Contract:

Engine Type PW 4062A	**USD per Engine Flight Hour**
Gross Engine MRO	116.48
- agreed savings	16.98
Net Engine MRO	99.50
FOD-related Shop Visits	2.45
Engine Condition Monitoring	1.00
Material replacement due to scrappage	3.62
Engine transportation	1.70
Total Restored Flight Hour Rate	**108.27**

37. As can be seen in the table, around 90% of the agreed rate is attributable to the value of work carried out during a shop visit engine overhaul. The continuous engine monitoring service provided by LHT accounted for less than 1% of the flight hour charge. Unscheduled Shop Visits due to foreign object damage accounted for less than 2.5% of the total hourly rate.[1] So the vast majority of the cost associated with contract (from CX's perspective) and income (from LHT's perspective) was attributable to scheduled shop visits.[2]

38. The restored flight hour rate was based on certain agreed operational assumptions. These are listed in Part 3 of Schedule 4 to the Agreement. On the basis of these assumptions, it was envisaged that each Engine would be expected to undergo two scheduled shop visits during the 10 year term: one 'light' and one 'heavy'. The uniform rate was thus a blended rate. What this meant was that CX paid around 30% more for the first shop visit than if they had been calculated separately.[3]

39. The Agreement provided for an adjustment to be made to take account of deviation from the performance assumptions on which the restored flight hour rate was based. The adjustments

[1] FOD repair causing damage in excess of USD1 million was excluded from the Flight Hour Services.
[2] Transcript Day 3, p.94 line 24 & ff.
[3] Teague 1st WS para. 32.

occurred only twice: once at the 5 year point (the first reconciliation) and again at the end of the Term (the second reconciliation). The Contact describes them as follows:

> *"It is recognized that the actual flying profile of the Fleet may differ from the assumptions set forth above. Deviation from the assumptions will affect the nature and frequency of the Flight Hour Services which are required to be performed upon the Engines, and therefore the Restored Flight Hour Charges that LHT would have offered CX if LHT had been able to predict the actual operation of the Fleet. Accordingly, at the end of each Reconciliation Period, the parties will conduct a reconciliation, calculated by reference to agreed matrices of variables, so that the Restored Flight Hour Chargers paid by CX reflect the actual operational parameters of the Fleet."*

40. The means of adjustment was the 'Actual Severity Factor'. This took account of the actual average Flight Hour to Cycle Ratio, the actual 'Take-off Derate'[4] and the average annual utilization of each Aircraft.

41. The formula used to calculate the Reconciliation Charge was:

> Agreed Total Flight Hours [X] restored flight hour rate [X] (1- Actual Severity Factor)

42. The parties recognized that this reconciliation charge could go in either direction. If it was positive, LHT had to pay CX; if it was negative, CX had to pay LHT. In practical terms the harder the engines were worked the greater the chance that a payment would be made to LHT as a result of the reconciliation exercise.

The Schedule 13 Reconciliation

43. Schedule 13 to the Agreement also provided for a reconciliation calculation. This was payable (either to CX or LHT) in the event that an engine was removed from the Flight Hours Service Programme. Although there is a dispute about whether CX is entitled to have a reconciliation conducted under Schedule 13, there is no dispute about how the reconciliation calculation was intended to operate.

44. The calculation is based on four principles:

> *"(a) The Parties will determine the number of Flight Hours operated by the relevant Engine from the time since the Entry into Service of the relevant Engine and the date upon which that Engine is removed from the Flight Hour Service program.*
>
> *(b)The Parties will determine the number of Shop Visits predicted for the particular Engine based on a new Engine having 24,000 hours between EIS and its first Shop Visit and a Mean Time Between Shop Visit (MTBSV) of 20,000 hours thereafter. In the case of a used Engine, the Mean Time Between Shop Visit (MTBSV) is based on 20,000.*

[4] The difference between the proportion of thrust actually used on take off and the maximum available thrust expressed as a percentage of the latter.

(c)The Parties have agreed that the Flight hours required to recover the cost of a Shop Visit is a constant of 22,000 hours

(d) The Parties have agreed that the Restored Flight Hour Rate for the purpose of this Schedule 13 will be as stated in Part 2 of Schedule 4 (Restored Flight Hours Charges) without any adjustment to reflect actual operational parameters.

45. The formula for calculating the sum due to CX (+) or to LHT (-) is set out in Schedule 13 as follows:

(Time since contract start **[minus]** Number of Shop Visits Predicted X Hours required To recover cost for shop visit) X Restored Flight Hour Rate

46. The formula for calculating the No. of Shop Visits Prediction ('**NSVP**') is

((Total Flight Hours **[minus]** 24000 **) /** 20,000) **+** 1

47. If the NSVP figure is less than one, then it is deemed to be zero and when it is greater than 0 is rounded down to the nearest integer. Schedule 13 itself gives two worked practical examples of how the calculation would be applied in two scenarios. In one, the formula yields a sum payable to CX and in the other the sum is payable to LHT.

48. The result of applying this formula at any moment in the course of the 4062 Contract is illustrated by the table below. This is based on a table produced by Mr Thompson and put to LHT's witnesses in cross-examination:

Schedule 13 Compensation Formula						
A	**B**	**C**	**D**	**E** [**A** – (**C** x **D**)]	**F**	**G** Σ [**E** x **F**] = [(**A** – (**C** x **D**)) x **F**]
Total Flight Hours since EIS[5]	**NSVP As per sch.13 formula**	**NSVP rounded down to nearest integer**	**Hours required to cover SV as per Sch.13**	**Multiplier**	**Restored Flight Hour Rate (US$)**	**Compensation to (CX+) or (LHT-)** **(US$)**
2000	-0.1	0	22,000	2000	108.27	216,540
4000	0	0	22,000	4000	108.27	433,080
6000	0.1	0	22,000	6000	108.27	649,620
8000	0.2	0	22,000	8000	108.27	866,160
10000	0.3	0	22,000	10000	108.27	1,082,700
12000	0.4	0	22,000	12,000	108.27	1,299,240
14000	0.5	0	22,000	14,000	108.27	1,515,780
16000	0.6	0	22,000	16,000	108.27	1,732,320

[5] Entry into Service

18000	0.7	0	22,000	18,000	108.27	1,948,860
20000	0.8	0	22,000	20,000	108.27	2,165,400
22000	0.9	0	22,000	22,000	108.27	2,381,940
24000	**1**	**1**	**22,000**	**2000**	**108.27**	**216,540**
26000	1.1	1	22,000	4000	108.27	433,080
28000	1.2	1	22,000	6000	108.27	649,620
30000	1.3	1	22,000	8000	108.27	866,160
32000	1.4	1	22,000	10000	108.27	1,082,700
34000	1.5	1	22,000	12000	108.27	1,299,240
36000	1.6	1	22,000	14000	108.27	1,515,780
38000	1.7	1	22,000	16000	108.27	1,732,320
40000	1.8	1	22,000	18000	108.27	1,948,860
42000	1.9	1	22,000	20000	108.27	2,165,400
44000	**2**	**2**	**22,000**	**0**	**108.27**	**US$0**
46000	2.1	2	22,000	2000	108.27	216,540
48000	2.2	2	22,000	4000	108.27	433,080
50000	2.3	2	22,000	6000	108.27	649,620
52000	2.4	2	22,000	8000	108.27	866,160
54000	2.5	2	22,000	10000	108.27	1,082,700
56000	2.6	2	22,000	12000	108.27	1,299,240
58000	2.7	2	22,000	14000	108.27	1,515,780
60000	2.8	2	22,000	16000	108.27	1,732,320
62000	2.9	2	22,000	18000	108.27	1,948,860
64000	3	3	22,000	-2000	108.27	-216,540
66000	**3.1**	**3**	**22,000**	**0**	**108.27**	**US$0**

49. The parties assumed the engines to be used for a total 54,000 over 10 years. 64,000 total running represents an average of 17.5 hours operation a day every day for 10 years. This is close to the practical limit for real life engine use.

50. The following point emerge from the table:

a. At all times within the contractually assumed total flight hours of 54,000, the compensation figure was + and therefore a credit to CX.

b. The first time that LHT would be compensated with a credit was if a 4062 engine was removed at 64,000 flight hours.

c. Just before each scheduled shop visit, the compensation figure peaks at around US$2 million.

d. Immediately after the second scheduled shop visit at 44,000 hours, the compensation payment falls to zero. It then immediately starts to climb again until it again reaches zero immediately after the third schedule shop visit at 66,000 hours.

51. The reason why the compensation for removal falls after each of the two expected shop visits is that LHT is assumed to have invoiced CX and to have been paid for the cost of the shop visit when the engine is delivered to LHT (induction). This was in line with the concept of the

Restored Flight Hour Rate (as explained above) which was to give CX predictability of expected costs but at the same time to invoice for shop visit work only upon induction. Thus, if any particular engine was removed from the Flight Hour Service programme before a scheduled shop visit took place, CX could see how much of a rebate it was entitled to by using the Schedule 13 formula.

52. The positive figures in the table show that the Schedule 13 formula carried with it an in-built financial incentive for CX to remove engines from the Flight Hours Services Programme before the end of the 10 year term.

53. The most neutral result for the both parties would be if all the engines were removed immediately after the second shop visit because at this point the compensation payable in either direction was at equilibrium point. In that scenario, LHT would have done all the work required for the second shop visit and invoiced for it (having already invoiced for the first ship visit) and there would be nothing for CX to set off against the End of Term Charges.

54. The first 4062 engines entered into service on 18 May 2008. This triggered the commencement of the 10 year term.

Contract Review and Amendment No. 1

55. The parties reviewed the status of both the Agreement and 4056 contract at a meeting on 6 December 2010.

56. LHT produced a 'contract status' Powerpoint presentation for the meeting. This presentation reveals that LHT's losses on the two contracts to date were €34.8 million and the predicted loss by the end of the contracts is predicted to be €183 million. The main reason for the losses was a greater than anticipated failure rate for a high-pressure turbine blade. LHT's proposed solution was to modify the 4062 engines by fitting an Advantage Performance Upgrade ('**APU**') kit. This kit had been developed by P&W. It had the twin advantage of making the engines more efficient (thus reducing costs) and helping to reduce the HPT blade failure rate. It also increased the residual value of the engine.

57. This led ultimately to an agreement between CX and LHT to fit the APU kits to all the engines (at the next convenient shop visit) and for LHT to share in the commercial benefit by an increase in the Flight Hour Rate from US$108.27 to US$131.17.

58. In the course of those discussions, the issue arose of whether CX would commit to not phase out any APU engines before all non-APU engines had been phased out. It is not surprising LHT should have wished to have non-APU engines phased out first given the HPT blade problem. CX's position on this was set out in an e-mail dated 13 June 2011:

> *"Our existing agreements with LHT are designed to allow for flexibility in phasing out engines. This flexibility remains key to our agreements…*

> *[A]s flexibility to our fleet planning is key, we cannot commit to not phase any post-APU engines before all pre-APU engines are phased out. Nevertheless, it is in Cathay's interest to phase out pre-APU-engines before the post APU ones, and we will certainly try to do so."*

59. This led to the old clause 21.2 being replaced by a new clause in both the Agreement and 4056 Contracts as described in paragraph 5 above.

Amendment No. 2 to the 4056 Contract

60. In January 2013, CX reviewed the status of the 4056 Contract internally. The review noted that CX was "extremely satisfied with the service provided [by LHT]", the 4056 powered aircraft were subject to an accelerated retirement programme and that CX were looking at "exiting engines" in the most cost effective way. The review suggested sharing thoughts with LHT and discussing options to exit the 4056 Contract "in a mutually acceptable" way.

61. CX's review was shared with LHT and the parties amended the 4056 Contract on 8 April 2013.

62. The Amendment contained the following clause (under the heading "commercial settlement"):

> *"As of the effective date of this Amendment No. 2, the Parties agree that all remaining Engines are deemed to have been removed from the Flight Hours Services permanently in accordance with Clause 21.2"*

63. A schedule 13 reconciliation was performed in respect of five engines (ESN 729041) and all four engines on aircraft B-KAH. This was set off against a number of other obligations. The net result was that CX agreed to pay a net amount of US$1.8 million.

64. Clause 6 of Amendment No. 2 provided:

> *"Notwithstanding the removal of the remaining engines from the Flight Hours Services with effect from 1st January 2013, the remaining Engines shall continue to be covered by Fixed Price Services and Time and Material Services until the end of the Term with changes set out in this Clause 6 of Amendment No. 2.*
>
> *LHT further agrees to continue to provide engine condition monitoring services for such Engines during the Term.*
>
> *The Parties agree to work together in good faith to put together a mutually agreed procedure for implementing Fixed Price Services and Time and Material Services…"*

First Schedule 4 Reconciliation

65. The First Schedule 4 Reconciliation Period under Agreement fell in April 2013. The reconciliations were carried out and the net sum was paid to CX on 29 November 2013.

Reviews of the expiry of the Agreement and the beginning of the dispute

66. In October 2016, CX started to consider its position in the run up to the scheduled end of the Agreement in May 2018 in terms of End of Term Charges, potential early (partial) termination reconciliations and actual performance related reconciliations. CX calculated that early removal savings might be somewhere between US$16.9 million to US$46.3 million. The review document records that the potential savings might be "used as an incentive" to (a) extend the LHT contract until the next scheduled Shop Visit and (b) bring the replacement of a new part within the terms of the contract[6].

67. CX returned to the same topic in another internal review in December 2016. The document noted 24 performance restoration shop visits were not due until after the end of the Term. Given the proximity of the end of the Term, the review noted that CX had started to think about initiating discussions with other potential MRO suppliers (as well as with LHT) for the period post May 2018.

68. The first time that LHT became aware that CX was considering the possibility of removing 4062 engines from the Flight Hours Service Programme was in April 2017. It is common ground that a casual remark to this effect was made by CX's Powerplant Procurement Manager, Thomas Pratx to Christian Möller of LHT as they left a meeting about the 4056 Engines at CX's offices in Hong Kong.[7]

69. The suggestion that CX might remova all or most of the 4062 engines was raised formally at a meeting in Hong Kong on 3 August 2007.

