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Case No: CL-2016-000627

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2018

Before :

MR PETER MACDONALD EGGERS QC (Sitting as a Deputy Judge of the High Court)

Between :

(1) TRIPLE SEVEN MSN 27251 LIMITED

Claimants

(2) TRIPLE SEVEN (CIS) LIMITED

- and -

AZMAN AIR SERVICES LIMITED

Defendant

Stephen Midwinter QC (instructed by Elborne Mitchell LLP) for the Claimants

Philip Newman (instructed by Debelo Law Limited) for the Defendant

Hearing dates: 16 & 17 April 2018

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.

.....
MR PETER MACDONALD EGGERS QC

Peter MacDonald Eggers QC:

Introduction

1. The Claimants were the registered owners of two Boeing 777-200 ER aircraft (MSN 27251 and MSN 27252) and leased them to the Defendant (“Azman”) by two separate lease agreements dated 20th June 2016, one lease in respect of each aircraft. Each lease agreement was for a period of five years.
2. It was understood that the aircraft would be used by Azman to transport passengers from West Africa to the Kingdom of Saudi Arabia for the Hajj and Umrah pilgrimages. On 11th May 2016, the National Hajj Commission of Nigeria (“NAHCON”) confirmed that Azman was approved to participate in the airlift of pilgrims to and from Saudi Arabia for the 2016 Hajj. However, this was not the only approval which was required in order to participate in the 2016 Hajj airlift; the approval of the Saudi authorities was also required.
3. On 15th June 2016, NAHCON sent a letter to Azman informing it that the General Authority of Civil Aviation of Saudi Arabia (“GACA”) had excluded Azman from participation in the 2016 Hajj airlift because it had not met Saudi economic, security and safety requirements. However, Azman did not receive this letter until some hours after it had signed the lease agreements on 20th June 2016. Azman sought to persuade GACA to change its mind and to approve Azman to participate in the airlift for the 2016 pilgrimage, but these attempts were not successful.
4. The Claimants tendered the aircraft for delivery to Azman on 28th June 2016 and 4th July 2016 respectively.
5. Soon afterwards, on 6th-7th July 2016, Azman informed the Claimants that it was not in a position to take delivery of the aircraft, because it was no longer able to participate in the 2016 Hajj airlift, which was the major reason or one of the major reasons for Azman’s entry into the lease agreements. In response, on 8th July 2016, the Claimants called on Azman to take delivery of the aircraft. On 12th July 2016, Azman said was not in a position to accept either aircraft.
6. On 12th August 2016, the Claimants purported to terminate the lease agreements in accordance with the provisions of the lease agreements by reason of Azman’s failure to accept delivery of the aircraft and to pay the first instalment of the rent due under the lease agreements.
7. The Claimants claim damages for breach of the lease agreements in accordance with the lease agreements.
8. Although Azman had pleaded a number of defences to this claim, by the time of the trial, the only substantive defence advanced by Azman to the Claimants’ claim was that the Claimants are not entitled to damages because the lease agreements were void at common law for common mistake, the mistake being that it was believed or understood by both parties that Azman was expected to or would be approved to participate in the 2016 Hajj airlift, which was the or a major purpose of the lease agreements, but in fact at the time of the execution of the lease agreements, such approval had been withheld by GACA.

9. During the trial, Mr Philip Newman on behalf of Azman confirmed that if the defence of common mistake failed, Azman would be liable to compensate the Claimants for their losses arising from Azman's non-performance of the lease agreements.
10. Azman has required the Claimants to prove their losses.

The negotiation of the lease agreements

11. On 5th April 2016, Mr Kani Kurtulus, the Chief Executive Officer of Or Express Aviation & Airline ("Orex"), sent an email to Mr Hitesh Patel, the Chief Executive Officer of Veling Limited ("Veling"). Veling was the operating company of the group of which the Claimants formed a part. In this email, Orex enquired about leasing two Boeing 777 passenger aircraft for 4-5 years. Orex stated that it had a lease contract with Azman and that "*We will operate the aircraft for UMRAH and HAJJ operation mainly from Nigeria and west Africa to Saudi ...*".
12. On 6th April 2016, Mr Patel replied to Mr Kurtulus' email, providing the specifications of five aircraft which Veling had available. On 8th April 2016, Mr Patel provided Mr Kurtulus with a Letter of Intent setting out the basic terms of a lease agreement between Veling and Orex. Mr Kurtulus forwarded this Letter of Intent to Mr Faisal Abdulmunaf, the Managing Director of Azman. On 9th April 2016, Mr Abdulmunaf sent an email to Mr Kurtulus making a number of observations on the Letter of Intent, including that the lease agreement would be with Orex and would be for five years. Mr Abdulmunaf concluded that it would be best to approach Veling with a proposal to purchase one of the aircraft and lease one aircraft "*for Hajj period only*". In response, Mr Kurtulus commented that Azman could lease the aircraft and that Veling would not accept a lease of less than five years.
13. On 10th April 2016, Mr Kurtulus sent an email to Mr Patel, stating that it would like the rental period to start on 15th August 2016 and that "*We will be able to start operation with only Hajj flights regarding delivery date .. we do not have any other option to fly before HAJJ as you understand*". In this email, Mr Kurtulus said that the "*main issue is seat configuration*". Orex's intention was to remove the first class and business class seating and to introduce extra economy class seating.
14. On 15th April 2016, Mr Kurtulus sent a copy of the signed Letter of Intent (identifying Veling and Orex as the parties) to Mr Patel. The Letter of Intent stated that the aircraft would be delivered in "*3-class configuration*" but that Veling had no objection to the reconfiguration of the aircraft after delivery.
15. On 26th April 2016, Mr Kurtulus informed Mr Abba Goni, Azman's technical advisor, that the seat reconfiguration ("upgrade") would be carried out by GMF Garuda in Indonesia. On 4th May 2016, Garuda provided Mr Kurtulus with the proposed layout of passenger accommodation ("LOPA") and Mr Kurtulus forwarded this to Mr Abdulmunaf, with a copy to Mr Goni. Mr Goni responded by stating that "*This LOPA is good enough for hajj operations*" and requested that Garuda confirm the turn-around time in order to ensure that the reconfiguration was completed and the aircraft were positioned in Kano, Nigeria "*in good time for hajj operations*".
16. On 5th May 2016, Mr Goni inspected one of the aircraft.

