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Claim No: HT-2021-000495

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT

QUEEN'S BENCH DIVISION

Date: 26 May 2022

B e f o r e :

MR JUSTICE WAKSMAN

QATAR AIRWAYS GROUP Q.C.S.C.

Cl

- and -

AIRBUS S.A.S.

Def

Akhil Shah QC and Harrison Denner (instructed by Crowell and Moring LLP, Solicitors) for the Claimant

Rosalind Phelps QC and Samuel Ritchie (instructed by Clifford Chance LLP, Solicitors)

for the Defendant

JUDGMENT

Hearing date: 26 April 2022

INTRODUCTION

1.
On 26 April 2022, I handed down judgment on an injunction application made by the claimant in this action, Qatar Airways Group Q.C.S.C. ("Qatar") against the defendant, Airbus S.A.S. ("Airbus"). That application, which I dismissed, was made in what I called the A321 Proceedings which are separate from the instant proceedings ("the A350 Proceedings") but both proceedings are related. They are both being managed together and will be tried together. For present purposes, I proceed on the basis that the draft Amended Defence and Counterclaim and the draft Amended Particulars of Claim in the A350 Proceedings (the former preceding the latter) are both operative.

2.
The general background to the present disputes between the parties are set out in my earlier judgment and I do not intend to repeat it here. I will use, as appropriate, the definitions contained in that judgment.

3.
The applications now before me were heard immediately following delivery of my earlier judgment. The first application is for a trial of a preliminary issue referring to the agreement made between the parties on 31 December 2020 which I described in my earlier judgment as "the SCL". The second is for injunctive relief relating to A350 aircraft which Airbus has already sought to tender for delivery to

Qatar, but which were not accepted by it, or further A350 aircraft, delivery of which Airbus may seek to tender hereafter. Before going into more detail about those applications I should first set out some further background matters in relation to the dispute about the A350 aircraft.

Further background

The Condition - the Present Position

4.
It seems hard to dispute that, irrespective of any contractual or airworthiness implications, it would be unusual and unexpected for an aircraft only 3 or 4 years old to exhibit peeling and/or degradation of its paintwork and/or outward surfaces. These are the manifestations of what the parties have referred to as the Condition affecting the relevant Qatar A350 aircraft, and which are shown in the numerous photographs to which I have been referred.

5.
Further, it is not suggested that these problems are one-off, confined only to the aircraft already delivered to Qatar or further aircraft the subject of the A350 Agreement. Indeed, Airbus's own positive case, as pleaded in its Defence, is that the Condition is effectively bound to occur at some point in the lifetime of an A350 aircraft because it results from a different coefficient of expansion as between the composite fibre reinforced polymer ("CFRP") of which the airframe is made, and the expanded copper foil layer ("the ECF") which is bonded to, or cured onto it. The reason for the presence of the ECF is to act as a lightning conductor which prevents serious damage to the aircraft in the event of a direct lightning strike which is said to happen, on average, once a year to passenger aircraft in regular service. What this difference in the coefficient of expansion means is that these two sets of material expand and contract at different rates and at least in the form present on the A350, leads over time to (at least) the cracking of the layers of paint above.

6.
Airbus's present position is that in respect of the A350s already delivered to Qatar and perhaps future A350s whose assembly has not yet been completed, there is no simple fix to the problem. The only thing that can be done is to apply patches to all affected areas (principally the fuselage) which could be as many as 900. That was the figure quoted by Airbus in respect of the aircraft where repainting work was done at Shannon Airport. Patching for other aircraft may not be quite as extensive but on any view it would seem to be considerable. The word "patch" is appropriate here. It deals with the symptoms of the Condition, not the Condition itself. The Condition itself cannot be rectified by, for example, applying some yet further coating, with or without the paintwork being removed. Nor can it be achieved by removing the ECF (which is very difficult anyway since it is cured onto the CFRP) and applying a replacement ECF. In any event, unless the new ECF differed in its composition or design from its predecessor, the Condition would be likely to emerge again, in time. The same appears to be the position if there was a simple repainting of the aircraft.

7.
It follows as a matter of logic that the Condition has resulted from the design of the aircraft so far as the relevant materials are concerned. There are only two possibilities. Either the use of this relatively new form of airframe made of CFRP (instead of a metal like aluminium), combined with any kind of ECF, will inevitably cause the Condition or something like it. Or it is in fact possible to design and manufacture the relevant materials, staying faithful to the use of CFRP, but in a way which avoids the Condition arising in the first place.