70. LHT's formal response was recorded in an email dated 20 November 2017. This is worth setting out in full because it neatly encapsulates both CX's and LHT's position then (and as subsequently maintained in these proceedings):

> *"Dear Thomas,*
>
> *I would like to follow up on our last meeting in HGK from August 2017. From our talks we have learned that CX intends to remove all or most of the engines from the PW4062 Flight Hour Service programme prior to the completion of the contractual term and to perform a financial reconciliation as stated in clause 21.1 of the contract. CX wishes to keep the affected engines in operation and to continue LHT's engine service on Time & Material basis until the end of the contractual term on May 23rd 2018. We have understood that CX aims to thereby achieve maximum savings related to PW4062 engine MRO costs.*
>
> *I am afraid that LHT does not share the view that this is a unilateral option of CX. Clause 21.2 has been introduced to the contract in order to respect CX's operational needs and to enable CX to phase out engines from the operating fleet. An early removal from the Flight Hour Service Programme with the sole objective to maximise savings on CX side*

[6] The HPC drum. Replacement of this part would otherwise have to be paid for separately.
[7] Pratx WS para 16; Möller WS2 para 15.

and to continue operation for the affected engines is not intended. Such approach is not covered by Clause 21.2.

For further evaluation, Rudiger Heck and myself would be available for a meeting in HKG throughout November and early December. Let me know if this approach is fine for you.

Best regards
Christian"

71. Four points emerge from this e-mail.

a. CX made clear that it wished to remove all or at least most of the 4062 engines from the Flight Hours Services programme and thereby trigger a schedule 13 reconciliation but did not wish to terminate the Agreement as a whole.

b. CX was open that the its motivation was purely commercial ("with the sole objective to maximise savings") and LHT understood this.

c. CX saw its proposal as being covered by the Option whereas LHT considered that it was not.

d. LHT were open to further discussions.

72. CX's response to LHT's position was to accept the invitation to further talks and to engage with LHT to seek to find a commercial solution. In a note to senior management, Mr Pratx recorded CX's options as follows:

"1. Meet to understand what room and options we have for a commercial settlement
2. Evaluate compensating business through the whole CX group
3. Ask them to provide data supporting their position
4. Keep a hard line

The right strategy is probably a blend of options 1,2 and 3 above…"

73. The parties met on 6 December 2017. LHT produced a Powerpoint presentation. Page 4 of the presentation set out in clear terms that the net result of removing all the 4062 engines would be a net payment from LHT at the End of the Term. CX proposed extending the term of the contract until all of the 4062 Engines had received a second Shop Visit.[8]

74. LHT's reaction to the meeting was to welcome the suggestion of a contract extension as evidence of CX's interest in finding a mutual solution. A further telephone conference took place in January. Shortly thereafter, LHT refused the idea of extending the term of the contract.

[8] A further variation on this proposal was to extend for 5 years was also rejected by LHT.

Formal notification of intention to remove all 4062 engines

75. On 7 February 2018, CX confirmed formally in writing its intention to remove all the Engines from the Flight Hour Service programme "in accordance with a schedule to follow".

76. In a follow up letter dated 1 March 2018, CX confirmed:

    a. All 27 Engines would be removed
    b. Pre-APU engines will be removed before the APU engines
    c. The basis for the removal was the Option in clause 21.2

    The letter also noted that CX had not received any alternative commercial proposal from LHT.

77. LHT's response on 16 March 2018 was to repeat its position in relation to the interpretation of the Option and to reserve its rights to present commercial proposals to prevent the removal of the APU engines.

78. On 19 March 2018, Mr Pratx sent an email to a French Technical Services Manager in the following terms (in translation):

> *"Hi Philippe,*
> *We need to discuss this confidentially. We need to remove the LHT engines to avoid the 35 million. Contractually, the first one that we need to remove is the one that didn't have a shop visit. Them we can either remove the others in one go, or we can stagger it. What would be [smart / cunning][9] would be to remove the at risk engines last (high cycles, reduced inspections etc). Would you be able to evaluate the engine group that would have a higher risk of UER between now and the end of May?..."*

79. LHT relies on this email as evidence of CX acting in an underhand way.

80. On 27 April 2018, CX sent LHT a removal schedule setting out the dates and precise times on which it would remove each of the Engines from the Flight Hours Services programme. The first four engines were to be removed at 23.59 UTC on 20 May 2018 and the rest at 23.59 UTC on 21 May 2018. The letter ended with:

> *"CX will consider any reasonable commercial offer proposed by LHT to CX's intention to exit engines from the Flight Hours Services agreement".*

81. In a response dated 4 May 2018, LHT disputed the validity of the removal schedule and reserved all its rights, including but not limited to presenting commercial proposals to CX.

82. In a letter dated 14 May 2018, Mr Pratx said:

[9] The French word is "malin"

> *"Unless a proposal acceptable to CX is received, CX will proceed to remove the Engines from the Flight Hours Service programme as per the phase out schedule provided on April 27th 2018 in accordance with Clause 21.2."*

83. No commercial proposals were received from LHT and all the Engines were removed on the dates set out in the 27 April schedule just before the 4062 Contract expired on 23 May 2018.

The Proceedings

84. The parties engaged in a protracted exchange of correspondence following the end of the Agreement but were unable to resolve their differences. The proceedings were commenced in the form of a CPR Part 8 claim on 2 November 2018. For the reasons set out in the judgment dated 6 March 2019 [2019] EWHC 4848 (Ch) the proceedings were transferred into CPR Part 7 and the parties thereafter exchanged Part 7 pleadings.

The Agreed List of Issues

85. The parties helpfully agreed a list of ten issues for trial:

The Agreement

1. Did the parties in entering into the Agreement and Amendment No. 1 have or form any mutual understanding as to the purpose and/or effect of clause 21.2 of the Agreement? If so, what was the content of any such mutual understanding?

2. In particular, when entering into the Agreement and Amendment No. 1, was it the parties' mutual understanding that clause 21.2 was to be exercised for operational reasons only: i.e., for phase-out of leased aircraft, retirement of CX owned aircraft or other operational reasons?

3. Did the Agreement envisage, and did its performance entail, any substantial and 0n-going communication and collaboration between the parties? If so, what was the nature and extent of such communication and collaboration?

4. Could the operation of clause 21.2 of the Agreement affect any rights and obligations of LHT under the Agreement?

5. On its true construction, alternatively as a result of the implication of any term, does clause 21.2 of the Agreement entitle CX to exercise its rights thereunder at its unfettered option, or:

    a. Only for operational reasons; and/or

    b. Only in a manner that is not arbitrary, capricious or unreasonable; and/or

c. Only in good faith (in the sense that it could not be exercised in a way that would be regarded as commercially unacceptable by reasonable and honest people)?

The second Reconciliation Charge

6. Regarding the calculation of the second Reconciliation Charge (without prejudice to the validity of CX's purported exercise of clause 21.2 of the Agreement) (as to which, see below):

a. Are all the Flight Hours flown by all the Engines to be included, and if so, is the Total Engine Flight Hours 396,865 or 386,779;

b. Was the Actual Average Utilisation (to the nearest 50 hours) 3,250 or 3,170; and

c. Was the Actual Severity Factor (to four decimal places) 0.8997 or 0.9366?

7. If CX validly removed the Engines from the Flight Hour Services pursuant to clause 21.2 of the Agreement (as to which, see below), in calculating the second Reconciliation Charge:

a. Was the amount to be paid by LHT to CX pursuant to the second Reconciliation Charge US$4,200,210.95 or US$467,677.45 (or some other sum); and

b. Would the first Reconciliation Charge need to be recalculated, so that the amount to be paid by CX to LHT was US$38,080.83 (or some other sum)?

8. If CX did not validly remove the Engines from the Flight Hour Services pursuant to clause 21.2 of the Agreement (as to which, see below):

a. Was the amount to be paid by LHT to CX pursuant to the second Reconciliation Charge US$2,654,968.83 (or some other sum)?

The exercise of clause 21.2

9. Did CX validly exercise clause 21.2 of the Agreement? Or by purporting to exercise clause 21.2 of the Agreement in the manner and time in which it did, did CX breach the Agreement? In this respect:

a. Did CX allow LHT a reasonable opportunity to present commercial proposals to prevent the removal of APU Engines and remain ready, willing and able to give reasonable consideration to any such proposals?

b. Did CX act otherwise than for an operational purpose and so contrary to the restriction under 5(a) above (in the event such a restriction exists)?

c. Did CX act in a manner that was arbitrary, capricious or unreasonable and so contrary to the restriction under 5(b) above (in the event such a restriction exists)?

d. Otherwise than in good faith (in the sense set out at 5(c) above) and so contrary to the restriction under 5(c) above (in the event such a restriction exists)?

Set off against End of Term Charges

10. Is CX entitled to set off against the sum of US$35,815,325.17 which CX accepts that it owes to LHT as End of Term Charges the sum of US$42,854,896.44, plus interest (or some other sum)?

Witnesses

86. CX called two witnesses: Stephen Teague and Thomas Pratx.

87. LHT called three witnesses, Rainer Janke, Wolfgang Weynell and Christian Möller.

Mr Teague

88. Mr Teague started working for CX in 2001. He was a Technical Services Engineer and then a Senior Technical Services Engineer. In 2003, he was promoted to Procurement Manager. At the time the 4062 Contract was signed, Mr Teague was CX's Powerplants Purchase Manager. He had this role from 2007 until July 2012. In that role he was responsible for managing CX's engine portfolio and the negotiation of engine maintenance contracts. In July 2012 he was promoted to General Manager (Engineering Commercial & Projects). He held this position until he left CX in May 2017. In the positions he held from 2007 – 2017, Mr Teague reported to Keith Brown (Head of Procurement – Powerplants and Landing Systems) and Christopher Gibbs, CX's Director (Engineering). Mr Teague now works as a consultant.

Thomas Pratx

89. Mr Pratx is a French national. He joined CX as a Powerplant Procurement Manager in October 2016. He initially worked alongside Romain Mouchet but then took over responsibility for engine procurement activities. He was also involved in managing certain maintenance and supply relationships, including that with LHT. In February 2018 he became a Component and Landing Systems Manager. However, despite this change of title he remained responsible for managing CX's relationship with LHT in respect of the PW4062 engines. Like Mr Teague, Mr Pratx reported to Mr Brown. Mr Pratx left CX in March 2019. He now works for Airbus Services as a Business Development Director. Mr Pratx was the key person on CX's side who communicated CX's decision to exercise the Option.

Rainer Janke

90. Mr Janke is a German national. He has been employed by LHT for 31 years. From June 2003 to August 2008 he was Head of Corporate Sales for North East Asia, including Hong Kong. He was involved in the negotiation of the 4056 and 4062 contracts alongside Wolfgang Weynell (to whom he reported). His current position is Vice President of Marketing and Sales at Lufthansa Technik Philippines Inc. It was Mr Janke who devised the compensation formula which was incorporated in Schedule 13. He was able to provide evidence about the context of the 4056

and 4062 Contracts and describing the reasons for LHT's reaction to CX's decision to use clause 21.2 to remove all the 4062 engines just before the end of the 4062 Contract.

Wolfgang Weynell

91. Mr Weynell is a German national. He started working for Lufthansa in 1977. He was Director of Quality Assurance from 1988 to 1998. He was the Vice President of Sales at LHT from 2007 until 2014. In 2014, he became the Senior Vice President of Sales until he retired in 2016. Mr Weynell's evidence covered the negotiation and conclusion of the 4056 and 4062 contracts.

Christian Möller

92. Mr Möller is a key account manager at LHT. He joined LHT in January 2016. His evidence was mainly concerned with the financial impact of the removal of the 4062 engines and the calculation of the reconciliation charges.

Assessment of witness evidence

93. The witness statements submitted for both parties were all highly polished products. They had clearly been through many drafts with the assistance of lawyers. Because many of the events referred to in them took place over ten years ago, the statements inevitably comprised to a large extent a reconstruction of events based on contemporaneous documents. There was also unfortunately an element of seeking to argue the case through the witness statements, in particular in the witness statements served by LHT. Nevertheless, when it came to answering questions in cross examination all the witnesses did their best to answer truthfully.

94. The witness evidence provided some helpful context. However, the principal matters taken into account by both parties before, during and after the 10 year term of the Agreement were recorded to a very large extent in contemporaneous e-mails and Powerpoint presentations produced for meetings (both internal and joint) so none of the of the main issues really turned on the credibility or reliability of the witness evidence. It is this extensive record which has permitted me to give such a detailed factual background to the issues.

Proper interpretation of clause 21.2

95. There was no dispute about the proper approach to the interpretation of clause 21.2. Both parties referred me to Arnold v Britton [2015] UKSC 36, [2015] AC 1619 ('*Arnold*') [15] – [23], and Wood v Capita Insurance Services Limited [2017] UKSC 244, [2017] AC 1173 ('*Wood*') [8] – [15], Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 ('Rainy Sky'), Re Sigma Finance Corp [2009] UKSC 2, [2010] 1 All ER 571 ('*Sigma*').

96. More recently, the following principles were identified by the Chancellor in Deutsche Trustee v Duchess & Others [2019] EWHC 778 (Ch) at [29] – [30]. They were subsequently approved by the Court of Appeal [2020] EWCA Civ 521 as an accurate summary of legal principles which can be derived from the cases referred to above:

a. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" (per Lord Neuberger in *Arnold* at para. 15 quoting from Lord Hoffmann in Chartbrook Ltd v. Persimmon Homes Ltd [2009] 1 A.C. 1101 at [14]).

b. The Court should focus on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause (ii) any other relevant provisions of the lease (iii) the overall purpose of the clause and the lease (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions (*Arnold* at [15])

c. Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. (*Arnold* at [19])

d. While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. … Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party (*Arnold* at [19]).

e. The court is required to undertake an iterative approach. This involves checking each of the rival suggested interpretations against other provisions of the document and investigating its commercial consequences (*Wood* per Lord Hodge at [12] *Sigma* per Lord Mance at [12] and Lord Collins at [37], and *Rainy Sky* per Lord Clarke [28])

97. Mr Thompson for CX additionally referred me to the following passage from Lord Hodge's Judgment in *Wood* at [13] with emphasis added.

> *"Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary*

> *according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type."*

98. LHT's case is that on its proper construction, the Option was only exercisable if the engine was being removed for an operational purpose. It was also pleaded[10] that this was the parties' mutual understanding at the time but I will deal with this separately below.

99. The examples pleaded by LHT of such an operational reason were: a "phase-out of leased aircraft", a "retirement of CX-owned aircraft" and "other operational reasons".