17. On 11th May 2016, NAHCON wrote to Azman confirming NAHCON's approval for Azman to participate in the airlift of pilgrims registered under the State Muslim Pilgrims Welfare Boards/Agencies/Commissions to and from the Kingdom of Saudi Arabia for the 2016 Hajj. NAHCON stated that Azman's participation was subject to the certification of Azman's aircraft by the Nigerian and Saudi Arabian Civil Aviation Authorities.
18. On 16th May 2016, Garuda informed Mr Kurtulus that the reconfiguration work would commence on 4th July 2016 for the first aircraft and on 14th July 2016 for the second aircraft. On 17th May 2016, Mr Kurtulus forwarded this email to Mr Patel. That day, Orex entered into a contract with Garuda for the seat reconfiguration work.
19. On 26th May 2016, there was a meeting in Istanbul between Mr Patel, Mr Kurtulus and Mr Abdulmunaf to discuss the terms of the proposed lease agreements.
20. On 1st June 2016, Mr Patel requested Mr Kurtulus to provide details "*regarding the Nigerian Regulatory Authorities' method of allocation and the likelihood of Azman's allocation being cancelled*". Later on 1st June 2016, Mr Abdulmunaf informed Mr Kurtulus, with a copy to Mr Patel, that "*The arrangement could only be cancel [sic] if it becomes obvious to the authorities that we can't meet the deadline, as time is very important in this business*".
21. On 2nd June 2016, Mr Patel provided Mr Kurtulus with a draft lease agreement.
22. On 8th June 2016, Veling asked Mr Abdulmunaf to provide "*a copy of the Hajj allocation letter or agreement between the Azman and the NAHCON, reflecting [sic] the number allocated to Azman*" and for evidence that Azman would be one of the selected airlines for the Hajj airlift for the next four years. In reply to the latter question, on 10th June 2016, Mr Kurtulus said that "*NOBODY HAS THIS KIND OF GUARANTEE ... BUT NATIONAL HAJJ COMMITTEE GIVES THE NUMBERS OF PASSENGER (PILGRIMS) to the companies in Country. The yare [sic] 90.000 pilgrims that they have to give the capacity to all companies*".
23. On 10th June 2016, Mr Abdulmunaf sent Mr Patel a copy of the NAHCON appointment letter of 11th May 2016 by email.
24. Following further exchanges, there was a meeting between the parties on 11th June 2016, at which it was agreed that the lease agreements would be signed on 17th June 2016, that the parties to the lease agreements would be the Claimants as lessors and Azman as lessee, and that the aircraft would be registered in Nigeria. In an email dated 11th June 2016 addressed to Mr Patel, Mr Abdulmunaf said that up until the execution of the lease agreements, "*we are going on with all the necessary arrangements for the scheduled Hajj operation including processing of all the necessary permits and approvals both at home and in Saudi Arabia*".
25. On 14th June 2016, Orex sent to Mr Abdulmunaf a feasibility study, which was forwarded to Mr Patel later that day. I shall refer to this feasibility study later in this judgment.
26. By a letter dated 15th June 2016, NAHCON informed Azman that "*Saudi General Authority of Civil Aviation (GACA) has written to the Nigerian Civil Aviation Authority*

(NCAA) and has copied the ... NAHCON ... of its decision to exclude your airline from participation in 2016 Hajj Airlift". The reasons given for GACA's decision to exclude Azman from the 2016 Hajj airlift was the non-designation by a competent authority and non-compliance with Saudi economic, security and safety requirements. NAHCON added that *"the matter is being given its due attention by the both the NCAA and the NAHCON with the hope of resolving it in good time, and you will be intimated with any development on the matter"*. However, as discussed below, Azman was not informed of GACA's decision until after the lease agreements were executed.

27. On 17th June 2016, Mr Patel sent Mr Abdulmunaf final versions of the lease agreements.
28. On 20th June 2016, the parties signed the lease agreements in Dubai. The agreements were signed at 10.00 am (Dubai time), which is 7.00 am Nigeria time.

The lease agreements

29. The Claimants' claims are made in respect of two lease agreements, one in respect of each aircraft. The lease agreements are in materially identical terms.
30. The aircraft were leased by the Claimants as Lessors to Azman as Lessee for a period of five years from the date of delivery (clauses 2.1.1, 4.1 and 4.2).
31. The lease agreements contained the following provisions:

“3 DELIVERY

3.1 Delivery

Lessor shall deliver and Lessee shall accept the Aircraft on lease on the Scheduled Delivery Date or such other date as the parties may agree. The Aircraft shall be delivered to and accepted by Lessee at the Delivery Location in an "as is, where is" condition, except as provided for in Schedule 10 (Delivery Condition) ...

5 RENT

...

5.2 Rent Date

5.2.1(a) Lessee shall pay the Rent Start Payment on the Rent Start Date and thereafter, Lessee shall pay Rent to Lessor or to its order in advance on each Rent Date ... Lessee shall initiate payment adequately in advance of each Rent Date to ensure that Lessor receives credit for the payment on such Rent Date ...

8 PAYMENTS

...

8.2 Default Interest

If Lessee fails to pay any amount payable under this Agreement and the other Operative Documents on the due date, Lessee shall pay to Lessor on demand from time to time interest at the Default Rate (both before and after judgment) on that amount, from the due date to the date of payment in full by Lessee to Lessor. All such interest will be compounded monthly and calculated on the basis of the actual number of days elapsed and a 360 day year. Interest payable pursuant to this clause 8.2 (Default Interest) which is unpaid at the end of each such period shall thereafter itself bear interest at the rate provided in this clause 8.2 (Default Interest).

8.3 Absolute Obligations

8.3.1(a) Lessee's obligations under this Agreement and the other Operative Documents are absolute and unconditional, irrespective of any contingency or circumstance whatsoever, including (but not limited to):

(v) any invalidity or unenforceability or lack of due authorisation of, or other defect in, this Agreement or any other Operative Document; and

(vi) any other cause or circumstance which (but for this provision) would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement or any other Operative Document.

(b) Lessee hereby waives, to the extent permitted by applicable Laws, any and all rights which it may now have or which may at any time hereafter be conferred upon it (by law or otherwise) to terminate, cancel, quit or surrender this Agreement or any obligations imposed upon Lessee under this Agreement except as provided in this Agreement ...

10 LESSEE COVENANTS - GENERAL

...

10.2 Information

10.2.1 Lessee shall:

(a) notify Lessor forthwith of the occurrence of any Default or any other event which might adversely affect Lessee's ability to perform any of its obligations under this Agreement or any other Operative Document and provide Lessor with full details of any steps which Lessee is taking or proposes to take, in order to remedy or mitigate the effect of such Default ...