8.
The former possibility seems unlikely. That is at least because the Boeing 787 Dreamliner is also made of CFRP and yet such aircraft (which first entered service in 2011) seem not to have exhibited the Condition. This was a point made in submissions by Qatar. For its part, Airbus adduced no evidence to suggest that the 787 had manifested the Condition. However, in the course of argument at the hearing and on instructions, Ms Phelps QC for Airbus said that it was wrong to say that the 787 aircraft had not manifested the Condition. She invited me to make an appropriate Google search where this would be revealed. I took up that invitation. I did not find any examples of 787 aircraft said to manifest the Condition. I did find information about some of Air New Zealand's 787 aircraft (reported in Business Desk). It referred to peeling on their wings (not fuselage) apparently caused by UV light (rather than a difference in the thermal expansion coefficients of the underlying CFRP airframe and the ECF). I then saw that on 6 April 2020 the US F.A.A. published a safety notice stating the following:

"**Background**: The Boeing Company reported to the Federal Aviation Administration (FAA) that certain Boeing model 787 airplanes are prone to paint adhesion failures due to Ultra Violet (UV) ray damage. Eleven in service Boeing 787 operators have reported vacuum-type fall-arrest protection systems failing due to the paint lifting off and away from the surface of the upper wing skin.

Discussion: Boeing attributed the paint peeling to Ultra Violet (UV) ray damage between the primer and the resin layers on the upper wing. In many cases, the paint peeling became apparent when the vacuum-type fallarrest protection system was attached to the airplane surface and became detached when the paint lifted away from the surface of the plane, disabling its ability to provide fall protection for personnel, resulting in possible injury. The current Boeing 787 Aircraft Maintenance Manual… provides instructions for using and attaching vacuum-type fall-arrest protection system attachment points on the upper wing surface. However, when paint and resin primers have been affected by UV rays, cohesion is weakened, increasing the probability of vacuum-type suction cups coming loose, and peeling the paint off the wings. Paint adhesion failures on the upper wing surfaces could result in the failure of the vacuum-type attachment fall-arrest systems, leading to the potential for serious injury to personnel.

Recommended Action: All operators and repair facilities should review their fall protection procedures. If they allow suction grip type units to be attached to the B-787 upper wing surfaces, they should stop such actions or procedures. Additionally, if they are following the instructions in the Boeing 787 Aircraft Maintenance Manual…, for repair or any other approved safety fall protection procedures, they stop such actions. Utilization of Vacuum-Type Fall-Arrest Protection Systems should be stopped until further subsequent information is published by the FAA or Boeing…"

9.
That rather suggests a different kind of problem and further, it is reported that Boeing is addressing it by having committed to repaint the affected aircraft by May 2022 as a permanent solution.

10.
So one turns to the other possibility, namely that, since the use of CFRP and an ECF will not inevitably lead to the emergence of the Condition, it can, or likely can in truth be avoided if a different design and/or manufacturing process is adopted. Airbus has not stated positively whether this is something that it is looking into. All it has said, at paragraph 7.2 of its Amended Defence, is that:

"As part of its continuous improvement approach, Airbus has investigated and continues to investigate how the effects of the matters which gave rise to the Condition… might be addressed or mitigated.

However, as set out above, it is inevitable that the paint on any aircraft will degrade or become damaged over time.…"

11.
However, I do not doubt for one moment that, as one of the world's leading aircraft manufacturers, acting responsibly and indeed in its own commercial interests, Airbus is and has been for some time investigating as a matter of urgency how the Condition could be avoided at least for aircraft whose manufacture has not yet begun.

12.
The fact that other airlines have taken delivery of A350 aircraft (which, unless constructed differently will have the same latent Condition) is neither here nor there for present purposes. We are not privy to what particular arrangements may have been made with other airlines (at least some of which, for example Finnair and Cathay Pacific, have expressed concerns) in respect of the manifestation of the Condition.

13.
This is, as far as I can discern, the present state of play as to the Condition. I emphasise that I am dealing here only with the facts and not the question of the implication of those facts for the allegations of breach of contract or otherwise under the A350 Agreement or of the SCL.

The SCL

14.
I should say something more about the SCL since its existence and alleged breach thereof by Airbus is the foundation for the Preliminary Issue Application. Paragraph 2 thereof sets out the detail of the Condition dividing it into 7 of the 8 separate parts. Airbus committed to provide by no later than 31 July, 2021 a "full root cause analysis" ("RCA") of each of the sub- Conditions, as it were, and for some of them, by an earlier date. Paragraph 3.2 deals with AOG Compensation. It provides as follows:

"An "AOG" means (i) and Aircraft being grounded on an unscheduled basis for 12 hours or more, as a result of the Condition,… For each AOG of an Aircraft, the Seller will pay the Buyer an amount of $175,000 per each day, or part thereof the aircraft is AOG.… For the avoidance of doubt in the event all the Aircraft in the Buyer's fleet grounded due to the Condition, then the above compensations shall apply as long as the AOG of such Aircraft continues."