100. CX asked for clarification of LHT's case in a part 18 Request. LHT responded by saying:

> "*Not entitled. The phrased "operational purpose" is a matter of plain English and does not require further exposition beyond that contained in the Defence and Counterclaim (for example, without limitation, at paragraph 19."*

But then added:

> *"Without prejudice to the foregoing, the phrase refers to the removal of Engines for fleet planning reasons, including the need/desire to sell aircraft, to return aircraft or to phase out or to retire aircraft"*

101. In his oral opening, Mr Shah added a further gloss. He said this:

> *"Our primary case is that properly construed, clause 21.2 [means that] [an] engine can only be removed for an operational reason, and by that, I mean for reasons that require the removal of the engine from Cathay's fleet."*

102. It was therefore LHT's case at trial that the Option should only be available to CX if the removal of the engine is for an operational purpose and if the engine was to be removed from the Fleet.

103. In other words, as I understood LHT's case, the Option ought to be read as follows:

[10] Defence paragraph 19 and 25(1).

> "CX may at its option remove Engines from the Flight Hour Service programme prior to the completion of the Term *if, but only if, the Engines are removed from the Fleet for operational purposes"*

104. From a purely textual point of view, LHT's case is an ambitious attempt at linguistic manipulation. The language used in the clause is straightforward. There is no patent ambiguity at all. On its face and as a matter of ordinary language, the clause appears to grant CX a unilateral option to withdraw any number of Engines from the Flight Hours Services programme at any time prior to the Term. The Option is clearly not unqualified because if it is exercised, it triggers the application of the agreed financial reconciliation set out in Schedule 13. There was (potentially at least) a price to be paid for the exercise of the Option.

105. Use of the word "may" alone would have been sufficient to create the Option. The words "at its option" immediately after "may" appear to me to emphasise that it is intended that CX was to have the freedom to choose when any engine was withdrawn from the programme as long as it is prepared to accept the financial consequences of the reconciliation in Schedule 13.

106. LHT made the following submissions in support of its interpretation of the Option:

a. Without such a limitation, clause 21.2 would be inconsistent with (a) the restrictive termination provisions in the Agreement (b) the exclusivity provisions (c) the reconciliation charges in Schedule 4.

b. Without the limitation, CX has the unilateral means to change / defeat the deferred remuneration due to LHT at the end of the Term under the Agreement. It was said, that CX's interpretation allowed CX to "game" the Agreement in its favour.

c. If CX's interpretation is correct, it was almost inevitable that all the Engines would be removed from the Flight Hours Services programme and this cannot have been what was intended.

d. It was never intended for CX to have the option to continue to demand services on a Time and Materials basis.

107. As to the first submission, it is correct that the Agreement contains very limited provisions for general termination. In particular, neither party could terminate the Agreement simply by giving notice. The parties appear to have given consideration to the question of how the Option fits into the overall contractual termination scheme by including it in a section headed 'partial termination'.

108. In my judgement, there is no contradiction between CX's interpretation of clause 21.2 and the more general termination provisions in clause 20. They are aimed at different things. Clause 21.2 is concerned only with the withdrawal of one or more Engines from one part of the contract only, namely the Flight Hours Services Programme. The 'termination' in clause 21.2 is partial in two senses. The primary sense is that even when an Engine is withdrawn, it remains

within and subject to the terms of the contract. This means for example that the end of Term Charges will still be payable in respect of that Engine calculated by reference to the number of hours it was operated during the Term. The other sense in which the exercise of clause 21.2 is partial is that the option may be applied to some but not all of the Engines. In neither sense, does the Option contradict clause 20.

109. There is no contradiction either between the exclusivity provision in clause 2.1 and CX's interpretation of clause 21.2. Clause 2.1 is expressed to be 'subject to' clause 21.2. This indicates that the parties have chosen to carve out an exception to the exclusivity obligation to cover the exercise of the Option.

110. There is also in my judgment no inconsistency between the Reconciliation Charges of Schedule 4 and clause 21.2. Schedule 13 expressly states that any reconciliation as a result of the withdrawal of an engine shall be without any adjustment to reflect the deviation from assumed operational parameters. This clearly demonstrates that the parties made a deliberate choice to exempt clause 21.2 from the type of adjustment performed under Schedule 4.

111. I reject the suggestion that CX's construction of clause 21.2 gives CX a unilateral means to 'defeat' the remuneration under the Agreement and thereby 'game' the contract in its favour. The Agreement makes detailed provision for charges, reconciliations and adjustments to be made in a number of defined circumstances usually by means of agreed detailed formulae. Clause 29.11 creates a right of general contractual set off for the benefit of both parties. The Schedule 13 reconciliation formula is expressed in such a way that is capable of applying after the expiry of any given number of flight hours for any number of engines. It is on its face designed to be applied at any moment from the first day of the Agreement to the last. The reconciliation under Schedule 13 is thus just one of those means chosen by the parties by which a sum may become payable in either direction. The exercise of the Option cannot be said to involve a 'gaming' of the contract if the financial consequences of its exercise have been pre-determined for all and any number of flight hours and the parties have expressly agreed a right of set off against other sums owed.

112. As to the third argument that CX's interpretation makes it inevitable that the Option would always be exercised, I reject it for three reasons:

    a. First, at the time the Contract was entered into, the parties did not know for certain how the engines would be used. If the engines had been used in the manner that the parties anticipated, each engine would have undergone two scheduled Shop Visits. It may have been the case that the end of the Term coincided with a second scheduled Shop Visit for many or all of the engines, in which case Schedule 13 would not have created any financial incentive for CX to remove engines from the Flight Hours Service programme.
    b. Secondly, the fact that under most scenarios of likely use, Schedule 13 was likely to generate a credit for CX is a product of the formula agreed by the parties. The

figures were available for both parties to calculate. It must be presumed that LHT was content for that in-built financial bias in CX's favour to exist.

c. Thirdly, although the credit due to CX on removal grows as each scheduled shop visit approaches, it does not necessarily mean that the incentive to remove grows. The figure is creeping up because the engine is getting closer to needing a major overhaul which has to be performed if the engine is to be used. The choice (at least if the engine is to be kept in operation) is therefore between keeping the engine in the programme and having the overhaul performed at the agreed cost or having the engine overhaul performed outside of the programme. Therefore whether it makes commercial sense to remove any engine under the Option will always depend on a broader range of factors than the quantum of the Schedule 13 reconciliation figure for any particular engine.

113. As to the final argument, it seems to me as a matter of ordinary language the parties chose to frame the exercise of the Option in terms of withdrawal from the Flight Hours Service programme and not the contract as a whole. If the parties had intended the Option to mean the withdrawal of the Engine from the Agreement as a whole, they would surely have said so. In my judgment, the language of clause 3.1 of the Contract makes it clear that LHT was obliged to continue to provide Additional work requested by CX. The words "in each case throughout the Term" in clause 3.1 makes it clear that the obligation to provide Flight Hour Services on the one hand and Additional Work on the other are independent of each other. The Additional Work comprises both the Fixed Price Services (as defined in Part 1 of Schedule 5) and the Time and Materials Services (as defined in Part 1 of Schedule 6).

114. The opening words of Schedule 6 are very clear:

> *"Work required to make an Engine (or any Module, Component or Accessory of that Engine) Serviceable which is not covered by the Flight Hour Services or the Fixed Price Services shall be charged on a time and material basis as set forth below"*

115. There are two ways in which work required to make an Engine serviceable will not be covered by the Flight Hours Services programme: either the work is the result of an Excluded Event or if the Engine has been withdrawn altogether from the Flight Hours Services part of the Agreement. It seems to me to be quite clear that CX's options are intended to be: to have the work done to make and Engine serviceable at the price fixed in advance by the Flight Hours Service Programme, to have the work done on a time and materials basis (with a greater degree of uncertainty as to the price) or not to have the work done at all.

116. This is not to say that LHT would be obliged to provide the full range of services described in Part 1 of Schedule 3 on a Time and Materials to an Engine withdrawn from the Flight Hours Services Programme. The Time and Materials Services listed in the Agreement are plainly intended to cover the core MRO service of restoring an engine to operational condition but do not cover ancillary services such as maintaining the Joint Procedures Manual or providing engine condition monitoring. If CX wanted an Engine or a group of Engines removed from the Flight Hours Service Programme but wanted to continue to benefit from these ancillary

services, that is something which the parties would have to negotiate for. This is what happened under the 4056 Contract. Following the removal of all the Engines from the Flight Hours Services Programme, the parties agreed in Amendment No. 2 that LHT would continue to provide engine condition monitoring services and to develop a joint procedure manual to cover the provision of Fixed Price Services and Time and Material Services. However, the fact that a negotiation would be necessary for these items seems to me to make no difference to the proper interpretation of the Option.

117. In summary, therefore, I an not persuaded by any of LHT's arguments based on the wording of the Agreement itself. As has been repeatedly said in the cases on contractual interpretation (cited by Lord Hoffmann in Chartbrook at [14]), English law does not easily accept that people have made linguistic mistakes, especially in formal documents drawn up by sophisticated commercial parties with the assistance of commercial law firms on both sides. Of course, there are cases where context and background may drive a court to the conclusion that something has gone wrong with the language used by the parties. I now turn to consider LHT's arguments based on shared mutual understanding, genesis and wider context.

Shared mutual understanding

118. Part of LHT's pleaded case was that there was a "mutual understanding" that the Option was only intended to be used for operational purposes.[11] CX denied that there was any such understanding.

119. Both Mr Weynell and Mr Janke's witness statements contained assertions that they believed that it was "understood at all times by both parties" that the sole purpose of clause 21.2 was to permit CX to remove engines for operational reasons but not otherwise. Mr Janke's witness statement also referred to the earlier drafts of clause 21.2 in the 4056 Contract which contained an option to remove engines from specific aircraft.

120. Mr Teague's witness statement by contrast emphasised that in the negotiations for both contracts CX wanted "maximum flexibility" to remove and add engines. Mr Teague also referred to earlier drafts of the 4056 contract. He referred in particular to a comment from a member of the CX negotiating team suggesting a clause for "partially terminating engines other than lease return".

121. All of this evidence was in my judgement inadmissible for three reasons:

    a. The general rule is that evidence of statements made in pre-contractual negotiations is not admissible to interpret the concluded contract: Prenn v Simmonds [1971] 1 WLR 1381 at 1385, Chartbrook v Persimmon Homes Ltd [2009] 1 AC 1101 at [33] and [42] and most recently Mrthyr (South Wales) Limited v Merthhyr Tydfil County BC [2019] EWCA Civ 526 at [51] – [55].

[11] Paragraph 19 of the Defence and Counterclaim

b. Evidence of what one party thought was understood by another party in the course of the negotiations is also inadmissible and irrelevant to the exercise of interpreting a contract in writing.

c. The Agreement contains an entire agreement clause (clause 29.8). This precludes any recourse to alleged mutual understanding relied upon by LHT.

122. As to the first point, it is clear that the general principle remains good law. It is subject to a number of limited exceptions. These are listed in *The Interpretation of Contracts* (6th edition, 2015) at p. 111 – 116. None apply here.

123. If statements made in the course of negotiations are inadmissible, statements by one participant as to what he or she believed another participant understood is even more objectionable. It is trite law that in interpreting a contract, subjective evidence of what one of the parties believed was agreed or understood is inadmissible. It is even more inappropriate to seek to adduce oral evidence of what a person believed the other party to a contract believed or thought.

124. Clause 29.8 in the Agreement is a standard form entire agreement clause. CX submits, and I accept, that it is well recognised that the very purpose of this type of clause is to prevent either party to contract in writing from thrashing around in the undergrowth of their negotiations and exchanges in to order to find some statement or chance remark which might assist their case as to how it should be interpreted: Inntrepreneur Pub Co. v East Crown [2000] 2 Lloyd's Rep 611 at 614. Unfortunately, this is exactly what has happened in this case. The evidence relied upon by LHT in support of a mutual understanding was in my judgement inadmissible.

125. LHT placed a great deal of weight on the following passage from the cross-examination of Mr Teague (with LHT's added emphasis):

> "There were meetings in the Lufthansa offices in Sheung Wan where we discussed the flexibility for all 13 engines **to be able to remove from the fleet** and it was agreed in the meetings in Sheung Wan in Hong Kong with Rainer [Janke]"

126. Mr Shah submitted that Mr Teague's turn of phrase is "absolutely key".[12] I disagree. Cross-examining witnesses about their recollection of what was negotiated 13 years ago and then seizing on a turn of phrase used in an answer is exactly the sort of thrashing around in the undergrowth which the Court should not permit. The parties in this case, advised by sophisticated commercial firms decided to include an entire agreement clause in their contract in order to prevent the court from hearing evidence of what was discussed orally.

[12] Closing Submissions para. 26(5).

127. If I am wrong that these well-established principles prevent LHT from relying on evidence from the negotiation of the Agreement and 4065 contract to prove a mutual understanding in relation to the Option, I would find as follows:

    a. There was no discussion between the parties that the clause would only be used for operational reasons or that it would only be used when CX wished to remove an engine from the Fleet.

    b. There was no mutual understanding that the clause would only be used for operational purposes or when an engine was to be removed from the fleet.

    c. There was no discussion to the effect that the clause could be used for any reason whatsoever. The first suggestion that there might have been such an explicit discussion of the Option being available for any purpose came in Mr Teague's cross-examination. He said that he had discussed this with Mr Janke in a meeting in Sheung Wan in February 2007. No reference is made to this discussion in any contemporaneous email, in subsequent correspondence or in Mr Teague's witness statement. In particular no mention is made of any such discussion in the account of the meeting sent by Mr Teague to his superior on 23 February 2007. I am satisfied that Mr Teague is wrong in his recollection expressed in cross-examination for the first time that there was any such discussion.

The genesis of the Option and factual matrix

128. Mr Shah was on firmer ground when he submitted that in interpreting the Option, it was necessary to take account of the genesis of the provision and its background.

129. LHT places a great deal of weight on the fact that the Option in the Agreement originated in the 4056 Contract. This means that it originated in the context of the parties' shared knowledge that some of the engines in the 4056 fleet were on leased aircraft which terminated during the Term. It is common ground that the clause was simply transferred across without any further substantive discussion.

130. LHT referred in its opening submissions[13] to seven categories of documents passing between the parties in which reference is made to in a variety of different ways to engines being removed for what might be termed operational reasons, including: aircraft retiring from the PW4056-3 powered fleet, "individual engine early exit", "engine retirement" and the "phasing out" engines.

131. LHT submits therefore that the words of the option ought to be read as being subject to and limited by this original purpose as revealed in the documents it referred to. I reject this for three main reasons:

[13] Para 173

a. The clause was not unthinkingly transferred across from the 4056 Contract. Schedule 13 was amended for use in the Agreement. Different terminology was used and the mean time between shop visit figure was increased from 20,000 to 22,000 hours.

b. The fact that the parties discussed a number of practical examples of engines being retired for operational reasons is not sufficient reason to conclude that they intended this to be the limit to the Option's scope.

c. The phrase 'for operational reasons' as a suggested umbrella concept for the examples used by the parties is inherently vague. Had it been suggested as a qualification for the Option, this would inevitably have led to a debate as to what sort of operational reasons would count and the extent to which commercial considerations might be relevant.