20 EVENTS OF DEFAULT

20.1 Events of Default

20.1.1 *Each of the following events will constitute an Event of Default and a repudiatory breach of this Agreement by Lessee:*

(a) **Non-payment:** *Lessee fails to make any payment under this Agreement and any Operative Document within five (5) Business Days ... or ...*

(c) **Breach:** *Lessee fails to comply with any other provision of this Agreement or any other Operative Document and, if such failure is in the opinion of Lessor capable of remedy, such failure continues for ten (10) days after notice from Lessor to Lessee; or ...*

(f) **Approvals:** *any consent, authorisation, licence, certificate or approval of or registration with or declaration to any Government Entity required in connection with the Operative Documents, including, without limitation: ...*

(iv) *any airline licence or air transport licence required by Lessee,*

is not obtained or modified in an manner unacceptable to Lessor, in its sole discretion, or is withheld, or is revoked, suspended, cancelled, withdrawn, terminated, or otherwise ceases to be in full force and is not, as applicable, restored, replaced, returned, re-granted or renewed within five (5) Business Days ...

(p) **Delivery:** *Lessee fails to comply with its obligation under clause 4 (Lease Period) to accept delivery of the Aircraft; or*

(q) **Adverse Change:** *any event or series of events occurs which, in the reasonable opinion of Lessor, might have a material adverse effect on the financial condition or operations of Lessee and its Affiliates or on the ability of Lessee to comply with its obligations under this Agreement ...*

20.2 **Lessor's Rights**

(a) *If an Event of Default occurs, Lessor may at its option (and without prejudice to any of its other rights under the Operative Documents), at any time thereafter while such Event of Default is continuing:*

(i) *accept such repudiation and by notice to Lessee and with immediate effect terminate the leasing of the Aircraft (but without prejudice to the continuing obligations of Lessee under this Agreement), whereupon all rights of Lessee under this Agreement shall cease; and/or*

(ii) *proceed by appropriate court action or actions to enforce performance of this Agreement or to recover damages for the breach of this Agreement ...*

(b) *If an Event of Default occurs, Lessor may sell or re-lease or otherwise deal with the Aircraft at such time and in such manner as Lessor considers appropriate in its absolute discretion, free and clear of any interest of Lessee, as if this Agreement had never been entered into ...*

20.3 Default Payments

(a) *If a Default occurs, or the Aircraft is not delivered on the proposed Delivery Date by reason of failure of Lessee to satisfy any conditions to that delivery, or Lessor terminates the leasing of the Aircraft pursuant to clause 20.4 (Illegality affecting Lessor) Lessee shall indemnify Lessor on demand against any Loss which Lessor may sustain or incur directly or indirectly as a result, including but not limited to:*

(i) *any loss of profit suffered by Lessor because of Lessor's inability to place the Aircraft on lease with another lessee on terms as favourable to lessor as this Agreement or because whatever use, if any, to which Lessor is able to put the Aircraft upon its return to lessor is not as profitable to lessor as the terms contained in this Agreement ...*

(iv) *any Loss sustained or incurred by Lessor in or as a result of exercising any of its rights or remedies pursuant to clause 20.2 (Lessor's Rights) or as a result of Lessee's failure to redeliver the Aircraft on the date, at the place and in the condition required by this Agreement ...*

23.4 MISCELLANEOUS PROVISIONS

...

23.4 Expenses

...

(c) *Save as provided above, but without prejudice to clause 10.7 (Outgoings), each party shall bear its own costs and expenses (including legal expenses) associated with the preparation, negotiations and completion of this Agreement and the other Operative Documents, provided that if, for whatever reason, the Aircraft is not delivered to Lessee pursuant to this Agreement, Lessee shall reimburse Lessor on first written demand, for all costs and expenses (including legal expenses) incurred by lessor associated with the preparation, negotiation and completion of this Agreement and the other Operative Documents ...*

23.8 *Entire Agreement*

23.8.1 *This Agreement is the sole and entire agreement between Lessor and Lessee in relation to the leasing of the Aircraft and supersedes all previous agreements in relation to that leasing ...”*

32. By clauses 1.1 and 1.2, the terms used in the lease agreements were defined and were to be construed in accordance with the definitions in Schedule 1, including:

“Default Rate means a rate of interest per annum equal to LIBOR plus ten per cent. (10%) per annum;

Delivery means delivery of the Aircraft on lease by Lessor to Lessee hereunder ...

Delivery Location means Dubai, United Arab Emirates, or such other location as may be agreed by Lessor or Lessee ...”

33. Clause 1.1 of Schedule 2 to the lease agreements set out a number of representations and warranties made by Azman, including:

“(a) Status: Lessee ... is the holder of all necessary air transport licences required in connection therewith and with the use and operation of the Aircraft ...

(e) Authorisation: all authorisations, consents, registrations and notifications required by Lessee in connection with the entry into, performance, validity and enforceability of, this Agreement and the other Operative Documents and the transactions contemplated by this Agreement and the other Operative Documents, have been (or will on or before the Delivery Date have been) obtained or effected (as appropriate) and are (or will on their being obtained or effected be) in full force and effect ...”

34. By clause 25.1, the lease agreements were expressed to be governed by English law.

Azman’s attempts to obtain GACA’s approval

35. As mentioned above, the lease agreements were signed on 20th June 2016 at 10.00 am (Dubai time) (7.00 am Nigeria time). According to the evidence of Mr Abdulmunaf, he was informed of GACA’s decision to exclude Azman from the 2016 Hajj airlift by email at 11.17 am (Nigeria time) (3.17 pm Dubai time), *i.e.* after the lease agreements were signed.

36. On 22nd June 2016, Azman sent a letter to the Nigerian Ministry of Foreign Affairs maintaining that Azman was qualified to operate the pilgrimage flights and implored the Ministry *“to prevail on the Saudi authorities to honour and respect the recommendations of the relevant Nigerian authorities and the approval by the President of the Federal Republic of Nigeria to recognize the five Nigeria Airlines as official carriers for the 2016 Hajj airlift”*.

37. On 2nd July 2016, Mr Abdulmunaf sent an email appealing to GACA “*regarding getting permission to fly into Saudi Arabia for hajj operations*”, stating that “*we have spent money and lease 2 ex Emirates Boeing 777-200 ... for a period of 5 years just for this purpose*”.
38. Azman’s appeals to the Nigerian Ministry of Foreign Affairs and to GACA were not successful.