15.
Qatar contends that Airbus is in continuing breach of the SCL in two respects. First, it failed to provide an RCA, whether by 31 July 2021 or at all. For its part, Airbus denies this breach and contends that it has provided a series of documents which amount to an RCA. Second, it is said that Airbus now owes (as at 30 March 2022) a total of US$1.08bn to Qatar by way of AOG Compensation given that there are 23 of Qatar's A350s which have been grounded for a considerable period which grounding is continuing. See paragraphs 30-38 of the Amended Particulars of Claim. For its part, Airbus denies any such breach contending that "serviceability" in this context equates to airworthiness and the fact is that, despite the Condition, the A350s remain airworthy.

Airworthiness

16.
On any view, the question of how, if at all, the Condition affects the airworthiness of the A350s in question is critical. It may affect the question of breach of the A350 Agreement and, if Airbus is

correct in its interpretation of the SCL, it directly affects whether the AOG Compensation claimed is payable.

17.
Here, one has the most unfortunate situation of the EASA (European Union Aviation Safety Agency) taking the view that there are presently no airworthiness implications (although it appears that it expects updates from Airbus on its investigations into the Condition), while the Qatar Civil Aviation Authority ("QCAA") considers that there are. Or at least there might be, and that is sufficient for it to ground Qatar's A350s. On Airbus's case, there is no rational basis for the QCAA to have grounded these aircraft. It seems to me that the QCAA should be capable of being persuaded to change its position, provided that Airbus, as the manufacturer, can demonstrate (as it contends it can) with all the information and expertise at its disposal, that in truth there are no airworthiness concerns. So persuading the QCAA must be in Airbus's general interests. It is, of course, also in Qatar's commercial interests, since it says that what it seeks, above all else, is to get its grounded A350s back in the air. Indeed, that was one of the hoped-for results of the proposed Preliminary Issue Trial which it has proposed. Airbus does not accept that Qatar really does seek that, but this does not matter for present purposes.

18.
When I asked why there had not been detailed and intensive contact between Airbus and the QCAA to date, I was told first by Airbus that this is essentially a regulatory matter between Qatar and the QCAA and it was not for Airbus to intervene. That does not seem a very sensible or proactive approach. I was then told that Airbus had asked to join with Qatar in dealing with the QCAA at the outset but Qatar did not invite it to participate. If that is true, that is not a very sensible approach either. Whatever else happens in this case, I now expect Qatar and Airbus to work proactively together to try and satisfy the QCAA that its current approach is wrong. The fact that, if the QCAA is prepared to change its approach, this might adversely affect Qatar's position in the litigation, in that the aircraft, whatever other faults they may have, might not now be regarded as unairworthy, is irrelevant. Moreover, it seems to me to be at least highly arguable that if Qatar does not work with Airbus in seeking to change the QCAA's mind it would be failing reasonably to mitigate its losses. The converse, of course, is that Airbus must be a willing partner in all of this, so as to enable Qatar to mitigate such losses.

Speedy Trial

19.
Whether there is a Preliminary Issue Trial or not, there will still have to be a main trial -unless everything settles, of course. This is not disputed by either party. Nor do the parties disagree that there needs to be a speedy trial. By "speedy" what I mean here is a trial which must take place as soon as fairly and proportionately possible. Each side has different proposals for the directions leading to, the length of and the earliest date for, such a trial. But the principle of a speedy trial is not really in dispute.

20.
Nor can it be in dispute that the whole question of how and why, in detail, the Condition arose will be a central issue in the trial; as will be its implications for the safety and airworthiness (subject to my earlier point) of the aircraft, their maintenance and the cost thereof. That is quite apart from the determination of the contractual issues arising both in relation to the A350 Agreement and the A321 Agreement.

21.
None of these matters are supremely difficult points nor do they raise types of issues with which this court is unfamiliar. But they will all need time to be addressed in evidence, both factual and expert, and disclosure will be a significant part of the process, too. Accordingly there will be much work to do before trial, although on the technical side, Airbus has been dealing with this issue since at least November 2020, and much of the disclosure material will be readily available. The issues at trial are unlikely to turn on the odd email here or text there. Likewise, from the perspective of how the problems have affected the operations of Qatar, it will already have amassed much documentary evidence, along with documents relating to its own technical investigations of the Condition. In my view, preparations for trial must start in a serious way now.

22.
When it comes to timetabling, I also take into account that these proceedings concern two extremely large international commercial organisations with very substantial resources, both legal and otherwise, at their disposal. This means that they are able to make trial preparations at a greater pace than other organisations or legal teams.

23.
Nonetheless, in my view, it is critical that trial preparation should not be disrupted or distracted from. That is relevant when I consider the Preliminary Issue Application.

The preliminary issue application

Introduction

24.
The Preliminary Issue Application is that I should determine whether Airbus has provided the stipulated RCA pursuant to the SCL, which it says it has but which Qatar says it has not. In this regard, Qatar has produced an expert report from Dr Michael Koehler dated 17 December, 2021 which not only analyses the possible causes of the Condition but opines that what Airbus produced to date did not amount to an RCA. No responsive expert evidence has been served by Airbus.