132. In my judgement, the drafting changes between Schedule 13 in the 4056 contract and Schedule 13 in the Agreement are consistent with a deliberate decision by the parties to apply clause 21.2 outside the context of aircraft being removed from the fleet. The parties it seems to me must be taken to have decided that CX was to have the option to remove Engines from the Flight Hours Services programme even when it was highly unlikely that the Fleet would be reduced in size.

133. The admissible factual matrix evidence to the Agreement in my judgement amounted to no more than this:

a. The parties expected the contracts to run for a period of 10 years.

b. LHT's remuneration for Flight Hours Services under the contracts was deferred because it was paid only on a Shop Visit and at the end of the Term.

c. The contracts operated on a set of assumptions about engine use.

d. The purpose of the First and Second Reconciliation was to adjust sums due in light of how the engines were in fact used.

e. The Schedule 13 reconciliation was not calculated on the basis of actual engine use but instead by reference to actual flight hours and assumptions.

f. Some of the 4056 Aircraft were likely to be removed during the 10 year Term because the leases for aircraft on which they were mounted were due to expire with the period but this did not apply to the 4062 Aircraft.

134. Ultimately, I was not persuaded that there was anything in the admissible factual matrix including the genesis of the Option which caused me to even begin to believe that something might have gone wrong in the clear language chosen by the parties. I am not satisfied that there is any good reason to read down or qualify the simple and plain language clause 21.2.

The Commercial result

135. Mr Shah submitted that CX's interpretation led the highly uncommercial result that the End of Term Charges were not only wiped out but that LHT ended up owing CX money.

136. I was unimpressed with this argument. As I have already observed, the Agreement contained a number of formulae for calculating sums due or adjustments to sums due from one party to the other. Read in the context of the agreement as a whole, Schedule 13 was just one of the mutually agreed calculations which adjusted the credit / debit balance between the parties whenever it was triggered.

137. I fully accept that LHT may have seen the Option as likely only to be used exceptionally for a few engines on an ad hoc basis rather for all engines.[14] However, the language of the clause contains no such restriction. It would have been very easy to insert a maximum number of engines to which it could be applied to or to limit its exercise to a certain time or times during the Term. Any one of these measures would have prevented CX from relying on the reconciliation prescribed under Schedule 13 to reduce or extinguish the End of Term Charges that would otherwise be due.

138. The central commercial injustice of which LHT complains is illustrated in Annex 1 to LHT's opening submissions. It takes engine ESN P729253 as an example and shows the financial effect of removing the engine after 29,940 flight hours.

139. The effect of the agreed formula in Schedule 13 is that LHT is required to credit CX with 7,940 flight hours. This means that in the second reconciliation period, the engine is operated for a total of 12,111 hours but LHT only receives payment for 6,377 of those flight hours. The diagram produced by Mr Shah illustrates that this results from the fact that the Schedule 13 multiplicand is calculated by subtracting a fixed 22,000 flight hours from the total hours flown. By contrast, the End of Term Charge multiplicand is based on the hours flown since the last shop visit. If the 22,000 fixed figure in Schedule 13 had been closer to the actual flight hours between shop visits of 24,200 or subject to some sort of taper as the end of the Term approached, the financial impact complained of by LHT would have been substantially mitigated or removed altogether. The Annex 1 diagram was put to CX's witnesses as an illustration of how CX had cynically used Schedule 13 to not only defeat LHT's End of term Charges and to create a credit it its favour. However, the truth it seems to me is that it was LHT's own choice (through Mr Jahnke) to use a fixed 22,000 figure in the Schedule 13 reconciliation formula which created the financial result now complained of by LHT.

[14] In cross-examination Mr Janke said that this was what he thought but no such case was pleaded.

140. The English Courts have said on numerous occasions that the process of contractual interpretation cannot be used to rectify a failure to think through the financial consequences of the operation of a clause – see most recently in Trillium (Prime) Property GP Limited v Elmfield Road [2018] EWCA Civ 1556 at [15]. In that case the tenant was arguing that a rent review clause should interpreted in accordance with business common sense. Lewison LJ with whom Leggatt LJ agreed said this:

> *"Mr Dutton also argued that even if the language of the clause was apparently unambiguous, the commercial background and the commercial consequences of the literal interpretation showed that something had gone wrong with the language of the clause. The decision of the House of Lords in Chartbrook Ltd v Persimmons Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 showed that in those circumstances the court could correct the mistake as a matter of interpretation. What is necessary to bring this principle into play is (a) that it should be clear that something has gone with the language and (b) that it is clear what a reasonable person would have understood the parties to have meant: Chartbrook at [22] and [25] The first problem with this argument is that if anything has gone wrong with the rent review provisions, as Mr Dutton suggests, it is a failure to think through the consequences of what the parties agreed, rather than any deficiencies in drafting. A failure of that kind cannot be solved by the process of interpretation: ING Bank NV v Ros Roca SA [2011] EWCA Civ 353, [2012] 1 WLR 472 at [24] (Carnwath LJ), [80] (Rix LJ); Scottish Widows Fund and Life Assurance Society v BGC International [2012] EWCA Civ 607, 142 Con LR 27 at [21] (Arden LJ); Honda Motor Europe Ltd v Powell [2014] EWCA Civ 437, [2014] Pens LR 255 at [37] (Lewison LJ)…"*

141. In my judgment, Mr Shah in this case was trying to do exactly what counsel for the tenant unsuccessfully sought to argue before the Court of Appeal in Trillium. As Mr Jahnke admitted in cross-examination, although he was the draftsman of the Schedule 13 formula, neither he nor anyone else at LHT sat down at the time to work out what financial result the formula produced as the flight hours accrued or how it might interact with the End of Term Charges if an engine was removed near the end of the Term.

The conclusion on interpretation

142. In short, there is no ambiguity in the language of Clause 21.2. There is nothing in the admissible factual matrix, or in the genesis of the Option which causes me to interpret it as containing a qualification that it may only be used in for Engines removed for operational purpose from the Fleet, as contended by LHT. To the extent that the reconciliation formula in Schedule 13 leads to a large credit to CX in certain circumstances, that is a matter which was capable of calculation before the Agreement was signed.

Implied terms

143. To have decided that the language of the clause does not admit of any qualification by means of interpretation is not of course to say that the option is unfettered. It may be fettered or qualified by a term implied as a matter of law and/or fact.

The operational purpose implied term

144. LHT submitted a term ought to be implied that the Option "could only be exercised in accordance with its operational purpose"[15] that is to say that the Option could only be exercised in respect of engines which CX wished to remove from the Fleet for operational reasons.

145. To succeed with this submission, LHT needs to satisfy me that the proposed qualification was something which the reasonable reader of the Agreement would consider to be so obvious as to go without saying or that it is necessary to give business efficacy to the contract – see Marks and Spencer plc v BNP Paribas Securities Trust Company (Jersey) ltd [2015] UKSC 72; [2016] QB 742.

146. In my judgement, the proposed implied term comes nowhere near satisfying the first test. The reasonable reader of the Option would consider that there might be any number of reasons why CX may wish to withdraw one or more of its engines from the Flight Hours Services programme. The reasons might be commercial or operational or a mixture of the two.

147. In the amended version of the Option, CX was obliged to consider any "commercial proposals" which LHT might make to prevent the removal of APU Engines from the Flight Hour Service programme. It would be an odd asymmetry for CX to be obliged to consider commercial proposals to keep the engines in the programme but for CX to be precluded on relying commercial reasons for wanting to remove them in the first place. A more sensible reading of the clause as amended, in my judgment, would be that the exercise of the Option may be for commercial and/or operational considerations. There is a natural symmetry in CX having purely commercial reasons for wishing to remove one or more engines from the programme and CX being obliged to consider any commercial proposal from LHT's side before coming to a final conclusion on whether to go through with it.

148. Any implied term must itself be reasonably precise if it is to be implied. The pleaded term is opaque. LHT found itself having to recast the proposed implied term so that it was not focused so much on limiting the range of justifications or purposes for which an engine might be removed but more on the result i.e. removal from the fleet. The implied term proposed by LHT in my judgment is simply too vague and uncertain in either of its formulations. The proposed term would add a layer of unnecessary complexity and uncertainty to what is on its face a simple option to remove an engine from one part of a service contract.

149. Furthermore, the Agreement works perfectly well without the proposed implied term. The option triggers a reconciliation in accordance with an agreed formula. The formula itself appears to be designed to operate at any stage of the contract and for any number or engines.

[15] Defence para 25(1).

The Socimer / Braganza implied term

150. The second implied term contended for by LHT is that the Option may not be exercised in "in an arbitrary and/or capricious and/or unreasonable" way.[16]

151. LHT relies on Socimer International Bank v Standard Bank London [2008] 1 Lloyd's Rep 558 at [60] - [66] per Rix LJ and Braganza v BP Shipping Ltd [2015] 1 WLR 1661 [18] and [31] – [32] per Baroness Hale.

152. CX submits that no such term ought to be implied and relies, in particular, on UBS AG v Rose Capital Ventures Ltd and Others [2018] EWHC 3137 (Ch) [39] – [58] and TAQA Bratani Limited v Rockrose UKCS8 LCC [2020] EWHC 58 (Comm) [44] – [53].

153. It is worth remembering that the Socimer-Braganza line of case represent an exception to the general rule of English law. The general rule is as stated in White & Carter (Councils) Limited v McGregor [1963] AC 413 at page 430 (per Lord Reid):

> *"It has never been the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way…".*

154. The modern Braganza-Socimer implied term has its origins in two rather disparate lines of cases concerning admission to (or expulsion from a committee) or the exercise of a discretion under a time charterparty: see Tillmanns & Co. v. SS. Knutsford, Limited [1908] 2 K.B. 385 (a time charterparty case), *Weinberger v. Inglis [1919] A.C. 606* (a committee membership case), Government of The Republic of Spain v. North of England S.S. Co., Ltd. (1938) 61 Lloyd's Rep. 44 (another time charterparty case) and *The "Vainqueur Jose" [1979] 1 Lloyd's Rep. 557* (a committee membership case).

155. These two lines of case law were considered by the Court of Appeal in The Product Star [1993] 1 Lloyd's Rep 397. That case concerned a clause in a charterparty which provided that a master may be relieved of the obligation of signing bills of lading if the loading or discharge of cargo at any such port were considered by the Master or Owners *in his or their discretion* to be dangerous. Charterers alleged that the Owners had abused this clause by pretending to have formed a view about the dangers at a port when in fact the real reason for refusing to comply with the order was due to an insurance dispute. Leggatt LJ having cited the four cases I have just referred to said this (at p. 404):

> *"The essential question always is whether the relevant power has been abused. Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after*

[16] Defence paragraph 25(2).

making any necessary inquiries. To these principles, little is added by the concept of fairness: it does no more than describe the result achieved by their application."

156. Socimer international Bank v Standard Bank London Ltd [2008] 1 Lloyd's rep 558 concerned a valuation clause in which one party was entitled to value assets. Rix LJ described the issue of whether a term ought to be implied to put some constraints on the exercise of such a power in the following terms, at [60]:

> *"When a contract allocates only to one party a power to make decisions under the contract which may have an effect on both parties, at least two questions arise. One is, what if any are the limitations on the decision-maker's freedom of decision? The other is, what is to happen if the contractual power was not in fact exercised at the time when the relevant party was obliged to make a decision?"*

157. In answer to the first question Rix LJ, having referred to The Product Star and Ludgate Insurance Company Ltd v. Citibank NA [1998] Lloyd's Rep IR 221, concluded (at [66]) that:

> *"It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time."*

158. The passage cited above was approved by the Supreme Court in Braganza v BP Shipping [2015] UKSC 17 at [22]. The specific question in Braganza itself was what constraints there might be on the approach of an employer who is considering whether an employee has committed suicide in order to determine whether death in service benefit is payable. Baroness Hale described the issue in more general terms in paras [18] and [19]:

> *[18] Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.*
>
> *[19.] There is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority. In neither case is the court the primary decision-maker. The primary decision-maker is the contracting*

> *party or the public authority. It is right, therefore, that the standard of review generally adopted by the courts to the decisions of a contracting party should be no more demanding than the standard of review adopted in the judicial review of administrative action. The question is whether it should be any less demanding.*

159. The result in Braganza turned in the end on the fact that the contract in question was an employment contract, as appears from the passage below:

> *"[32] However, it is unnecessary to reach a final conclusion on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action. Given that the question may arise in so many different contractual contexts, it may well be that no precise answer can be given. The particular context of this case is an employment contract, which, as Lord Hodge explains, is of a different character from an ordinary commercial contract. Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. This must be borne in mind in considering how the contractual decision-maker should approach the question of whether a person has committed suicide."*

160. UK Acorn Finance ltd v Markel (UK) Ltd [2020] 922 [62] – [66] is a recent example of a clause which did satisfy the test for implying a Socimer/Braganza type clause because the contract in question devolved to one party the power to decide whether they are satisfied that a particular state of affairs existed (in that case whether a non-disclosure or misrepresentation was innocent).

161. It is, however, clear that not every situation in which party A has to make a decision under a contract which will have an effect on party B will be treated as a discretionary power which ought to be made subject to a Socimer/Braganza implied term. In Mid Essex Hospital Services NHS Trust v Compass Group UK Ltd (Trading as Medirest) [2013] EWCA Civ 200, the parties had entered into a detailed contract under which Medirest supplied catering and cleaning services to the Defendant Trust at two hospitals. Clause 5.8 provided that the Trust may award service failure points and levy payment deductions if contractual performance fell below the specified service level.

162. The Trust issued SFPs and ultimately terminated the contract. The trial judge held that the power to award SFPs and to make deductions was subject to an implied term that when exercising the powers the Trust would not act in an arbitrary, capricious or irrational manner and that this implied term had been breach such that the Trust had not been entitled to terminate the contract.