The attempted delivery of the aircraft

39. The lease agreements provided for delivery of the aircraft at Dubai or at such other location as the parties agreed.
40. It was agreed between the parties that the aircraft would be delivered at Jakarta Airport so that Garuda could carry out the seat reconfiguration works there.
41. On 21st June 2016, Mr Patel sent an email to Mr Kurtulus informing him that the first aircraft would arrive at Jakarta Airport at 1700 hours on 23rd June 2016. However, on 22nd June 2016, Garuda informed Veling and Mr Kurtulus that it could not accommodate the aircraft until after 2nd July 2016, given “*the high tension on slot and parking*” in the Garuda facility in relation to preparation of the Garuda fleet “*to face the coming hajj season*”. In response, later that day, Veling stated that the aircraft must leave Dubai no later than 26th June 2016 and sought reassurance that Garuda was aware that the second aircraft would leave Dubai on 30th June 2018. On 24th June 2016, Mr Kurtulus informed Mr Patel that the aircraft could arrive at Jakarta on 26th June 2016.
42. On 26th June 2016, Veling informed Mr Kurtulus and Mr Abdulmunaf that the first aircraft would arrive at Jakarta on 28th June 2016.
43. On 27th June 2016, Mr Simon Ferguson, Vice President of Veling, informed Mr Kurtulus that he planned to be in Jakarta for four days after 30th June 2016 “*to complete an acceptance hand over off the aircraft*”. In reply, Mr Kurtulus said that “*I understand that we will make the acceptance of the aircraft in Jakarta [sic]. Sure I will be able to sign the acceptance certificate of aircraft that we agreed with AZMAN ... Then we can hand over the aircraft to [Garuda] ...*”.
44. On 28th June 2016, the first aircraft landed at Jakarta for reconfiguration.
45. The second aircraft had been scheduled to arrive at Jakarta on 30th June 2016, but was delayed by 24-36 hours. On 30th June 2016, Garuda requested that the arrival of the second aircraft be delayed until 4th July 2016.
46. The second aircraft arrived at Jakarta on 4th July 2016.

The purported termination of the lease agreements

47. On 2nd July 2016, Mr Abdulmunaf requested Mr Patel to attend an “*emergency meeting*” on 4th July 2016.
48. In the event, the parties met in Dubai on 6th July 2016. It was at this meeting that Mr Abdulmunaf informed Mr Patel (or as Mr Patel put it “*dropped the bombshell*”) that Azman had not received GACA’s permission to participate in the 2016 Hajj airlift. At

that meeting, Mr Abdulmunaf indicated that, without Saudi approval, Azman could not accept the aircraft under the leases. According to Mr Abdulmunaf's evidence, he postulated a number of options, including renegotiation of the lease agreements for a later delivery date or walking away from the leases. There was a further meeting on 7th July 2016, at which Mr Abdulmunaf handed over to Mr Patel NAHCON's letter dated 15th June 2016 and Azman's letter to the Nigerian Ministry of Foreign Affairs dated 22nd June 2016.

49. At another meeting on 8th July 2016, Mr Abdulmunaf provided Mr Patel with a letter from Azman dated 7th July 2016 addressed to the Claimants and Veling stating that Azman wished to invoke clause 10.2.1 of the lease agreements on the ground of "*some emerging issues capable of adversely effecting [sic] our ability to perform our obligations under the Lease Agreement*", and added:

"... it is pertinent to remind you that one of the major reasons we entered into the Lease Agreement is to participate in the airlift of Pilgrims from Nigeria to Saudi Arabia for 2016 Hajj operations and subsequent Hajj operations, within the Lease period. To attest to this fact, find attached copy of letter of appointment dated 11.05.2016 from National Hajj Commission of Nigeria ... Unfortunately however on 15-june-2016 we received a letter from the National Hajj Commission of Nigeria conveying the decision of Saudi Arabia General Authority of Civil Aviation (GACA) to exclude Azman ... from participating in 2016 Hajj airlift of Pilgrims from Nigeria to Saudi Arabia on the flimsy excuse of non designation and economic and security requirement. Attached herewith is a copy [of] the said letter ... In view of the foregoing therefore, we regret to inform you that we will not be able to participate in the airlift of Pilgrims for 2016 Hajj operations. However since Hajj operations is an annual events [sic] we are hopeful to participate next year and subsequent years ..."

50. Mr Abdulmunaf concluded this letter by presenting a number of proposals, including extending the commencement date of the lease agreements and meeting and agreeing on an exit strategy.
51. Mr Patel's evidence was that, at this point of time, he was aware that Azman was not going to be in a position to pay for the aircraft under the lease agreements, at least in the short term.
52. In reply to Azman's letter, by a letter dated 8th July 2016, the Claimants stated that Azman had no right to invoke clause 10.2.1 of the lease agreements and that the lease agreements remained binding on Azman, who had to comply with the obligations in the lease agreements.
53. There followed discussions and correspondence between the parties toward negotiating a compromise, but these attempts failed.
54. By an email dated 12th July 2016, Mr Abdulmunaf informed Mr Patel that "*AZMAN will not be able to continue the lease of the aircraft regarding HAJJ permissions*" and, by a further email on the same date, stated that the failure to carry out the Hajj airlift would affect Azman's payment obligations and that Azman was not in a position to accept delivery of the aircraft, because it was a matter outside its control.

55. On 1st August 2016, the first instalment under the lease agreements was due for payment, but no payment was made by Azman.
56. By letters dated 12th August 2016, the Claimants informed Azman that “*Events of Default*” under clauses 20.1.1(q) and 20.1.1(c) had occurred and were continuing and that they were giving notice that the lease agreements were terminated with immediate effect pursuant to clause 20.2(a)(i), whereupon all of Azman’s rights under the lease agreements would cease.

The Claimants’ claims

57. Originally, the Claimants maintained claims for breach of contract, for a contractual indemnity, for breach of warranty and for misrepresentation. Azman presented a number of defences to these claims, including a defence based on common mistake, and also maintained a counterclaim.
58. The parties’ respective claims and defences have now been clarified such that the only substantive defence advanced by Azman is one of common mistake. If the leases are void for common mistake, Azman is not liable to the Claimants and has a claim for restitution in the sum of US\$750,000. If, however, the leases are not void for common mistake, Azman accepts that there has been a breach of the lease agreements and that the Claimants are entitled to damages.
59. I do not understand that the claims made by the Claimants for damages for misrepresentation are maintained.