The Law

25.
There is no dispute as to the relevant legal principles and guidance applicable when the court is invited to consider the ordering of the trial of preliminary issues.

26.
Paragraph 8.1.1 of the TCC Guide notes that the hearing of preliminary issues can be extremely cost-effective and efficient as a way of narrowing the issues between the parties and in certain cases resolving disputes altogether. On the other hand, as noted by paragraph 8.1.5, if preliminary issues are ordered inappropriately they can have an adverse effect. Evidence may be duplicated, the prospect of a preliminary issue hearing may delay the commencement of ADR or settlement negotiations and two trials are more expensive than one. So any proposal for preliminary issues needs to be examined carefully so as to weigh the benefits and drawbacks. Paragraph 8.2.1 notes that any issue proposed as a suitable preliminary issue should be capable of resolving the whole of the proceedings or a significant element thereof, significantly reducing the scope and therefore the costs of the main trial or significantly improving the possibility of a settlement of the whole proceedings.

27.

I note also the 10 factors which may be regarded as relevant (though not exhaustively so) to the question as to whether a proposed Preliminary Issue Trial is appropriate, as set out by Neuburger J (as he then was) in Steele v Steele [2001] CP Rep 106. It is not necessary to set them out here. I bear them all in mind.

Analysis

28.
The first question is what benefit the Preliminary Issue Trial would bring. Qatar argues that, assuming it is correct that Airbus has not produced an RCA, once it has done so following an order from the court to that effect (in other words specific performance of that part of the SCL) this will unlock or there is at least a real chance of unlocking, the core issue between the parties - i.e. what to do about the Condition. That in turn should lead to a way to getting the grounded aircraft airborne once again (assuming the QCAA had not changed its mind in the meantime). Yet further, this might lead to a settlement of the entire dispute.

29.
However, this assumes two major things. First, that an RCA must include a clear solution to the problem in addition to explaining in detail how it arose. The parties are presently in dispute about that conceptual matter. Second, even if it should, it is very difficult to see what the solution here is going to be. There certainly seems to be no easy answer, for all the reasons I have given above. And certainly not one which, with the best will in the world, can be agreed on so as to satisfy Qatar and make a difference prior to the hearing of the main trial. In those circumstances, the claimed benefit of a Preliminary Issue Trial (if resolved in Qatar’s favour) is more apparent than real.

30.
That alone seems to me to be fatal to the utility of any Preliminary Issues Trial. But there are in any event further problematic aspects to it. First, if there is more detail to be provided in relation to the cause of the Condition and what the solution might be (both relevant issues for trial, irrespective of the claims under the SCL) I can and indeed should order Further Information from Airbus now to that effect, or at least in the very near future. At the last hearing, Ms Phelps QC made the point that there is obviously a very large amount of disclosure to be given by Airbus on this. In my judgment, that exercise is likely to reveal just as much as an RCA if ordered, but without the additional burden of litigating the whole question of this aspect of the SCL in a separate trial.

31.
Second, and even with the substantial resources at the disposal of these parties, a Preliminary Issues Trial, whenever it is heard, is bound to distract from the preparations for the main trial. That is not sensible where it is important to get the main trial on swiftly. This is in a context where the Preliminary Issues Trial is in my view not going to be limited to dealing with short points of construction and law although these will arise. There is likely to be lay and expert evidence on the whole question of the provision (or not) of the RCA by Airbus. Qatar estimates that the trial will take 3 working days while Airbus submits that it may take as long as 8. I suspect it will be somewhere in between.

32.
Third, in truth the Preliminary Issues Trial provides no real shortcut for the main trial. The former will not deal with all the questions about delivery obligations and compensation under the SCL or the relief sought, or render such questions academic. Moreover, even if there is a judgment in favour of Qatar on the Preliminary Issues Trial, at best it will lead to an order that Airbus now produce an RCA,

whose content will be unknown until it emerges a month or two later. By that time, there is no reason why disclosure in respect of the main trial will not have been well underway. The Proposed Preliminary Issues Trial will certainly not dispose of the case so far as the main trial is concerned nor, in my view, bearing in mind when the main trial should take place will it even be likely to dispose of a significant part of it. By the same token, I think it most unlikely that even if an RCA is ordered, there is a real chance of settling all or most of the issues for the main trial before it takes place.

33.
Finally, while the production of an RCA, if ordered, will deal with the cause of the Condition and perhaps more, which would be an issue for the main trial, it is unlikely to save much time or costs because those matters will still have to be the subject of evidence and disclosure in parallel. The likely upshot is that, far from saving costs, a Preliminary Issues Trial will add to them.

34.
For all those reasons, and bearing in mind the applicable guidance and legal principles, I dismiss the application for a Preliminary Issues Trial.