163. The Court of Appeal reversed the trial judge's decision that a Socimer type term ought to be implied. Jackson LJ held that the Product Star – Socimer line of cases all concerned a discretion in the sense of choosing between a range of options taking into account the interests of both parties. He contrasted that with a simple decision whether or not to exercise an absolute contractual right:

> *"[83] An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner…"*

164. Jackson LJ held on the facts:

> *"There is no justification for implying into clause 5.8 a term that the Trust will not act in an arbitrary, irrational or capricious manner. If the Trust awards more than the correct number of service failure points or deducts more than the correct amount from any monthly payment, then that is a breach of the express provisions of clause 5.8. There is no need for any implied term to regulate the operation of clause 5.8."*

165. Lewison LJ in his judgment accepted the submission made on behalf of the Trust that the power in the contract to award SFPs and make deductions was not a discretion in any real sense:

> *"[136]. Mr Collins QC accepted on behalf of the Trust that where one party to a contract has a discretion to exercise which will potentially impact upon the contractual rights and entitlements of another party to the contract the courts are more willing than heretofore to interpret the provisions conferring that discretion as being subject to implicit limits. Thus where one party to a contract has a discretionary power to decide whether a port is safe (The Product Star (No 2) [1993] 1 Lloyd's Rep 397); or discretion to decide whether an employee should be paid a bonus, and if so how much (Horkulak v Cantor Fitzgerald International [2005] ICR 402; Khatri v Cooperative Centrale [2010] EWCA Civ 397); or discretionary power to raise interest rates (Paragon Finance plc v Nash [2002] 1 WLR 685) an arbitrary or capricious exercise of discretion will be invalid. Indeed in some cases a failure to exercise a discretion or an arbitrary or capricious exercise of discretion will amount to a free-standing breach of contract sounding in damages (Horkulak v Cantor Fitzgerald International). But the rationale for interpreting discretionary powers as subject to implicit limitations is that without such limitations the discretion would be unfettered; or, as Leggatt LJ put it in The Product Star (No 2), the exercise of the power would be the decision maker's "uninhibited whim". It is, therefore, a necessary control mechanism.*
>
> *[137] By contrast, Mr Collins said that in our case there is no need for a control mechanism of this kind. Here, he said, the Trust had no discretion. He accepted that the language of this clause (unlike others) was expressed in terms of entitlement rather than obligation. But he said that there was no real discretion either in awarding SFPs or in the number of SFPs awarded. The language used was no different from clause 6.1 which said that Medirest "may" charge the Trust the contract price. Clearly that was not a discretion in any real sense: the parties plainly expected Medirest to charge what it was entitled to charge. Moreover, as he pointed out, GP11 (which was part of the performance specification) required Medirest itself to calculate SFPs.*

> *[138]. I see no reason to depart from the language of entitlement in which clause 5.8 and Part C paragraph 1.1 are expressed. Thus in my judgment it was up to the Trust to decide whether or not to levy payment deductions; and whether or not to award SFPs. But that was the extent of the Trust's decision-making power under the contract. If the Trust decided to award SFPs, the contract itself, through the medium of the Payment Mechanism, provided for the number of SFPs to be awarded. Either the Trust was right or wrong in its application of the contract terms to the facts of the case. It had no discretion to exercise as regards the maximum number of SFPs to be awarded. The judge did not find that in deciding to award SFPs the Trust had made an arbitrary or capricious decision. Rather, he decided that the absurdity of the Trust's position was in the number of SFPs that it awarded. Likewise in the case of Deductions, the contract itself provided for their calculation.*

166. Like Jackson LJ, Lewison LJ held that where a contract provides a control mechanism for the contractual power, there is no need for the court to imply a different one. This was in particular so where the control mechanism is an objective test.

167. Beatson LJ agreeing with both Jackson LJ and Lewison LJ in the result added:

> *"[154] The contract in the present case is a detailed one which makes specific provision for a number of particular eventualities. The specific provisions include clauses 5.8, 6.3 and 6.5. In a situation where a contract makes such specific provision, in my judgment care must be taken not to construe a general and potentially open-ended obligation such as an obligation to "co-operate" or "to act in good faith" as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them."*

168. Mid Essex is thus a case where it was decided that given the structure of the contract, the nature of the power and the control mechanisms within it, it was not appropriate to imply any Socimer-Braganza type clause.

169. However, the choice is not a binary between implying a Socimer/Braganza term or not. The subsequent decision of the Court of Appeal in Property Alliance Group Ltd v Royal Bank of Scotland [2018] EWCA Civ 355 demonstrates that a fetter may be implied but it may be in a more limited form. The facility Agreement contract contained the following clause:

> *"The Lender [i.e. RBS] may, at any time, require the Valuer [i.e. Lambert Smith Hampton or such other valuer or surveyor as RBS might appoint] to prepare a Valuation of each Property [i.e. each of the properties over which RBS held security]. The Borrower [i.e. PAG] shall be liable to bear the cost of that valuation once in every 12 month period from the date of this Agreement or where a default is continuing."*

170. PAG submitted that the clause was not unfettered but was rather subject to a "Socimer-type" implied term requiring RBS to act "reasonably, in a commercially acceptable or rational way, in good faith, for a proper purpose (i.e. the purpose for which such power or discretion was conferred), not capriciously or arbitrarily and not in a way that no reasonable lender, acting reasonably, would do.

171. The trial judge held that RBS had "an absolute right to call for the valuation and accordingly, that the Socimer line of authorities and the necessary implication of terms in order to control the otherwise unfettered exercise of a discretion/assessment or formulation of opinion [do] not arise" (paragraph 278 of the judgment).

172. For the bank it was submitted that the trial judge had been correct and that furthermore: "that clause 21.5.1 of the 2011 facility did not involve any discretion, assessment or choosing from a range of options and that there was therefore no scope for any implied term to arise." The Bank also pointed out that clause 21.5.1 had been "inserted for the benefit of RBS and maintained that it was not obliged to take account of PAG's interests when deciding whether to invoke the provision."

173. The Court of Appeal took a middle path and concluded that:

> *"The power conferred by clause 21.5.1 of the 2011 facility was not wholly unfettered. We agree with Mr Handyside that the provision will have been inserted for the benefit of RBS, and there is, of course, no question of RBS having owed fiduciary duties. In the circumstances, it seems to us that RBS must have been free to act in its own interests and that it was under no duty to attempt to balance its interests against those of PAG. It can, however, be inferred that the parties intended the power granted by clause 21.5.1 to be exercised in pursuit of legitimate commercial aims rather than, say, to vex PAG maliciously. It appears to us, accordingly, that RBS could not commission a valuation under clause 21.5.1 for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them."*

174. In UBS AG v Rose Capital Ventures ltd and others [2018] EWHC 3137 (Ch) Chief Master Marsh reviewed the above authorities and extracted the following principles:

> *1. It is not every contractual power or discretion that will be subject to a Braganza limitation. The language of the contract will be an important factor.*
>
> *2. The types of contractual decisions that are amenable to the implication of a Braganza term are decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest. In one sense all decisions made under a contract affect both parties, but it is clear that Baroness Hale had in mind the type of decision where one party is given a role in the on-going performance of the contract; such as where an assessment has to be made. This can be contrasted with a unilateral right given to one party to act in a particular way, such as right to terminate a contract without cause.*
>
> *3. The nature of the contractual relationship, including the balance of power between the parties is a factor to be taken into account: per Braganza per Baroness Hale. Thus, it is more likely for a Braganza term to be implied in, say, a contract of employment than in other less 'relational' contracts such as mortgages.*

> *4. The scope of the term to be implied will vary according to the circumstances and the terms of the contract.*

175. LHT accepted that these principles represent an accurate summary of the cases cited to Chief Master Marsh. I agree.

176. On the facts of that case, Chief Master Marsh concluded that a clause permitting UBS to call in a loan at its absolute discretion was not the sort of discretionary power that Baroness Hale described in Branganza. He noted that the power under consideration is solely for the benefit of the mortgagee. He concluded that no Socimer / Braganza type clause ought to be implied.

177. The Chief Master went on to hold that if he were wrong in his principal conclusion and some fetter ought to be implied it ought to be a limited one requiring good faith prohibiting UBS from calling in the loan for proper purposes and not for the sole purpose of vexing the mortgagor.

178. Finally, and most recently in this run of cases, in Taqa Bratani Limited and Others v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm), it was held that it was in appropriate to imply a Braganza / Socimer term as a fetter on a right of termination in a joint venture agreement. The Defendant ('RRUK') acted as an operator in relation to the extraction of oil and gas from defined areas ('blocks') located in the North Sea as part of a joint venture with the Claimants. The relevant agreement provided that the Claimants could change operators by serving notice and by means of a committee vote. The Claimants exercised both rights. The notice did not terminate the joint venture itself so RRUK remained a participant in the joint venture but ceased to have the status of an operator. RRUK challenged the exercise of the power of termination on the basis that the right to terminate was constrained by a Braganza / Socimer type restriction which ought to be implied into the contract.

179. RRUK's case was rejected by HHJ Pelling QC sitting as a Judge of the High Court. The judge held as follows at [46]:

> *"[W]hilst I accept that the circumstances in which such terms can be implied into commercial agreements is an incrementally developing area of the law, I consider it clear that on the current state of the authorities, the Braganza doctrine has no application to unqualified termination provisions within expertly drawn complex commercial agreements between sophisticated commercial parties such as those in this case. As Mr. Foxton QC submitted on behalf of the claimants, if a right of the sort being exercised by the claimants in this case was to attract a Braganza qualification, then there is almost no contractual provision that would not attract them. That would have profound implications for English commercial and contract law …"*

180. Having reviewed a number of authorities concerned with contractual termination provisions, including Reda v. Flag Limited [2002] UKPC 38, IBRC v. Camden Market Holdings Corp, [2017] 2 All E R (Comm) 781, Lomas v. IFB Firth Rixon [2012] EWCA Civ 419, TSG Building Services Plc v. South Anglia Housing Limited [2013] EWHC 1151 (TCC), the Judge held:

> *" [49] In my judgment these authorities speak with a single voice – where the parties choose to include within their agreement a provision that entitles one or more of the parties to terminate the agreement between them, that clause takes effect in accordance with its terms"*

181. HHJ Pelling QC saw no distinction between a contractual provision which terminates a role carried out by one of the parties from a provision which terminates the relationship as a whole. He held:

> *"Whilst it is true to say that the right to terminate in this case was a right to terminate one party's role as Operator, leaving the agreement in place and RRUK as a participant, RRUK has not demonstrated any principled difference between such a provision and any of the other termination provisions that have been considered over the years. There is no reason to treat a provision which brings the relationship of the parties to an end differently from one that entitles one party to terminate a particular role carried on by one of the parties under the agreement in question, at any rate whereas here the parties are expressly permitted to act on what they perceive to be their own best interests. Even if such a distinction does have a principled basis, in my judgment that does not lead to the conclusion that a term should be implied that qualifies an otherwise unqualified express term in Braganza terms because to imply such a term would be to depart from the cardinal rule that "… if a contract makes express provision ... in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction …"[17] that qualifies what the parties have agreed should be unqualified."*

182. The reasoning of HHJ Pelling is consistent with the earlier decision of David Foxton QC sitting as a Deputy High Court Judge in Monk v Largo [2016] EWHC 1837. In that case under the heading "Termination clauses", the judge said this:

> *"[54.] However, it is not every decision which a party to a contract makes which can properly be characterised as a contractual discretion and to which the principles identified in Socimer and Braganza apply. Where, for example, a commercial contract gives one party a right to terminate in certain circumstances, it will not ordinarily be appropriate to subject the exercise of that right to obligations of procedural or substantive fairness akin to the public law duties which apply to the decisions of the executive. In Lomas & Ors v JFB Firth Rixson [2012] EWCA Civ 419 at [46], the Court of Appeal noted: "the right to terminate is no more an exercise of a discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract"*
>
> *…*
>
> *[57.] Similarly, where a commercial contract gives one party an option to extend the contract, or as to the amount of goods to be supplied or acquired, or as to the ports or berths to or from which cargo is to be shipped, that party will not ordinarily be under any duties of the kind recognised in Braganza in relation to the exercise of that option."*

[17] Nelson v. BBC [1977] IRLR 148 per Roskill LJ (as he then was) at 151 quoted in Reda v. Flag Limited [2002] UKPC 38

183. In light of these case law cited above, in my judgement, it is clear that no Braganza / Socimer ought to be implied into the Agreement as a fetter on the exercise of the Option for the following reasons:

    a. The Option is far closer in nature and type to the sorts of clauses which have been held to be not subject to a Socimer-Braganza type implied term than the sorts of discretionary powers in which this type of restriction has been implied.

    b. The Option is closely analogous to the partial termination clause considered in the Taqa case. Just as in that case, the exercise of the power brings one part of the relationship of the parties to an end (the provision of Flight Hour Services) but the contractual relationship as a whole continues.

    c. The exercise of the Option is not as Chief Master Marsh put it in UBS v Rose is "*the type of decision where one party is given a role in the on-going performance of the contract such as where an assessment has to be made".* In particular it does not involve the assessment by one party of whether a particular state of affairs exists or not as was the case in Braganza ('Was the employee's death the result of suicide), The Product Star ('Was the port too dangerous to approach') and UK Acorn Finance ltd v Markel (UK) Ltd [2020] 922 ('Was the misrepresentation / non-disclosure innocent?')

    d. A power to terminate or withdraw an object from a contract of service is by definition a power inserted for the benefit of the terminator / withdrawing party and at least where it is clearly drafted (as it the Option in this case is), it ought usually take effect in accordance with its express terms

    e. The parties here are both commercial entities aided by lawyers have agreed as part of a sophisticated commercial arrangement that one party should have the benefit of an option and have agreed the financial consequences of the exercise in advance. Applying what I consider to be the main thrust of the judgments in Mid Essex Hospital Services NHS Trust v Compass Group UK Ltd (Trading as Medirest) [2013] EWCA Civ 200, there is no justification in these circumstances for the court to interfere with the nature of the bargain struck by CX and LHT.

    f. The Option also seems to me to be not far removed from the type of commercial option considered in Monk v Largo as being unsuitable suitable for the implication of a Socimer / Braganza type implied term.