The defence of common mistake

The law

60. The law of common mistake was stated and clarified by the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679. At paragraph 76 of his judgment, Lord Phillips, MR set out the judgment of the court and held that a contract will be void for common mistake at common law if the following elements are present:
 - (1) There must be a common assumption as to the existence of a state of affairs.
 - (2) There must be no warranty by either party that that state of affair exists.
 - (3) The non-existence of the state of affairs must not be attributable to the fault of either party.
 - (4) The non-existence of the assumed state of affairs must render the performance of the contract impossible (or according to paragraph 82 of the judgment must render performance of the essence of the obligation impossible).
 - (5) The state of affairs may be the existence or a vital attribute of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

61. The Court of Appeal’s identification of the elements of a common mistake which is of sufficient importance to render the contract void was itself an elaboration of the principles stated by Steyn, J in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, 266-270. In that case, Steyn, J said that the doctrine of common mistake was concerned with “*the impact of unexpected and wholly exceptional circumstances on apparent contracts*” (page 268). The elements of a common mistake identified by Steyn, J were as follows:
- (1) The mistake must be substantially shared by both parties and must relate to facts as they existed at the date of the contract. The parties must have had reasonable grounds for their mistaken belief.
 - (2) The mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist.
 - (3) If the contract itself provides for the allocation of risk or the consequences of such a mistake, the contract must be applied to the exclusion of any applicable doctrine.
62. There are two elements of the doctrine which are worth considering in more depth. First, the fundamental nature of the common mistake. On the face of it, even though the Court of Appeal adopted Steyn, J’s approach, the language used by the Court of Appeal to describe the doctrine (“*impossibility of performance*”) differed from that used by Steyn, J who considered that the relevant mistake must have rendered the subject matter of the contract “*essentially and radically different from the subject matter which the parties believed to exist*”. I do not think that the doctrine is necessarily limited to a shared assumption as to the subject matter of the contract if the reference to “*subject matter*” means one particular element of the consideration of the contract (such as the goods under a sale of goods contract or the aircraft in the lease agreements in this case). I consider that the essential and radical difference relates to the nature, content and/or effect of the contract as a whole, which appears to conform with the principles explained by the Court of Appeal in *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd*.
63. Both approaches - impossibility of performance and essential and radical difference - were adapted from the doctrine of frustration (*William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016, 1039), which applies to events arising after the contract is made, unlike common mistake which arises when the contract is made. The Court has equated the notions of impossibility of performance and essential and radical difference in that both approaches “*may essentially amount to the same thing*” (*Kyle Bay Ltd v Underwriters* [2007] EWCA Civ 57; [2007] Lloyd’s Rep IR 460, paragraphs 20-28).
64. In *Apvodedo NV v Collins* [2008] EWHC 775 (Ch), at paragraphs 43 and 46, Henderson, J sought to reconcile the two different formulations of the test in the following way:
- “[43] *However, Associated Japanese ... shows that there are cases where a defence of common mistake can succeed even though performance of the relevant contractual obligation is possible (in that case payment by a bank under a guarantee). This suggests that the true test may rather be whether the non-*

existence of the state of affairs renders performance of the contract in accordance with the common assumption impossible ...

[46] *Associated Japanese is also of importance because it demonstrates that a defence of common mistake can succeed even if it is on the face of the contract perfectly possible for the defendant to do precisely what he has contracted to do ...*”

65. I agree that the basis on which to rest the doctrine of common mistake requires some adjustment. However, I am not certain that this alternative formulation advances an understanding of the circumstances in which the doctrine applies in at least some circumstances. When the parties enter into a contract, they will entertain a number of beliefs and assumptions. Some of those beliefs and assumptions will be set out or catered for in the terms of the contract itself and some will form the immediate background to the conclusion of the contract, whether it is the reason for entering into the contract, or it concerns the practicability or ability of the parties to perform the contract, or the means available to the parties to enable performance. These beliefs and assumptions may relate to the identity or attributes of one or more of the parties to the contract, the existence, identity or nature of the subject matter of the contract, one or more of the parties’ title, the reasons or motives for entering into the contract, the meaning and effect of the transaction represented by the contract or related transactions, and the like. If those beliefs and assumptions are shared between the parties, the true position may be such that the parties’ perception and understanding of the contract fundamentally changes from what they had mistakenly assumed.
66. In those circumstances, I consider that the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical.
67. The doctrine of common mistake is not meant to apply to those cases where the shared assumption is not sufficiently fundamental and/or where the difference between the assumed and actual states of affairs is anything less than fundamental or essential or radical. If it were otherwise, the value of certainty attached to a contract would be unjustifiably undermined. Thus, in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, Steyn, J said (at page 257):
- “Throughout the law of contract two themes regularly recur — respect for the sanctity of contract and the need to give effect to the reasonable expectations of honest men. Usually, these themes work in the same direction. Occasionally, they point to opposite solutions. The law regarding common mistake going to the root of a contract is a case where tension arises between the two themes.”*
68. At page 268, in the same judgment, Steyn, J said that the first imperative must be to uphold contractual bargains, not to undermine them.
69. There is no precise test to measure what constitutes a fundamental assumption underlying the contract and what constitutes a fundamental or essential or radical difference between the assumed and actual state of affairs. It is obviously a question of

degree, but the nature of the test is such that it necessarily applies to a small number of cases, given that the doctrine applies in circumstances which, in Steyn, J's words, are "*unexpected and wholly exceptional*" (see also paragraphs 84-85 of Lord Phillips, MR's judgment in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*).

70. Moreover, the fundamental nature of the common mistake is not one necessarily to be equated with the inducing effect of the commonly shared assumption upon the parties. In other words, it is not sufficient if both parties would not have entered into the contract had they known of the true state of affairs. If such were the test, it might well be on the facts of the particular case that both parties might not have entered into the contract had they known the true state of affairs, even where the commonly shared assumption related to a less important or non-fundamental matter. Therefore, if there had been a misrepresentation by one of the parties, the fact that the representee would not have entered into the contract had the misrepresentation not been made, is not necessarily indicative of the importance or fundamental nature of the representation itself. The reason for this is simple. Unlike misrepresentation or a unilateral mistake known or encouraged by one of the parties, a common mistake exists where neither party is at fault for the mistaken assumption, and the contract which they have voluntarily concluded should not be disturbed unless that assumption renders the contract wholly different from what they understood the case to be.
71. In *Bell v Lever Brothers Ltd* [1932] AC 161, in a judgment which underpins the Court of Appeal's judgment in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, Lord Atkin commented on Sir John Simon KC's formulation of the relevant proposition in support of resting the doctrine of common mistake on an implied contractual condition (a basis rejected by the Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, at paragraph 73). The suggested proposition was that "*Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e., it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact*". Lord Atkin said (at pages 225-226):

"Various words are to be found to define the state of things which make a condition. "In the contemplation of both parties fundamental to the continued validity of the contract," "a foundation essential to its existence," "a fundamental reason for making it," are phrases found in the important judgment of Scrutton L.J. in the present case. The first two phrases appear to me to be unexceptionable. They cover the case of a contract to serve in a particular place, the existence of which is fundamental to the service, or to procure the services of a professional vocalist, whose continued health is essential to performance. But "a fundamental reason for making a contract" may, with respect, be misleading. The reason of one party only is presumed not intended, but in the cases I have suggested above, of the sale of a horse or of a picture, it might be said that the fundamental reason for making the contract was the belief of both parties that the horse was sound or the picture an old master, yet in neither case would the condition as I think exist. Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are

“necessary” for giving business efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts ... We therefore get a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts. Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts? To apply the principle to the infinite combinations of facts that arise in actual experience will continue to be difficult, but if this case results in establishing order into what has been a somewhat confused and difficult branch of the law it will have served a useful purpose.”