The relief sought at trial

35.
The relief sought in the Prayer to the Amended Particulars of Claim is as follows:

“(1) A declaration that the Defendant is obliged to perform and deliver to the Claimant a full root-cause analysis for each of the defects comprising the Condition.

(2)
An order for specific performance that the Defendant perform and deliver to the Claimant a full root-cause analysis for each of the defects comprising the Condition.

(3)
Payment of AOG Compensation…

(4)
Alternatively, damages for the Defendant's failure to pay AOG Compensation in breach of Clause 3.2 of the SCL and/or the Warranties.

(5)
A declaration that the design of the A350 is defective.

(6)
A declaration that pending rectification of the Condition and the design defects giving rise to it, the Claimant is not obliged to accept any further undelivered A350 aircraft.

(7)
A declaration that pending rectification of the Condition and the design defects giving rise to it, any written notice served by the Defendant that any of the Undelivered A350 QR Fleet (including but not limited to MSN 409 and/or MSN 430) is in a condition to begin the Acceptance Procedure is invalid and of no contractual effect.

(8)

A declaration that pending rectification of the Condition and the design defects giving rise to it, any purported delivery of any of the Undelivered A350 QR Fleet (including but not limited to MSN 409 and /or MSN 430) is invalid and of no contractual effect.

(8a) A declaration that the Defendant is not entitled to terminate the purchase of MSN 409 or the purchase of MSN 430, and/or that the MSN 409 Termination and the MSN 430 Termination and the Further MSN 409 Termination were invalid and/or ineffective.

(8b) A declaration that the Defendant is not entitled to terminate the SCL and/or that the SCL Termination was invalid and/or ineffective.

(9)
Injunctive relief to restrain the Defendant from purporting to deliver any of the Undelivered A350 QR Fleet pending rectification of the Condition and the design defects giving rise to it.

(9a) Injunctive relief to restrain the Defendant from terminating or purporting to terminate the purchase of any or all of the Undelivered QR A350 Fleet.

(10)
Interest pursuant to statute as pleaded above.

(11)
Further or other relief as the Court considers appropriate; and

(12)
Costs."

The injunction applications

Introduction

36.
There are two injunction applications before me. The first, made on 17 December, 2021 alongside the Preliminary Issue Application, is for an order restraining Airbus from exercising its purported right to:

(1)
tender any new aircraft for delivery, through the Technical Acceptance Process;

(2)
deliver any Certificate of Acceptance in relation to any new aircraft; and

(3)
seek any pre-delivery payments for new aircraft

("The Delivery Injunction").

37.
The second, made on 10 February 2022 is to:

(1)
restrain the Defendant from implementing or by any means howsoever acting on:

(a)

a Notice of Termination dated 17 January 2022 with reference CT2200370 relating to an A350XWB aircraft MSN 409; or

(b)
a Notice of Termination dated 28 January 2022 with reference CT2200595 relating to an A350XWB aircraft MSN 430; (collectively the "Notices"); or

(c)
any other such Notice of Termination;

(2)
restrain the Defendant from marketing or selling or otherwise disposing of in any way to third parties or otherwise howsoever aircraft MSN 409 or MSN 430;

(3)
restrain the Defendant from issuing any further Notice(s) of Termination in respect of any A350XWB Aircraft scheduled for delivery by the Defendant pursuant to the Aircraft Specific Purchase Agreement dated 18 June 2007

(“the Termination Injunction”).

38.
As with the application for the A321 injunction, it is common ground that the usual American Cyanamid approach should be taken but in a context where there needs to be focus on the final injunctive relief sought (as with the A321 Injunction) looking at the particular issue where there is a cap on damages available.

39.
I deal with each injunction application in turn.

The Delivery Injunction

40.
An initial point is that the Delivery Injunction is sought pending determination of the Preliminary Issue. First, that is not a very logical connection since the prospective Preliminary Issue Trial would not finally determine the issues between the parties on delivery anyway. Second, I have now rejected the Preliminary Issue Application. However, it seems to me that I should still deal with the Delivery Injunction, but on the footing that it is sought pending the main trial.

41.
One therefore needs first to look at the relief sought if Qatar succeeds at trial, which I have set out at paragraph 35 above. The relief which is relevant here is the final injunction at sub-paragraph (9) of the Prayer. As to this, I understand where Qatar is coming from, commercially, in seeking relief of this kind. It is based, first, on its belief that (at least by trial) it will be possible to rectify or modify the A350 aircraft already delivered to it and/or those in the pipeline and still the subject of the A350 Agreement, so as to remove the Condition or the prospect of it. Second, Qatar wants the A350 aircraft. It has no desire to abandon the A350 Agreement, even if it could do so lawfully. It simply wants the aircraft in their putatively proper condition. Airbus does not necessarily accept this characterisation of Qatar’s position but again, this does not matter for present purposes.