No breach

184. If I am wrong and a term is to be implied that the option was not to be exercised in an arbitrary, capricious or irrational manner, I would in any event have held that CX has not acted in breach of such a term for the following reasons:

    a. The decision to withdraw the 4062 Engines was not capricious, unreasonable or arbitrary. In late 2016 as part of a review of its MRO requirements going forward, CX came to a perfectly rational conclusion that as the end of the ten year term of the Agreement approached and a second Shop Visit for the Engines seemed unlikely, keeping them in the Flight Hours Services program was not commercially sensible.

    b. CX shared its view with LHT well before the final decision was made with a view to exploring options such as extending the Agreement.

    c. The parties had already been through the same procedure and reached an agreement that the 4056 engines to be withdrawn from the Flight Hours Service programme and for MRO services to be supplied on a Time and Materials basis via Addendum No. 2 to the 4065 Contract. The suggestion that all the 4062 engines might also be withdrawn before the end of the Agreement cannot therefore have come as a great surprise.

    d. CX's internal discussions of the exercise of the Option showed that it was believed to be nothing more than a straightforward contractual option and a means of making savings in its MRO costs.

    e. CX's purpose in exercising the Option (to make savings) was revealed to and understood by LHT at the time it was exercised.

    f. The fact that CX was in financial difficulty and had not made financial provision for the End of Term Charges does not taint the decision to exercise the option with bad faith. It was just one of the commercial considerations which bore on the decision.

    g. Mr Pratx's e-mail to the engineering department is not evidence of bad faith on the part of CX. The aim of the e-mail was to seek confidential technical advice on the most advantageous order in which to remove engines. It was in French simply because the sender and recipient were French speakers.

Relational contract

185. It is next necessary to consider the defendant's submission that 4062 contract is a relational contract into which a term requiring the parties to deal with each other in good faith ought to be implied.

186. The implied term contended for by LHT is that the Option could only be exercised in good faith. LHT submitted that this meant that it could not be exercised in a way that would be regarded as commercially unacceptable by reasonable and honest people.

187. LHT submitted in summary that:

a. A relational contract is a category of contract recognised by English law: see on Yam Seng Pte v. International Trade Corp [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep 526 and Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent [2018] EWHC 333 (Comm)

b. If a contract is properly regarded as relational, a term requiring the parties to act in good faith will usually (but not automatically) be implied as a matter of law and/or fact.

c. The implication of a good faith implied term is not automatic because the implication is heavily dependant on and sensitive to surrounding context and there may be express terms which exclude the implied term arising or limiting the scope of its application: Yam Seng at [141], [144], [147] and [154].

d. Whether a contract is or is not a relational contract is to be assessed by reference to the indicia set out by Fraser J in Bates v Post Office at [725] – [726].

188. CX submitted in summary that:

a. It is necessary to distinguish between terms implied in fact to give business efficacy to the particular contract in question and those implied as a matter of law into a particular class of contractual relationship such as that between employer and employee: Geys v Societe Generale [2013] 1 AC 523 [55].

b. There is only one case in which it has been suggested that a term of good faith might be implied into a relational contract as a matter of law (Sheikh Tahnoon) but that was not part of the ratio of the case and is questionable.

c. The burden is on LHT to show that a reasonable person reading the Agreement at the time it was made, with knowledge of the circumstances would consider it was obvious that CX was under an obligation to act in good faith or such an obligation is necessary to give coherent business effect to the contract: UTB LLC v Sheffield United [2019] EWHC 2322 (Ch) at [210] and Russell v Cartwright [2020] EWHC 41 (Ch) [87].

d. The Agreement was not a relational contract.

e. It is particularly inappropriate to imply a term of good faith into a termination provision: Taqa Bratani Ltd v Rockrose UKCS8 LLC [2020] EWHC 58 (Comm) [56]

189. As Fancourt J observed in UTB, the law on the subject of relational contracts has evolved rapidly since Yam Seng. I respectfully agree with him that the law has not yet reached a stage of settled clarity.

190. In Yam Seng, Leggatt J (as he then was) implied an obligation of good faith into the distributorship contract as a matter of fact rather than as a matter of law. At para 131, he said this:

> *"Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties."*

191. It is clear from this passage that in implying a duty of good faith, Leggatt J was applying the "established methodology" for the implications of terms in fact.

192. Further on in the judgment at paragraph [142] he referred to a class of contracts where a duty of good faith may be implied in order to "give business efficacy" to the arrangements:

> *" …. many contracts do not fit [the model of simple exchange] and involve a longer term relationship between the parties in which they make a substantial commitment. Such 'relational' contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements."*

193. Five years later in the Sheikh Tahnoon case, Leggatt LJ (as he then was but sitting at first instance) held that an implied term of good faith was to be implied in an oral joint venture agreement relating to the acquisition and operation of hotels. The express terms of the agreement were very limited. The joint venture was intended to be a long-term collaboration, which required co-operation and commitment of both parties. It was based on a personal friendship. The contract was identified as being a relational contract.

194. In paragraph 167, the judge said this:

> *"It does not follow from the conclusion that he did not owe any fiduciary duties to Mr Kent that the Sheikh's entitlement to pursue his own self-interest was untrammelled. I*

> *have previously suggested in [Yam Seng], at para 142, that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long-term basis, in ways which respect the spirit and objectives of their venture which they have not tried to specify, and which it may be impossible to specify, exhaustively, in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith".*

195. Leggatt LJ went on to hold at paragraph 174 that the implication of a term of mutual good faith test satisfied the business necessity test:

> *" In the circumstances the contract made between these parties seems to me to be a classic instance of a relational contract. In my view, the implication of a duty of good faith in the contract is essential to give effect to the parties' reasonable expectations and satisfies the business necessity test which Lord Neuberger in [Marks and Spencer] at paras 16 to 31 reiterated as the relevant standard for the implication of a term into a contract.*

196. In UTB Fancourt J at 201 said this:

> *"The ratio of the decisions in Yam Seng and Sheikh Tahnoon are ones that any first instance judge must follow unless he or she were satisfied that they were wrong. I shall follow them."*

197. I agree but what is the ratio of those two decisions? The answer, it seems to me, is that a term requiring mutual good faith may be implied as a matter of fact if at the time the contract was made, a reasonable reader of it would consider the term to be so obvious as to go without saying or the term is necessary for business efficacy. Strictly speaking, therefore neither case establishes any new principle of law. Both Yam Seng and Sheikh Tahnoon are applications of the general law of implied terms as restated by the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd [2015] UKSC 72; [2016] QB. 742 albeit applied in the particular context of a category of contracts which may be referred to as "relational contracts".

198. In UTB itself Fancourt J went to ask himself the question of whether a reasonable person reading the ISA at the time that it was made, with knowledge of the circumstances in which it is entered into (though not the negotiations of the parties or their drafts and preparatory documents) and the other agreements made as part of the same transaction, would consider that it was obvious that UTB had to act in good faith in all its dealings with SUL, and vice versa, or whether such an obligation is necessary to give coherent business effect to the ISA. He held that it did not.

199. The approach of Fancourt J is also consistent with the two other first instance decisions in Bristol Ground v Intelligent Data Capture [2014] EWHC 2145 (Ch) concerning a quasi joint venture between two individuals and D&G Cars v Essex Police Authority [2015] EWHC 226 (QB). Fancourt J's adoption of the traditional approach has subsequently been followed by Falk J in Russell v Cartwright [2020] EWHC 41 (Ch). At paragraph 87 in her judgment, Falk J says this:

> *"I agree with Fancourt J in UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch) at [196] to [205] that, rather than trying to identify first whether a contract is a "relational contract" and for that reason includes an obligation of good faith, the better starting point for the reasons he gives is the application of the conventional tests for the implication of contractual terms, as authoritatively restated by Lord Neuberger in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2016] AC 742 ("Marks and Spencer") at [16] to [31], that is whether a reasonable reader would consider that an obligation of good faith was obviously meant, or the obligation was essential to the proper working of the contract since it would otherwise lack commercial or practical coherence (the business efficacy test). This was the approach adopted by Leggatt LJ in Al Nehayan when he went on to find in that case, where the parties had not tried to specify the details of their collaboration in a written contract and that collaboration "involved much greater mutual trust than is inherent in an ordinary contractual bargain between shareholders", that the implication of a duty of good faith was essential to give effect to the parties' reasonable expectations, and satisfied the business necessity test (see in particular at [173] and [174]). Leggatt J had also adopted that approach in the earlier case of Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB)."*

200. In Sheikh Tahnoon Leggatt LJ went on to say that he would have reached the same conclusion by another route:

> *"I would also reach the same conclusion by applying the test adumbrated by Lord Wilberforce in Liverpool City Council v Irwin [1976] A.C. 239 at 254 for the implication of a term in law, on the basis that the nature of the contract as a relational contract implicitly requires (in the absence of a contrary indication) treating it as involving an obligation of good faith."*

201. The passage above is clearly obiter but it is equally clear that Leggatt LJ was contemplating that a good faith term may be implied as a matter of law in some relational contracts. I reject CX's submission that this is a questionable proposition of law. Like Fancourt J. it seems to me that the type of contract in which that will be so will be ones in which the parties have not only entered into a long-term collaborative relationship but crucially where they have not specified (or have been unable to specify) in detail the terms governing their relationship – see UTB at [200].

202. By contrast, if contracting parties (in particular sophisticated commercial companies) have reduced the terms of their agreement to well-defined obligations, the contract is not relational in the sense in which Leggatt LJ used the term in Sheikh Tahnoon. The underlying rationale is clear. If the parties have specified with precision what they are obliged to do in particular circumstances, they are not in respect of those matters or circumstances trusting each other to act in good faith. The legitimate expectation that each has of the other is not they will act in good faith that they will do what the contract stipulates they must do.

203. In Bates v Post Office (No. 3) [2019] EWHC 606 (QB) at para 725, Fraser J had to decide (amongst other things) whether a standard contract between the Post Office and its subpostmasters contained any of the 21 implied terms alleged by the claimant subpostmasters. Some of them were very specifically focussed on data and record management but they also included the following more general three good faith terms:

> *"(q) To exercise any contractual or other power, honestly and in good faith for the purpose for which it was conferred.*
> *(r) not to exercise any discretion arbitrarily, capriciously or unreasonably*
> *(s) to exercise any such discretion in accordance with the obligations of good faith, fair dealing, transparency, co-operation and trust and confidence. "*

204. Whether any of these terms was implied was described as Common Issue No. 2. Common Issue 1 was described as follows:

> *"Was the contractual relationship between the Post Office and Subpostmasters a relational contract such that the Post Office was subject to duties of good faith, fair dealing, transparency, co-operation, and trust and confidence (in this regard, the Claimants rely on the judgment of Leggatt J in Yam Seng Pte v International Trade Corp [2013] EWHC 111)?"*

205. Fraser J addressed the relational contract issue in section J of his judgment [702] – [741]. Having surveyed the case law, he said this at [721].

> *"These cases, both appellate and first instance, all demonstrate in my judgment that there is no general duty of good faith in all commercial contracts, but that such a duty could be implied into some contracts, where it was in accordance with the presumed intention of the parties. Whether any contract is relational is heavily dependent upon context, as well as the terms. The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not."*

206. At paragraph 725, Fraser J then continued:

> *"What then, are the specific characteristics that are expected to be present in order to determine whether a contract between commercial parties ought to be considered a relational contract? I consider the following characteristics are relevant as to whether a contract is a relational one or not:*

> *1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.*
> *2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.*
> *3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.*
> *4. The parties will be committed to collaborating with one another in the performance of the contract.*
> *5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.*
> *6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.*
> *7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.*
> *8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.*
> *9. Exclusivity of the relationship may also be present.*
>
> *I hesitate to describe this as an exhaustive list. No single one of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter. However, many of these characteristics will be found to be present where a contract is a relational one. In other cases on entirely different facts, it may be that there are other features which I have not identified above which are relevant to those cases."*

207. Having decided that there were no express terms in the contract which would prevent a duty of good faith being implied, Fraser J conclusion on Issue 1 is recorded at para 738:

> *"In all the circumstances therefore, and in the context of the commercial relationship between each SPM and the Post Office, I find that these were relational contracts. I find that this means the contracts included an implied obligation of good faith. This means that both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith."*

208. Having decided Common Issue 1 in the Claimants' favour, Fraser J went on to consider at [743] the individual implied terms. He held that a number of these, including (q), (r), (s) set out above were to be implied into the Post Office contracts "consequential upon these contracts being found to be relational, namely to include an implied obligation of good faith".

209. He then continued:

> *"However, it would be wrong to conclude that they all are. In my judgment, it is necessary to consider each of them individually to consider firstly, <u>are they simply consequential upon my finding that these are relational contracts</u>; and secondly, if not, are they to be implied terms because they are necessary to give business efficacy to*

the contracts under the first category as set out by Baroness Hale in Geys v Societer General."

210. In paragraph 746, he held:

"*Having considered the different terms in the light of my finding there is an implied obligation of good faith, those that are consequential upon, in my judgment, or incidents of that finding that these are relational contracts are those identified as terms in Common Issue 2 at (i)(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n)(as amended by me), (o)(as amended by me), (p), (q), (r) and (s)."*

211. Finally, Fraser J added that in relation to four of the implied terms (n), (o) ,(q) and (r) he added this:

"In particular in respect of these four, if I am wrong in my finding that these are relational contracts, and/or if I am wrong that these terms are consequential upon that finding, then I find that these four would be implied into the contract in any event, and separately from the issue of relational contracts, as being necessary to give business efficacy to the contracts."

212. In my judgment, there is no getting away from the fact that there is a difference of approach between Fraser J in Bates, on the one hand, and Fancourt J in UTB and Falk J in Russell v Cartwright [2020] EWHC 41 (Ch), on the other.

213. The approach of Fraser J is clear from the structure of his judgment, which was as follows:

a. To ask first whether the contract in question is a 'relational contract'.
b. To answer that question with the assistance of the indicia set out in paragraph 725.
c. To find on the facts that all of the indicia applied and therefore the contract between the Post Office and the Sub-postmasters was a relational contract.
d. To then hold that "as a consequence" of his finding that the contract was relational that the good faith implied terms (q), (r) and (s) were incorporated.
e. To hold that implied term (q) and (r) (but not (s)) would have been implied in any event under the standard Marks & Spencer test

214. The approach of Fancourt J and Falk J is more direct. It involves asking the single question: 'Would a reasonable reader of the contract consider an obligation of good faith to be so obvious as to go without saying or is such an obligation necessary for the proper working of the contract?'

215. There is, however, no need to overstate the difference between the two approaches. They will in many cases lead to the same result. In UTB at paragraph 230, Fancourt J says that the overall character of the contract in issue is highly material in answering the question of whether the term ought to be implied or not. Whether one starts with considering the overall character of the contract first (as Fraser J did in Bates) or does so at a later stage in the analysis not may not ultimately matter very much. To that extent, the difference is one of

emphasis and starting point. Fancourt J also acknowledges that the list of characteristics listed by Fraser J *may* assist in identifying the character of a relational contract.