72. That said, the inducing effect of the mistaken assumption is a necessary, although not by itself a sufficient, requirement for a common mistake to be fundamental so as to render a contract void. It is difficult to envisage how an assumption might be described as fundamental, where the parties to a contract would have entered into the contract in any event had they been aware of the true state of affairs at odds with their initial assumption. It is therefore necessary, but not of itself sufficient, for the application of the doctrine that the mistaken shared assumption resulted in the making of the contract in question.
73. The second element of the doctrine of common mistake worth considering is its non-application where the contract makes provision for the unexpected state of affairs which gives rise to the common mistake. At one point in his judgment in *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd*, at paragraph 76, Lord Phillips, MR said that the application of the doctrine of common mistake depended on there being no warranty that the relevant state of affairs exists. However, at paragraphs 74-89 of his judgment, Lord Phillips, MR plainly considered that this requirement could be extrapolated to the requirement that the contract must not make provision in respect of the mistake (for example, rendering the mistake at the risk of one party or the other).
74. This element was discussed by Leggatt, J in *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm); [2018] 1 Lloyd's Rep 177. Leggatt, J treats the matter as a question of a contractual allocation of risk (see also *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016, 1034-1035, 1040). After considering the decisions in *Bell v Lever Brothers Ltd* and *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd*, Leggatt, J said at paragraphs 61-64:

“[61] Where this leaves the common law doctrine of mistake, as it seems to me, is as follows. First, the doctrine is not based on an inquiry into the subjective beliefs of the parties but on an objective analysis of what they agreed. Second, the doctrine does not rest on the notion that the parties have impliedly agreed what is to happen in the event that an assumption underlying the contract proves to be false. It does, however, involve a question of construction of the contract. It is only where it is to be inferred from the terms of the contract or the surrounding circumstances that the contract was never intended to apply in the situation which in reality existed when the contract was made that the doctrine will apply. Such an inference will be drawn only if the difference between the state of affairs on which the contract was premised and the actual state of affairs is sufficiently fundamental. Thus, the doctrine of mistake can only apply if there is a gap in the contract. If the parties have expressly or impliedly agreed what is to happen if

they turn out to have been mistaken about the matter in question - in other words, if the risk of the mistake has been allocated by their contract - there is no scope for the doctrine ...

[63] One way - although not the only way - in which the risk of a mistake may be contractually allocated is by one party warranting that the relevant state of affairs exists.

[64] The main reason why pleas of mistake seldom succeed is that the risk of a mistake is usually allocated by the contract to one of the parties. Plainly, there is no room for the doctrine to operate if the contract states expressly what is to happen if the relevant assumption proves to be false. It may be harder to determine whether the contract impliedly allocates the risk ... In practice in such a case the answer is likely to be found through construction of the contract."

75. At paragraph 65, Leggatt, J reverted to the fundamental nature of the common mistake, equating the “*impossibility of performance*” test with the “*essential and radical difference*” test: “*The two approaches may essentially amount to the same thing*”.
76. Drawing these considerations together, the elements of a common mistake which has the effect of rendering the contract based on that common mistake void are as follows:
- (1) There must have been, at the time of the conclusion of the contract, an assumption as to the existence of a state of affairs substantially shared between the parties.
 - (2) The assumption itself must have been fundamental to the contract.
 - (3) That assumption must have been wrong at the time of the conclusion of the contract.
 - (4) By reason of the assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract; alternatively, the contract must be impossible to perform having regard to or in accordance with the common assumption. In other words, there must be a fundamental difference between the assumed and actual states of affairs.
 - (5) The parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common assumption was wrong.
 - (6) The contract must not have made provision in the event that the common assumption was mistaken.

Azman’s submission

77. Mr Newman, on behalf of Azman, argued that the singular purpose of the lease agreements was to enable Azman to participate in the 2016 Hajj airlift. This purpose was acknowledged by the Claimants as follows:

- (1) At paragraph 41(a)(i)(1) of the Particulars of Claim, the Claimants pleaded that *“At all material times prior to the Leases being completed it was represented to Veling as agent for the Claimants and/or to the Claimants by Azman (and/or by Orex on its behalf) that the primary purpose of leasing the two Aircraft was to transport pilgrims to and from the 2016 Hajj”*, and that by reconfiguring the aircraft, Azman expected to achieve revenue of US\$36,000,000 from the 2016 Hajj airlift and profits of US\$16,000,000.
 - (2) At paragraph 41(a)(i)(3) of the Particulars of Claim, the Claimants pleaded that it was clear to them that the expected revenue derived from the Hajj airlift would be sufficient to allow Azman to meet comfortably its financial obligations under the lease agreements.
 - (3) At paragraph 41(a)(i)(4) of the Particulars of Claim, the Claimants referred to Azman’s letter dated 7th July 2016 and pleaded that *“It is plain that the loss of the 2016 Hajj contract was more than just “capable” of affecting Azman’s ability to perform its Lease obligations, it had removed the very purpose for which the Aircraft were to be leased”*.
 - (4) NAHCON’s letter dated 11th May 2016 confirming its approval for Azman to participate in the 2016 Hajj airlift was provided to the Claimants prior to the execution of the lease agreements.
78. Indeed, I also note that this purpose was recognised by Mr Patel that *“The deal had always been based on the fact that Azman wanted the aircraft to ferry passengers to and from the Hajj and that they would get the permission they needed”* and that when Azman was informed that it did not have such approval, *“it meant a huge problem”* (paragraph 66 of Mr Patel’s first witness statement).
79. Mr Abdulmunaf’s evidence was that, based on the financial information provided to the Claimants, Azman could have afforded to enter into the lease agreements only if it obtained *“Full Hajj Approval”* (paragraph 9(ii) of Mr Abdulmunaf’s first witness statement).
80. Further, Azman points out that the Claimants’ claim for misrepresentation was advanced on the basis that the Claimants would not have entered into the lease agreements had they known that Azman had been excluded from participation in the 2016 Hajj airlift (paragraphs 47-50 of the Particulars of Claim). (The Claimants no longer pursue the claims based on misrepresentation.)
81. Similarly, had Azman been aware of its exclusion by GACA from its participation in the 2016 Hajj airlift, it would not have entered into the lease agreements.
82. As Mr Newman put it, Azman’s ability to participate in the 2016 Hajj airlift was *“fundamental to the decision to enter into the Lease contracts (for both the Defendant and for the Claimants)”*.
83. With these considerations in mind, Mr Newman contended that:

- (1) There was a common assumption as to the existence of a state of affairs, namely that Azman would or was expected to obtain GACA's approval to participate in the 2016 Hajj airlift.
- (2) The commonly shared assumption was wrong, because at the time of the conclusion of the lease agreements, GACA had decided to exclude Azman from participation in the 2016 Hajj airlift.
- (3) The non-existence of the assumed state of affairs was not attributable to the fault of either party.
- (4) The non-existence of the assumed state of affairs rendered performance of the contract impossible in that it removed "*the very purpose*" of the lease agreements and prevented the transaction from being "*commercially feasible*". In this latter respect, Azman relies on the feasibility study it prepared and sent to the Claimants demonstrating that the analysis relied on Azman's participation in the Hajj airlift. Azman's participation in the 2016 Hajj airlift was a "*vital attribute*" of the consideration for or the circumstances surrounding the lease agreements. In other words, it was sufficiently fundamental to the lease agreements.
- (5) There was no warranty or guarantee by Azman that it would be approved to participate in the 2016 Hajj airlift. During the contractual negotiations, the Claimants requested details "*regarding the Nigerian Authorities' method of allocation and the likelihood of Azman's allocation being cancelled*" and were informed by Orex that no guarantee could be given that Azman would be one of the selected airlines for the following four years, although Orex considered it likely.

84. In those circumstances, Azman submitted that the lease agreements were void at common law.

The Claimants' submission

85. Mr Stephen Midwinter QC, on behalf of the Claimants, contended that the lease agreements are valid and not rendered void by the doctrine of common mistake, for the following reasons:

- (1) There had been no mistake as to an existing state of affairs, because at the time of the lease agreements, it was understood that Azman required, but had not yet obtained, GACA's approval for Azman's participation in the 2016 Hajj airlift.
- (2) Further, the Claimants did not entertain a mistake, because they had been informed by Azman or Orex that Azman might not obtain GACA's approval to participate in the 2016 Hajj airlift
- (3) Any mistaken belief on the part of the Claimants was the fault of Azman insofar as it could be said that the Claimants believed that Azman had GACA's approval or would inevitably obtain such approval. In this respect, the Claimants relied on Mr Abdulmunaf's email dated 1st June 2016 identifying the fact that the "*arrangement could only be cancel [sic]*" if Azman could not meet a

relevant deadline. Mr Midwinter QC asserted that on the basis of Mr Abdulmunaf's evidence during his cross-examination the only reason why Azman might not obtain GACA's approval was the failure to meet a relevant deadline and anyone reading Mr Abdulmunaf's email dated 1st June 2016 would reasonably "*take it that provided you concluded leases GACA approval would be forthcoming*".

- (4) If there had been a mistake as to an existing state of affairs, it did not render the performance of the contract impossible or the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. The mistaken assumption related to GACA's approval for the 2016 Hajj airlift which did not render the five year lease agreements impossible to perform or essentially and radically different.
- (5) In support of the fact that the true state of affairs did not render the contract, based on the mistaken assumption, impossible to perform or essentially or radically different, Mr Midwinter QC referred to three matters which evidence the importance or lack of importance of the common assumption to the lease agreements, namely:
 - (a) The fact that Azman allowed the Claimants to take steps to deliver the aircraft to Jakarta airport on 28th June 2016 and 4th July 2016, well after Azman became aware of GACA's refusal to provide Azman with its approval. Indeed, Veling had to pay Garuda US\$1,000 in respect of outstanding fees for customs clearance for the second aircraft which had arrived at Jakarta on 4th July 2016.
 - (b) The fact that on 24th June 2016 Mr Patel requested Mr Abdulmunaf to provide audited financial statements for Azman Oil and Gas Ltd (Azman's parent). Later that day, Mr Abdulmunaf forwarded this request to Azman's account manager, with the instruction to Azman's auditor (Austin) as follows: "*Get Austin develop audited financials for Azman Oil & Gas that is at least 10X times that of Azman Air to avoid complications, make sure you carefully examined [sic] it before forwarding. They just need to see attractive paper not reality*". On 1st July 2016, Mr Abdulmunaf forwarded the requested financial statements to Mr Patel; those financial statements were dated 6th June 2016, but during his oral evidence, Mr Abdulmunaf said that the financial statements had been drawn up in response to Mr Patel's request on 24th June 2016. Mr Midwinter QC fairly put to Mr Abdulmunaf that the accounts were fraudulently prepared, but Mr Abdulmunaf said that the auditor refused to prepare fraudulent accounts and that the financial statements were mistakenly misdated.
 - (c) The fact that Azman did not assert that the lease agreements were void for common mistake at any relevant time, even when the Claimants purported to terminate the lease agreements on 12th August 2016.

To this end, Mr Midwinter QC relied on the Court of Appeal's statement in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679, at paragraph 165, that it is legitimate to have regard

to the defendant's conduct after the conclusion of the relevant contract, because such conduct is a "*telling indication*" as to whether there is an essential difference between the contract based on the assumed state of affairs and the contract based on the actual state of affairs.

- (6) The terms of the lease agreements allocated the risk of any mistaken assumption of fact as to GACA's approval for the 2016 Hajj airlift to Azman, in particular having regard to clauses 2, 3, 4, 8.3.1(a), 10.1.1(a), 10.2.1, and 20.1.1(f), and clause 1(1)(e) of Schedule 2 of the lease agreements.