42.

I have considerable sympathy with Qatar's thinking in this regard. The problem, however, is that I cannot see a court realistically making a final injunction of the kind sought. It is true that it is not, on its face, a mandatory injunction which requires Airbus positively to rectify the alleged design defect. That would be tantamount to an order for specific performance in circumstances where (unlike the A321) there is likely to be arguments and uncertainty as to whether rectification has been achieved; in any event, ordering what is likely to amount to a redesign of an entire aircraft type is extremely unlikely, if not impossible.

43.
But that being so, the final injunction which is actually sought would really require at some future point after the trial, a determination of whether there has been a true rectification so as to entitle Airbus now to deliver the aircraft. In practice, this boils down again to forcing Airbus to rectify in circumstances where this may be impossible without a redesign of the aircraft.

44.
Qatar may retort that in those circumstances, the final injunction will still be of value because it would mean that Airbus will not be able to tender deliveries and claim the relevant monies payable and so on. But if that is all that Qatar was seeking, it would not require a final injunction. That is because if Qatar wins at trial on liability, it will have shown (a) a defect, design or otherwise which (b) has had the effect of depriving Airbus of the ability to tender delivery and seek payments under the A350 Agreement and (c) also has the effect that in rejecting tendered deliveries in the past or in the future, Qatar would be absolved from its payment obligations and will not have been and will not be in breach. Moreover, since, on Airbus's own case, the Condition will inevitably arise absent rectification, it will know that without a redesign, it will be in no better position for future deliveries than it has been for the past deliveries rejected by Qatar. In saying this I also consider that the court at trial will have to consider the efficacy or appropriateness or otherwise of the suggested patch repairs. That is because this suggestion effectively forms part of Airbus's defence to the claim and so has to be evaluated.

45.
Yet further, this alternative purpose of the injunction is purely to prevent financial claims against Qatar by Airbus. But even if no final injunction were granted, Qatar will continue to reject delivery and not pay. Damages would not even enter the equation. But if they did, they would clearly be an adequate remedy.

46.
On that basis, I cannot see that there is a serious issue to be tried that the ultimate final injunctive relief sought would be granted. That alone would be sufficient to dispose of the Delivery Injunction now sought.

47.
But yet further, Qatar cannot show that absent the Delivery Injunction between now and trial, damages would not be an adequate remedy for it should it succeed at trial. That is because while Airbus might seek to tender deliveries of aircraft in that period, Qatar will simply refuse to accept them and will not make any payment. At trial, if it wins, it must follow that such a stance will prove to have been legally justified. Moreover, absent rectification of the Condition, Qatar positively does not want to take delivery of the aircraft. So its inability to use the 23 grounded or any further aircraft is not relevant for adequacy of damages or balance of convenience.

48.

For all those reasons, there is no basis for the grant of the Delivery Injunction.

The Termination Injunction

49.
I deal first with that part of which is to the effect that Airbus must not issue any further termination notices between now and trial. See paragraph 37.(3) above. A parallel final injunction has now been added by reason of paragraph (9a) of the Prayer to the Amended Particulars of Claim. But again, if Qatar succeeds at trial, first, Airbus's existing terminations will have been ineffective (as it concedes at paragraph 66 of its Skeleton Argument) and the same would be true of any further termination notices served between now and trial, and indeed following trial. So it is hard to see that the court would make that final injunction anyway. It is simply unnecessary. Moreover if Airbus serves more termination notices, nothing will happen because Qatar does not want the aircraft in their present state anyway.

50.
The other part of the Termination Injunction (see paragraphs 37.(1) and 37.(2) above) is to the effect that Airbus should not act on any issued termination notice including by selling MSN 409 or 430 to third parties. However, there is no equivalent final relief sought in the Amended Particulars of Claim. That fact would not necessarily prevent the grant of the injunction on an interim basis provided that it could be said to be in aid of some other injunctive relief sought at trial. The purpose of this part of the Termination Injunction is said to be to ensure that relevant A350 aircraft are kept available for delivery which would be made in short order after the trial if Qatar wins. Otherwise, Qatar will have to wait a long time. However, yet again, this assumes that there is some permanent and relatively speedy fix to be applied to the relevant aircraft (other than the application of patches) but short of a redesign. This does not appear to be realistic. Further, the only injunctive relief sought at trial whose purpose this part of the Termination Injunction could be said to support is that pleaded at sub-paragraph (9) of the Prayer. However, that relief is inherently problematic for the reasons given in paragraphs 41-46 above. On that basis, this part of the Termination Injunction goes nowhere and for that reason alone, should not be granted.

51.
However, as I have been addressed by both sides on the question of adequacy of damages for Qatar in the absence of the grant of this part of the Termination Injunction I should say something about it.