216. To the extent that there is a difference of emphasis between the two approaches I prefer that of Fancourt J for three reasons:

    a. It seems to me it more closely accords with the ratio of Yam Seng and Sheihk Tahnoon.

    b. It was the approach followed by Falk J in Russell v Cartwright [2020] EWHC 41 (Ch)

    c. It is in accordance with the comment of Beatson LJ (obiter) in Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396 at para [68]: "… as seen from the Carewatch Care Services case, an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."

217. Applications for permission to appeal were made in both UTB and Bates. Both applications contained challenges to the way the issue of relational contracts were dealt with. Both were unsuccessful. It seems to me that there is very little which can be read into this. I have to deal with the judgments as I find them.

218. Whilst the law is clearly still in a state of development, I find that the present state of the law in this area can be summarised as follows:

    a. A term of good faith may be implied in a relational contract as a matter of law under the principles set out by Lord Wilberforce in Liverpool City Council v Irwin subject to any contrary express term – see Sheihk Tahnoon para [174] and UTB [200].

    b. The test for incorporation as a matter of law is whether the contract is a long-term contract which requires the parties to collaborate in future in ways that respects the spirit and the objectives of their joint venture but which the parties have not specified or have been unable to specify in detail. The contract will also involve trust and confidence that each party will act with integrity and co-operatively - Sheihk Tahnoon para [174] and UTB [200].

    c. A good faith term may be implied as a matter of fact in a relational contact but there is not special rule for incorporation in a relational contract. Each term must be considered against the usual test for implied terms - Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396 at para [68].

    d. The main test of whether a term of good faith is to be implied in a contract is whether a reasonable reader of it would consider the term to be so obvious as to go

without saying or the term is necessary for business efficacy - UTB LLC v Sheffield United Ltd [2019] EWHC 2322 (Ch) at [196] to [205]; Russell v Cartwright [2020] EWHC 41 (Ch) Yam Seng Pte v. International Trade Corp [2013] EWHC 111 (QB), all of which applied the test in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2016] AC 742 at [16] to [31]

e. The overall character of the contract is an important consideration. In relation to this question the indicia in paragraph 725 of Bates may be helpful

f. The implication of a good faith term as a matter of fact is possible even in the case of long, complex and sophisticated contracts expressed in writing – see e.g. Bates and Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264.

Implication by law

219. In my judgment, there can be no serious argument that the Agreement meets the test in Sheihk Tahnoon for a good faith term to be implied as a matter of law. The only criteria it satisfies is that of being a long-term contract. The Agreement is plainly not a joint venture where the parties have relied on trust and confidence that they will each further the aims of a common purpose. In clause 29.6 the parties have expressly agreed that their relationship is not to be considered as a relationship of partnership or a joint venture. By doing so they have, in my judgment, sent a clear signal that they do not wish to be taken as relying on trust and confidence in each other to further their aims. Instead the parties have set out the terms of their relationship in detail including the precise scope of the services, the standards expected, as well as extremely detailed formulae for remuneration, including adjustments and reconciliations as the contract progresses.

220. Clause 2.3 of the Agreement required the services to be provided even if CX sub-let the engine or ceased to operate it. Conversely LHT was entitled under Clause 9 to sub-contract out the provision of the services. The focus of the contract was therefore very much on the services to be provided to 27 engines rather than the relationship between LHT and CX. The contract could well have ended up being performed by a sub-contractor of LHT's for the direct benefit of a sub-lessee of all the Engines. It was therefore potentially at least highly impersonal contact. This made it the polar opposite of a relational contract.

221. I therefore have no hesitation in rejecting LHT's case that a good faith term should be implied as a matter of law.

Implication as a matter of fact

222. Following the ratio of UTB, Yam Seng and Sheihk Tahnoon, the question I have to ask myself is whether a reasonable person reading the Agreement at the time it was made, with knowledge of the circumstances in which it was entered into (though not the negotiations of the parties or their drafts and preparatory documents) would consider that it was obvious that CX had to

act in good faith in all its dealings with LHT and vice versa, or whether such an obligation is necessary to give coherent effect or business efficacy to the Agreement.

223. In my view, the answer to that question is clearly 'No' for the following reasons:

a. The Agreement is an extremely detailed document carefully drafted by two commercial parties with the assistance of high calibre commercial law firms. The appropriate inference that a reasonable reader would draw is that the parties have given very careful consideration to all the terms by which they wish to be bound.

b. At its core, the Agreement is a contract for a set of engine maintenance services to be provided by LHT (or sub-contractor) and for CX to pay for those services. There is very little if anything for a good faith obligation on CX's part to bite upon. CX's main obligation was to pay the sums due under the Agreement.

c. The Agreement had elements of collaboration and co-operation. The most obvious examples of this are the production and maintenance of the Joint Procedures Manual, the need to communicate and exchange information with each other and the approved airworthiness authority set out in clause 10. However, that co-operation arises mainly out of the highly regulated nature of the aviation industry and the need to ensure safety of aircraft. The Agreement was however in my judgement not essentially a collaborative venture or akin to a joint venture. A reasonable reader of clause 29.6 would understand that the parties did not wish to be visited with the legal consequences of being joint venturers or partners. In my judgment clause 29.6 is therefore a very strong contra-indication for an implied duty of good faith.

d. The contract works perfectly well without any obligation of good faith. CX was entitled to expect that LHT would provide the agreed services (which are described in great detail) to the agreed standards (set out in clause 7) and LHT reasonably expected CX to comply with its obligations, in particular to pay sums due as defined in great detail in the contract on the stipulated dates and subject to the agreed adjustments.

e. The parties agreed in advance the circumstances in which sums due for services would and would not be adjusted (clause 5) where engine use departed from what was envisaged at the outset. The risks and rewards under the Contract were carefully balanced in detailed formula and matrices by the parties. The implication of a general good faith term would potentially replace the certainty chosen by the parties with uncertainty.

f. The Agreement was to a large degree an impersonal one which was not dependant on the good faith of the contracting parties or their employees. All that really mattered was that the stipulated maintenance work was carried out to the engines to the standards defined in clause 7.1.

g. An engine maintenance contract as a genus of contact is not an obvious candidate for the implication of a good faith obligation. Whether an engine is installed in a plane, car, ship or factory, a contract for the provision of maintenance services in respect of that engine is a standard commercial contract. It would usually be categorised as a contract for services (assuming the service provider and the service receiver are not in an employer / employee relationship). This type of contract might have implied into it a term to regulate the quality of the services to be provided and a right to receive reasonable remuneration in return but it is hard to see why good faith should enter the picture at all. There would have to be something special about the nature of the service or about the contracting parties for good faith even to enter the mind of the putative reasonable reader of the contract as a candidate to be implied.

h. If a good faith obligation were to be implied into the Agreement, it is hard to see why it would not be implied in every maintenance contract. There is no more reason to imply an obligation of good faith in this type of contact than into a wet lease for an aircraft described by Blair J in National Private Air Transport Services Co. v Creditrade LLP [2016] EWHC 2144 (Comm) as a "conventional contract" in which the parties' relationship is "legislated for in the express terms of the contract" (see Yam Seng at [143]).

i. Where the parties needed a good faith obligation for a specific area of co-operation they made express provision for it. Clause 6.3 of Amendment no. 2 to the 4056 Contract provides "The Parties agree to work together in good faith to put together a mutually agreed procedure for implementing Fixed Price Services and Time and Material Services". It is noteworthy that the parties should turn to good faith where they had not made detailed express provision.

224. In these circumstances, applying the test which I have held I am required to apply, I do not accept that a mutual obligation of good faith is obviously what the parties to the Agreement intended or that such a term is necessary to give business efficacy to the Agreement.

225. If I were to approach the question in the way that Fraser J approached it, which is how LHT approached the question in their closings, by considering the indicia of a relational contract I would reach the same conclusion. Taking each of the indicia in turn:

(i) No express terms that prevent a duty of good faith being implied.

226. It would appear to have been listed first by Fraser J because it is the only determinative factor. An express term which ruled out good faith specifically that would be the end of the matter regardless of whether or not the contract is otherwise relational. In this case there is no such term but as I have held clause 29.6 is a strong contra-indication that the Agreement should be considered a relational contract.

(ii) The contract will be a long-term one

227. This is clearly satisfied. A ten-year agreement is plainly a long-term contract.

(iii) The Parties intend that their roles be performed with integrity, and fidelity to their bargain

228. In their evidence Mr Weynell and Mr Janke said that they placed trust placed in CX and said that they considered reciprocal. In cross-examination Mr Weynell was emphatic that the nature of the parties' relationship went far beyond that of service provider and customer. I do not doubt that Mr Weynell considered that the relationship between CX and LHT was *"something special"* and that it was characterised by unusual transparency and openness. CX's witnesses also accepted that the relationship between the two parties was good. The contemporaneous documents, in particular the Powerpoint presentations which often seemed to form the basis of their meetings showed a great degree of openness. However, I am not persuaded that the relationship was anything other than evidence of a good working commercial relationship in a sector where it is not unusual for suppliers and airlines to work closely and to be transparent about profit and losses.

229. LHT relies on the agreement of Amendment No.1 to the Agreement and the 4056 Contract as an example of the parties acting together to find a mutually acceptable solution to try and stem LHT's ongoing losses under the agreements. However, it seems to me that the fact that that parties adjusted and redefined the contractual terms tend to emphasise that it was the commercial terms and not trust and confidence which defined their mutual expectations. The same applies to the reconciliation process in Schedule 4. I agree with LHT that the aim of the reconciliation process is to seek to preserve the economic balance between the parties based on the actual performance over a long-term agreement. However, I disagree with the submission that this is exactly the sort of provision that manifest an intention that the parties' roles be performed with integrity and fidelity to their bargain. It seems to me the very opposite is the case. In setting out clearly and comprehensively the limits of financial adjustments in response to real world performance demonstrates that the parties looked to the terms of their greement to define what they reasonably expected of each other.

(iv) Parties committed to collaborating in the performance of the contract

230. I accept LHT's submission that the 4062 Contract envisaged a very substantial degree of collaboration, cooperation and communication and that this was envisaged at the time of the agreements. The degree of co-operation was made clear in March 2005 when CX sent the first Request for Proposals. CX said that it expected that the parties would *"fully co-operate in the development of the Workscopes",* and that the successful bidder *"work jointly with [CX] to lower maintenance cost and the cost of ownership during the contract period"* and provide details of its *"continuous improvement activities or program".* The prime example of this is the Joint Procedures Manual. Whilst I am prepared to accept that there was a significant degree of collaboration, co-operation and constant communication between the parties, this was largely the result of the fact that the parties are operation in highly regulated environment in which safety is paramount rather than signifying something about the nature of their relationship.

(v) The spirit and objectives of the venture may not be capable of being expressed exhaustively in a written contract

231. This requirement is in my judgement plainly not satisfied. The parties fully expressed the spirit and objective of their venture in the following three short recitals to the Agreement:

> *(A) "Whereas LHT is an organization in the business of providing aircraft related technical Services such as but not limited to the maintenance of Aircraft, Engines and Components and is duly authorized and certified in accordance with the Joint Aviation requirements EASA Part 22 and EASA Part 145 …*
>
> *(B) Whereas LHT is willing to perform such Services for the benefit of CX in accordance with any prevailing Approve Airworthiness Authority requirements and LHT's quality standards and experience; and*
>
> *(C) Whereas CX wishes to have certain Engine related Services performed by LHT in accordance with such requirements, standards and experience,*
>
> *ITS IS AGREED AS FOLLOWS"*

(vi) Parties each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships

232. Mr Weynell and Mr Janke both gave evidence of their trust and confidence in CX. Mr Weynell said he would be prepared to do hand shake deals with CX. Mr Teague's evidence by contrast was that the relationship was good but nothing other than a commercial one. I found LHT's evidence of trust and confidence somewhat strained and self-serving. The parties were no doubt open and frank with each other. I have no doubt that in the broadest of senses they trusted each other and had confidence in each other but this is not what this factor is seeking to identify. The question must be whether the parties reposed trust and confidence in another in a way that went beyond what would normally expect in any commercial relationship. In other words, the question is whether the relationship was like a fiduciary relationship in terms of its closeness but unlike it only in that the dependence mutual rather than one way. In my view, the relationship between LHT and CX was nothing more than a good or possibly very good working commercial relationship.

(vii) The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty

233. This indicium seems to me to be superfluous. I don't see what it adds to indicia (iv) and (vi) taken together. For reasons already set out above, although there was a high degree of communication and co-operation between the parties as well as predictable performance, this was not based on mutual trust and confidence. It was based on an expectation that both parties would comply with the commercial terms of the contract, nothing more and nothing less. This indicium is also potentially slightly misleading in that in Yam Seng when performance

based on mutual trust and confidence is being referred to it carries an important proviso. The passage reads:

> "*Such 'relational contracts … may require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract …"*

It is therefore essential to point to trust and confidence going beyond those matters which the parties have legislated for themselves in the contract. LHT failed to point to any such trust and confidence.

(viii) There may be a degree of significant investment by one party (or both) in the venture.

234. LHT submits that it made a significant investment in order to provide the Flight Hour Services to CX. LHT points to its *"24 hours a day, 7 days a week Trend Monitoring, Data Analysis, and Engineering support",* which included (but was not limited to) providing constant engineering support and posting personnel to Hong Kong for the specific purposes of the contract. LHT referred to the list of services in Schedule 3. These it was submitted were undertaken because of the long-term, exclusive nature of the Agreement. I disagree, the services were undertaken because they were part and parcel of the engine maintenance contract. LHT charged for the service because it included with the calculation for Flight Hours Charges Hourly rate paid not only on Shop Visits but at the end of the Term. These services were no more of an investment than any other part the service LHT was contractually obliged to provide.

235. LHT also points to deferred payment structure and to the fact that in creating a net present value saving for CX, it created an equal net present value loss for LHT. LHT submits that forgoing those funds by deferral is an 'investment' within the meaning of this indicium. LHT also relied on the purchase of APU Kit to be installed to and remain with the Engines pursuant to Amendment 1 as an investment on LHT's part. I accept that these are investments but the deferred payment structure, which was LHT's proposal, was a commercial enticement to CX to appoint it as its MRO service provider. It was in substance little more than limited version of giving credit. That does not strike me as a strong indicator of a relational contract.

(ix) Exclusivity of the relationship.