52.
The first point is that there is presently no damages claim made in the Amended Particulars of Claim against Airbus at all. The financial remedy is confined to the claim for fixed compensation made under the SCL in respect of the 23 grounded aircraft. The absence of such a claim is important because, in argument, Mr Shah QC submitted that Qatar will have a damages claim in respect of the aircraft which, by trial, should have been delivered but which on Qatar's case, Airbus was unable to deliver because of the Condition (including MSN 409 and 430). That claim has not yet been formulated but Qatar says that at least one way of putting it will be that there has been a delay in delivery being the period between when the aircraft should have been delivered and when it ultimately is delivered. It says that it has been and will continue to be put to the very considerable expense of finding replacement equivalent aircraft in the meantime. There was an issue as to whether in principle, that sort of expense would sound adequately in damages. On the face of it, it is difficult to see why not. Indeed, for present purposes, as Mr Shah QC made clear in oral argument, he does not now contend

that any damages claim based on such matters would be inadequate. That being so it is unnecessary for me to spend any time on the evidential points made about it, save to a limited extent below.

53.
However, that is not the end of the matter because Mr Shah QC argues that damages would be inadequate in a different sense because, when claimed, they would be met by Airbus's invocation of the relevant provisions under the delay regime set out in Clause 11 of the Common Terms. Clause 11.1.1 provides liquidated damages for Qatar in the event of "Non-excusable Delay". In the case of the A350 Agreement, those damages are US$47,000 per day but they only run for a maximum of 150 days which means that the maximum liquidated damages claimable is US$7.05 million. That is the only financial relief available in the case of delay, as set out in clause 11.4. Of course, this claim for delay will only be made if the aircraft are ultimately delivered without the Condition or the prospect thereof. I have already referred to the fact that Qatar is considering whether it might exercise its contractual right under clause 11.3.1 to terminate. To that extent, the present position is somewhat unclear.

54.
Since no damages claim has yet been made, it is not certain what Airbus's response will be. Paragraph 59 of Mr Acratopulo's witness statement does refer to clause 11 but simply in the context of the delivery regime and termination and liquidated damages rights. Paragraph 67.2 of Airbus' Skeleton Argument refers to clause 11, but in the context of the delivery regime. Nonetheless, I ought to proceed on the basis that if damages are claimed, Airbus will indeed invoke the relevant caps.

55.
In this regard, Mr Shah QC placed reliance upon the decision of the Court of Appeal in AB v CD [2014] EWCA Civ 229, a case to which I was also referred in the course of the A321 injunction application. Here, a licensee of an internet platform claimed in an arbitration that the licensor had wrongly terminated the licence. The licensee then sought an interim injunction from the court under s44 of the Arbitration Act 1996, effectively to require the licensor to honour the licence agreement and not to terminate it pending trial. It does not appear that honouring it would be impractical or difficult, if ordered. That is not surprising since this was all about a licence. The principal loss to the licensee if the licence had been wrongly terminated was loss of profits. However, a clause in the agreement excluded any liability for loss of profits and also placed a cap on any award of damages that would otherwise live. At first instance, Stuart-Smith J (as he then was) refused injunctive relief on the basis that absent the clause, damages would have been an adequate remedy, and that he should disregard the fact of the clause which had been negotiated between the parties.

56.
The Court of Appeal reversed that decision. Having reviewed the authorities Underhill LJ, who gave the leading judgment, said this:

27…The primary obligation of a party is to perform the contract. The requirement to pay damages in the event of a breach is a secondary obligation, and an agreement to restrict the recoverability of damages in the event of a breach cannot be treated as an agreement to excuse performance of that primary obligation. I share Mance LJ's rejection of the position advanced by Mowlem that, even where a provision limited the victim of a breach to damages which bore no relation to its loss, those damages had nevertheless to be regarded an adequate remedy: see the end of para 14 of his judgment. Mr Bergin's stance was the same before us, as logically it had to be: even in the case of the most gross and cynical breach of contract, if—as was likely to be the case—the only losses suffered which would sound in damages were of a kind which were excluded by the contract, no injunction would lie and the

contract-breaker would be able to walk away from his obligations with impunity. That does not seem to me to be just. The rule—if "rule" is the right word—that an injunction should not be granted where damages would be an adequate remedy should be applied in a way which reflects the substantial justice of the situation: that is, after all, the basis of the jurisdiction under section 37.

28. Viewed in this way, there is no question of, as Mr Bergin contended, the commercial expectations of the parties being undermined. The primary commercial expectation must be that the parties will perform their obligations. The expectations created (indeed given contractual force) by an exclusion or limitation clause are expectations about what damages will be recoverable in the event of breach; but that is not the same thing.

29. This approach also seems to me to sit better with the acceptance by this court that an injunction may in an appropriate case be granted even where the loss caused by a threatened breach would not sound in damages. That is apparent both from the Regent International case The Times, 13 May 1985 and from the judgments of Aldous and Carnwath LJJ in the SmithKline case [2003] FSR 544 approved by Mance LJ, at paras 18-19 of his judgment in Bath v Mowlem [2015] 1 WLR 785. That is a separate but similar instance of the court refusing to allow a mechanistic application of the "damages an adequate remedy" rule to prevent the victim of a breach being able to enforce compliance with the primary obligations under the contract.

30. Mr Bergin argued that it could not be right that in every case where the victim of a threatened breach of contract sought an interim injunction he could rely on the existence of an exclusion or limitation clause to claim that damages would not be an adequate remedy. I think that that overstates the consequences of the case which I have accepted. A claimant will still have to show that if the threatened breach occurs there is (at least) a substantial risk that he will suffer loss that would otherwise be recoverable but for which he will (or at least may) be prevented from recovering in full, or at all, by the provision in question. If he does, then certainly it will not be sufficient for the defendant to say that the restriction in question was agreed; and to that extent the claimant will indeed have established that his remedy in damages may not be adequate. But that only opens the door to the exercise of the court's discretion; and in the exercise of that discretion the fact that the restriction in question was agreed may, depending on the circumstances of the case, be a relevant consideration—as may the scale of any shortfall and the degree of risk of it occurring. Mr Ter Haar made it clear that he did not contend to the contrary."

57.
Ryder LJ added this:

"32. … would wish to emphasise the expression of principle set out by Underhill LJ, at para 25. On the facts of this case the court's remedies are available in support of a contractual right and are not excluded by the terms of the contract. Injunctive relief is a remedy available to the court to give effect to commercial expectations where it is in the interests of justice that agreed obligations should continue to be binding on the parties, whether that be for an interim period or the term of the contract. The construction of the contract clause in the context of the description of legal principle set out by Underhill LJ has the effect of tending to support rather than undermine parties who have entered or seek to enter into a contract which contains their commercial expectations. There are different reasons on the facts of individual cases why this may be so and although it would be unwise to categorise them, it is surely the policy of the law to help to give effect to the parties' intentions and in particular their acceptance of commercial risk by performance. For that reason, I favour re-casting the question to be asked on an application for injunctive relief, which is: "Is it just in all the

circumstances that a [claimant] be confined to his remedy in damages?", per Sachs LJ in Evans Marshall & Co Ltd v Bertola SA…”

58.
And Laws LJ added this:

“33. I agree with both judgments. Where a party to a contract stipulates that if he breaches his obligations his liability will be limited or the damages he must pay will be capped, that is a circumstance which in justice tends to favour the grant of an injunction to prohibit the breach in the first place.”

59.
As Underhill LJ made clear, there is no rule that the mere presence of a liquidated damages clause or one which imposes a limit or cap on damages automatically means that damages are not an adequate remedy. Further, in some circumstances the very fact of that clause might favour the claimant when it came to the issue of discretion. That would be so even where the claimant could show on the evidence that there was a substantial risk that part or all of the loss otherwise recoverable would be denied to the claimant by reason of the relevant clause. The exercise to be performed by the claimant, therefore, as one would expect, will involve setting out what the otherwise recoverable loss would be, the likelihood that the relevant clause would operate against it and what the shortfall would be.

60.
In the case before me, what is said by Mr Shah QC is that it is likely that the clause 11 here would remove at least a substantial part of any claim for damages on the basis of delay which was otherwise available. Perhaps, but the matter has not been articulated in the way which Underhill LJ seems to have contemplated. One reason for this might be that (as with the A321 injunction application) Qatar’s principal or initial position had been that damages would not be an adequate remedy anyway, quite apart from the clause. This was indeed its position on this application prior to Mr Shah QC’s concession. The question of showing the recoverable loss in respect of delay is not straightforward because Qatar had capacity issues in any event because of the 23 grounded aircraft. But losses incurred in finding alternatives for them (which is principally what Qatar’s evidence deals with apart from the position in relation to the separate matter of the A321s) would not be relevant to the delay claim. There would need to be an articulated claim dealing only with the residual need for capacity (if any) above and beyond that caused by the grounded 23 aircraft and as a direct result of the putative non-availability for the time being of the A350 aircraft otherwise due. That has not been done and so in truth there is no damages figure which can be compared against any possible invocation of the cap here. As matters stand, therefore, it is not possible for me to say that there would be a substantial risk of a significant shortfall by reason of the operation of clause 11. This is therefore a further reason for not granting this part of the Termination Injunction, if one were necessary.

61.
For all the reasons given above, I refuse the application for the Termination Injunction.

Conclusion

62.
It follows that I must reject all the applications before me. I will, however, as already intimated, deal with directions for a speedy main trial at the hearing which will follow the handing-down of this judgment. I am most grateful to counsel for their helpful oral and written submissions.