236. The CX-LHT relationship was clearly exclusive.

237. Standing back and considering the matter in the round, I am quite satisfied that the Agreement is not a relational contact by reference to the Bates indicia. Whilst it has some of the elements which are found in relational contracts, in particular exclusivity, co-operation and long duration, they are in my submission insufficient to warrant regarding the Agreement as a relational contract. In my view, the core indicia are (v) and (vi) and these are not satisfied in this case. In so far as the others are present, they are present because the Agreement is a commercial contract for services in a highly regulated market. The relationship between the parties in this case is in my judgment an ordinary contractual relationship for commercial

services and very far removed from the types of case in which an implied term of good faith has been held to exist.

238. Even if that were wrong, and CX and LHT did owe it each other an obligation to act in good faith while performing their respective primary obligations under the contract, I do not believe that it would apply to the exercise by CX of the Option. In UTB (at [214]) Fancourt J considered that the exercise of the right to serve a Roulette Notice would not be constrained by a good faith requirement even if there were a general term to this effect implied into the contract as a whole. HHJ Pelling QC in Taqa held the same in relation to a termination of operating agreement.

239. I think the reasoning in those two cases applies equally here. When the Option is exercised the parties' interests are necessarily in conflict. It is one thing to imply a general term of good faith covering the provision of service or an exchange of information but quite another to say that at the moment an option is exercised the party exercising that option must act fairly towards the other. The essence of the Option is that CX is withdrawing engines from the Flight Hours Service programme and terminating that part of the contract. In deciding whether and when to do so it is necessarily, it seems to me, is entitled to focus on its own commercial interests and put them before those of LHT.

240. The conflict of interest is not as acute as in the case of the Roulette Notice in UTB not least because there was no difficulty with CX giving LHT notice of its intention to exercise the Option. However, if as I have held, the Option is intended to be an option for CX's benefit with a pre-determined agreed financial reconciliation, it seems incongruous for there to be an implied term requiring CX to have regard to the interests of LHT or the impact on LHT more generally of the exercise of the Option. It seems wholly artificial for CX to have been required to ask itself, 'if we exercise this option, will be acting in breach of contract'. Another way of putting it is that given that the parties have legislated for the Option and its consequences by an express term, it is impermissible for the court to imply a term to qualify it – see Taqa at [56]. It may be that impermissible is putting it to high. I would prefer to say that this part of contract works perfectly well without the suggested implied term and that a reasonable reader of it would not say that it was obvious that the parties were agreeing to it being qualified by a good faith qualification. If anything, the opposite is true.

241. In summary then, LHT's case on implying a term of good faith fails both on the general ground that the Agreement is not in my judgment a relational contract and on the specific ground that even if it were, the Option ought to be qualified by such an implied term.

No breach

242. If I had been persuaded that a good faith term ought to be implied, I was not persuaded that it was breached largely for the reasons set out in paragraph 184. It seems to me that CX acted at all times in good faith. They believed that had the benefit of a unilateral option to remove Engines from the Flight Hours Services programme and that the Option could be exercised for

commercial and not just operational reasons. CX exercised the Option because, contrary to the expectation at the outset of the Agreement, the Engines were not going to need a second scheduled Shop Visit during the 10 year term. There was nothing underhand about CX deciding to move the Engines out of the Flight Hours Service Programme in these circumstances. CX was open about its reasons for exercising the Option and gave LHT plenty of notice of its intentions and even offered to extend the Agreement so that LHT would perform the second shop visit.

Failure to comply with Clause 21.2 as amended

243. This issue is one of fact. The question is whether was given a reasonable opportunity to present commercial proposals to prevent the removal of APU engines. In my judgment they were. By the time CX began to consider the option to remove engines from the Flight Hours Service Programme in late 2016, all but one of the engines had become an APU Engine. LHT was informally informed of CX's intention in to remove Engines on 25 April 2017. This was followed up by a formal notification of the intention to remove most if not all the Engines at the meeting on 3 August 2017. LHT clearly gave the matter serous consideration before replying on 20 November 2017. It was clear that LHT fully understood what CX was planning to do and why. Furthermore, the senior management at LHT met in December 2017 to discuss the possibility of extending the Agreement as proposed by CX. The fact that CX was able to make a commercial proposal which would avoid the removal of the APU engines and the one non-APU engine demonstrates that there was plenty of time for LHT to make a commercial proposal of its own or indeed a counterproposal.

244. I reject LHT's submission that it was not able to make any commercial proposals until they received the formal removal schedule with precise dates and times. LHT was not able to identify a commercial proposal which it was precluded from making until the schedule was delivered but I in any event reject this argument as wholly artificial and uncommercial. The clause was aimed at giving LHT a reasonable opportunity to put commercial proposals to CX to incentivise CX to change its mind about exercising the Option. That did not depend on either side having a precise date and time for removal. In the event LHT did not make any proposals for CX to consider. There was therefore no breach of the condition.

245. I reject the suggestion that CX was simply going through the motions when it repeatedly said in correspondence that it would consider any proposals LHT might make. On the contrary, the internal documents produced by CX show that CX itself favoured a commercial solution.

The Second Reconciliation Charge

246. There are two issues to be determined:

    a. Is the amount of the Second Reconciliation Charge affected by whether CX validly exercised the Option?

b. Are the hours flown by engines ESN P717549 and ESN P727837 to be included in the calculation?

The First issue

247. On the first issue, LHT submits that the calculation of the Second Reconciliation Charge is affected by whether CX validly exercised the Option. CX disputes this. LHT submits that if CX has validly removed the Engines then those Engines' Flight Hours should not be credited to CX both under Schedule 13 and under Schedule 4 when determining the First and Second Reconciliation Charge. LHT submits that then the very same Flight Hours should not be credited to CX twice.

248. CX submits that the calculations under Part 3 of Schedule 4 and on the one hand and Schedule 13 on the other are independent and distinct from each other. The fact that the formula for the two calculations both use the Flight Hours is neither here nor there.

249. I prefer CX's interpretation. There is nothing in the Agreement to suggest that the calculation under Part 3 of Schedule 4 and Schedule 13 are anything other than entirely separate and independent. They are triggered by different events and are calculated by different formulae. The Contract contains no hint that if a reconciliation under Schedule 13 has been calculated the Flight Hours figure in the second reconciliation charge should be adjusted in some way. There is in my judgement no basis for importing into the Agreement a principle of double recovery and in any event it is incorrect to speak of Flight Hours being credited to CX in either calculation. The Flight Hours flown by each engine is just neutral input for both calculations. Whether the outcome of either or both calculations leads to a credit for CX will depend on a number of factors.

250. Therefore, the calculation of the Second Reconciliation Charge is not affected by whether CX validly exercised the Option and the First Reconciliation Charge does not need to be recalculated.

The second issue

251. The second issue arises because the parties have used different figures in their respective calculations of the 'Actual Severity Factor'. LHT uses 0.9366 and CX uses 0.8997. This stems from a dispute over 'Actual Average Utilisation' from which the 'Actual Severity Factor' is derived.

252. LHT has calculated utilisation using the total number of hours flown by the 27 Engines within the scope of the Agreement. LHT contends that the operation of engines ESN P717549 and ESN P727837 (the "**temporary Engines**") must be excluded from the calculation of the Actual Average Utilisation because they were initially part of the PW4056-3 fleet and were operated in the PW4062A fleet only temporarily whilst two of the 4062 Engines underwent their first shop visit.

253. CX on the other hand submits that the temporary Engines must be included in the calculation because they were used on the Aircraft and Schedule 4 is based on hours flown by the Aircraft and the Fleet. CX points in particular to the following clauses (with CX's added emphasis):

    a. Clause 4(a)(iii) of Part 3 of Schedule 4 which provides: "The Actual Average Utilisation shall be derived by calculating the average annual Utilisation for each Aircraft and then calculating a fleet average to the nearest 50 hours for the Relevant Period (the "Actual Average Utilisation")"; and

    b. Clause 4(b)(3) of Part 3 of Schedule 4 provides: 'For the purpose of determining the "actual" figures specified above … The actual average Utilisation shall be calculated as an average for the Fleet subject to the Services for each Reconciliation Period"

254. 'Aircraft' and 'Fleet' are both defined by reference to "CX Freighter Aircraft". However, as LHT points out, "CX Freighter Aircraft" is defined as being the Boeing 747-400 freighter aircraft powered by the PW4062A engines (which were supposed to be listed in Part 1A of Schedule 1). LHT therefore submits that the definition of Aircraft and Fleet cannot be separated from the 4062 Engines (at least for the purposes of calculating the Reconciliation charges).

255. Whilst a literal interpretation of clause 4 of Part 3 of Schedule 4 might suggest that all that it is necessary is to count the hours flown by the Aircraft/Fleet for the purposes of calculating the reconciliation charge, I do not consider that it was ever contemplated that any engines temporarily used on the Aircraft were to count.

256. The purpose of the reconciliation exercise was to make an adjustment for the difference between actual engine use and assumed engine use (as defined in clause 1 of part 3 of Schedule 4). This mattered commercially because: "Deviation from the assumptions will affect the nature and frequency of the Flight Hours Services which are required to be performed upon the Engines, and therefore the Restored Flight Hours Charges that LHT would have offered CX if LHT had been able to predict operation of the Fleet". It was accepted by Mr Pratx in cross examination that ESN P717549 and ESN P727837 were never added to the Agreement

and that no Restored Flight Hour Charges were ever made in respect of them under the Agreement. The use of these two temporary Engines therefore could never affect the Flight Hours Charges that LHT would have otherwise offered. It seems to me that the better and more commercial interpretation of Part 3 of Schedule 4 is that the Reconciliation Charges for the 4062 Engines should be calculated by reference to the hours flown by those engines alone and not by reference to any temporary use made of other (potentially older) engines brought in temporarily from other fleets.

257. I also reject CX's alternative argument that ESN P717549 and ESN P727837 fell within the definition of Spare Engines as defined in the Agreement. The Engines falling within the Agreement were the 27 Powerplants listed in Schedule A to the Particulars of Claim. These comprise the 24 installed Engines and three Spares Engines. The Agreement provided for the possibility that a powerplant might be "acquired" to replace any of these 27 engines and thereby become an Engine under the Agreement but that is in my judgment quite different to a temporary borrowing of an engine from another fleet.

258. Accordingly, I accept LHT's submissions in respect of the correct way to calculate the Actual Severity Factor and it follows that for the purpose of the Second Reconciliation Charge:

    a. The Total Engine Flight Hours are: 386,779

    b. The Actual Average Utilisation (to the nearest 50 hours) is: 3,150

    c. The Actual Severity Factor is: 0.9366 (to four decimal places).

Conclusions

259. In summary, my conclusions on the agreed issues for trial are as follows:

Issue No.	Issue	Answer
1	Did the parties in entering into the Agreement and Amendment No. 1 have or form any mutual understanding as to the purpose and/or effect of clause 21.2 of the Agreement? If so, what was the content of any such mutual understanding?	No. The parties mutual understanding was expressed by them in the words in clause 21.2. The entire agreement clause, clause 29.8 prevents the court from having recourse to any alleged prior oral understanding in any event
2	In particular, when entering into the Agreement and Amendment No. 1, was it the parties'	No.

	mutual understanding that clause 21.2 was to be exercised for operational reasons only: i.e., for phase-out of leased aircraft, retirement of CX owned aircraft or other operational reasons?	
3	Did the Agreement envisage, and did its performance entail, any substantial and 0n-going communication and collaboration between the parties? If so, what was the nature and extent of such communication and collaboration?	Yes. The Agreement envisaged a great deal of communication and co-operation in particular on the matters set out in paragraph 10 and Schedule 10 (the Joint Procedures Manual).
4	Could the operation of clause 21.2 of the Agreement affect any rights and obligations of LHT under the Agreement?	Yes. It triggered the right to a reconciliation under Schedule 13.
5	On its true construction, alternatively as a result of the implication of any term, does clause 21.2 of the Agreement entitle CX to exercise its rights thereunder at its unfettered option, or: a. Only for operational reasons; and/or b. Only in a manner that is not arbitrary, capricious or unreasonable; and/or c. Only in good faith (in the sense that it could not be exercised in a way that would be regarded as commercially unacceptable by reasonable and honest people)?	a. No b. No c. No
6	Regarding the calculation of the second Reconciliation Charge (without prejudice to the validity of CX's purported exercise of clause 21.2 of the Agreement) (as to which, see below): a. Are the Total Engine Flight Hours 396,865 or 386,779; b. Was the Actual Average Utilisation (to the nearest 50 hours) 3,250 or 3,170; and c. Was the Actual Severity Factor (to four decimal places) 0.8997 or	a. 386,779 b. 3,150 c. 0.9366

	0.9366?	
7	If CX validly removed the Engines from the Flight Hour Services pursuant to clause 21.2 of the Agreement (as to which, see below), in calculating the second Reconciliation Charge: a. Was the amount to be paid by LHT to CX pursuant to the second Reconciliation Charge US$4,200,210.95 or US$467,677.45 (or some other sum); and b. Would the first Reconciliation Charge need to be recalculated, so that the amount to be paid by CX to LHT was US$38,080.83 (or some other sum)?	a. US$2,654,968.83 b. No
8	If CX did not validly remove the Engines from the Flight Hour Services pursuant to clause 21.2 of the Agreement (as to which, see below): a. Was the amount to be paid by LHT to CX pursuant to the second Reconciliation Charge US$2,654,968.83 (or some other sum)?	Does not arise
9	Did CX validly exercise clause 21.2 of the Agreement? Or by purporting to exercise clause 21.2 of the Agreement in the manner and time in which it did, did CX breach the Agreement? In this respect: a. Did CX allow LHT a reasonable opportunity to present commercial proposals to prevent the removal of APU Engines and remain ready, willing and able to give reasonable consideration to any such proposals? b. Did CX act otherwise than for an operational purpose and so contrary to the restriction under 5(a) above (in the event such a	Yes a. Yes. CX did give LHT a reasonable opportunity to present commercial proposals to prevent the removal of APU Engines and remained ready, willing and able to give reasonable consideration to any such proposals b. CX acted for commercial reasons which was permitted by the Agreement.

	restriction exists)? c. Did CX act in a manner that was arbitrary, capricious or unreasonable and so contrary to the restriction under 5(b) above (in the event such a restriction exists)? d. Otherwise than in good faith (in the sense set out at 5(c) above) and so contrary to the restriction under 5(c) above (in the event such a restriction exists)?	c. No d. No
10	Is CX entitled to set off against the sum of US$35,815,325.17 which CX accepts that it owes to LHT as End of Term Charges the sum of US$42,854,896.44, plus interest (or some other sum)?	Yes. Pursuant to clause 29.11

Disposal

260. The claim succeeds in the sum of US$9,694,540.10 plus interest. The counterclaim is dismissed.