Discussion

86. The parties entered into the lease agreements on the assumptions that (1) NAHCON had provided its approval for Azman's participation in the 2016 Hajj airlift, (2) GACA might or might not provide its approval, (3) Azman expected to obtain GACA's approval, and (4) GACA had not yet made its decision whether to provide its approval.
87. In fact, at the time when the lease agreements were concluded, GACA had made its decision to exclude Azman from the 2016 Hajj airlift. In those circumstances, the third and fourth of the assumptions referred to above, namely Azman's expectation that it would obtain GACA's approval and that GACA had not yet made its decision, were wrong. In those circumstances, in my judgment, there was a mistake as to an existing state of affairs. I do not accept Mr Midwinter QC's submission that this amounted to no more than a misprediction. If GACA had made its decision after the lease agreements had been concluded, I would have acceded to the submission that there was no mistaken assumption as to an existing state of affairs, but in circumstances where GACA had already made its decision some five days before the lease agreements were concluded, the position is otherwise.
88. Further, I also reject the Claimants' submission that the mistake was attributable to Azman's fault. Based on the evidence, prior to the lease agreements being executed, Azman had been candid with the Claimants as to the then current status of the approvals obtained and not obtained for Azman's participation in the 2016 Hajj airlift. Furthermore, I do not accept that Mr Abdulmunaf said, during his evidence, that the only reason why GACA approval might have been withheld was the failure to meet a relevant deadline. Mr Abdulmunaf also said that that was "*Part of the reason*" and he concentrated on the fact that "*we couldn't prove that we had a contract arrangement with leasing company or we have our own aircraft*" as a reason for being denied GACA's approval, recalling that at the time of GACA's decision, the lease agreements had not yet been executed. When answering Mr Midwinter QC's question about the meaning to be given to his email dated 1st June 2016, Mr Abdulmunaf made it clear that if the lease agreements had been concluded in time, he would have expected GACA approval to have been forthcoming:

"Q. We will come on to the communication you get from [NAHCON] saying that you have not got your approval in a moment but if we can take things in stages, I just want to be clear, Mr Patel was obviously relying on you for information about where the Hajj approval process had got to and what you appear to be saying in this document is that the only basis on which it could be cancelled, on which it might not get approval, is if it becomes obvious to the authorities that you cannot meet the deadline and do you agree with me that is what you are telling me here?"

A. Yes, because at that time there was not any reason that we could think of because it never happened to anybody in Nigeria before, so unless we couldn't prove that we had a contract arrangement with leasing company or we have our own aircraft there was no reason for us to be excluded.

Q. So it would be reasonable, would it not, for someone reading this to take it that provided you concluded leases GACA approval would be forthcoming?

A. Yes, if we had done that in good time."

89. However, I consider that the mistaken assumption shared by the parties was not sufficiently fundamental to the lease agreements and did not render the lease agreements essentially and radically different from what the parties understood or impossible to perform, so as to render the lease agreements void at common law. I reach this conclusion for the following reasons:

- (1) The lease agreements were each for a period of five years. The 2016 Hajj airlift, had approval been obtained from GACA, represented a relatively short period of the entire lease period as a whole. Mr Midwinter QC, on behalf of the Claimants, accepted that if the lease agreements had been for a two or three month period sufficient only to participate in the 2016 Hajj airlift, there would have been a sufficiently fundamental mistake, but that is not the case. Once the 2016 Hajj airlift was completed, there remained some 90-95% of the lease period to be performed.
- (2) A feasibility study had been prepared on behalf of Azman for the Claimants, which revealed that the total anticipated profit for the five year leases of both aircraft was US\$84,010,553 to US\$142,973,824 (assuming 65% to 85% utility respectively). The profit for the 2016-2017 year was anticipated to be US\$14,126,932 to US\$24,874,971. If the profit for the 2016-2017 year were removed, there remained a substantial profit to be earned, at least according to the feasibility study, which of course is only a projection. If Azman had been successful in obtaining the approvals required for the subsequent Hajj airlifts in the remaining four years of the lease agreements, Azman would still have earned a substantial profit, as Mr Abdulmunaf acknowledged:

"Q. If, for the sake of argument, you had managed to trade through the three-month Hajj period and had then got Hajj approvals for 2017/2018/2019/2020, this would have still been a very profitable transaction for you, wouldn't it?"

A. Yes."

- (3) During his evidence, when questioned about the feasibility study, Mr Abdulmunaf focussed on the profits to be earned from the Hajj airlift for all of the five years of the leases. Mr Abdulmunaf said that *"all our forecast were based on Hajj revenue and we run this with them many times and they asked us if we could use the aircraft for other routes, which we said to them, it's possible but it's subject to the Hajj because our main source of income is going to be the Hajj. Without the Hajj there's no way we are going to survive"*. I accept that

participation in the Hajj airlift for all of the five years of the lease agreements would have been critical to the success of the venture. I also accept that the revenue earned for the 2016-2017 year, based on participation in the 2016 Hajj airlift was important, but I do not consider it was sufficiently important so as to be fundamental to the performance of the lease agreements as a whole. Mr Abdulmunaf's concern was with the profits to be earned from the Hajj airlifts for the entire lease period. As he said during his oral evidence:

“Q. The point I want to suggest to you is that loss of revenue from Hajj flights for the three months in 2016/2017 couldn't possibly have wiped out all of the benefit of this contract to Azman, because the benefits far exceed the relevant amount.

A. No, it can, because if you look at the arithmetic you discover that we based our analysis based on 20,000 passengers, and the cost per passenger was 1,650 USD to fly him to Saudi and back. So if you sum up that amount you will see that, per year, it's around 40 - between 40 and 50 million USD per year. So our calculation was based on: if we generated this amount of revenue we could be able to sustain the lease for the period of five years, and we told them - they even said that the first year we could pay actually like 50 per cent of the entire amount or they could actually sold the aircraft to us and we pay them the amount, which we discussed with them too. They knew that. Everything was based on that calculation, and without that calculation our financials couldn't afford to service the lease. So everything is based on this, even to operate US, China and Dubai is based on the revenue generated from the Hajj.”

- (4) There was no evidence that the failure to obtain GACA's approval for the 2016 Hajj airlift would have necessarily or probably resulted in approval being denied for the Hajj airlifts for the remaining years of the lease agreements. Indeed, in its letter dated 7th July 2016, after referring to GACA's decision, Azman concluded by stating that *“However since Hajj operations is an annual events [sic] we are hopeful to participate next year and subsequent years”*.
 - (5) It therefore remained possible for the parties to perform the lease agreements even without Azman's participation in the 2016 Hajj airlift. The lease agreements were not rendered fundamentally or essentially or radically different by reason of the mistaken assumption.
 - (6) I accept that had both parties been aware that GACA had withheld its approval to Azman to participate in the 2016 Hajj airlift, neither the Claimants nor Azman were likely to have entered into the lease agreements (as both Mr Patel and Mr Abdulmunaf said in their evidence). However, as I explained above, the mere fact that the parties were induced by their shared mistaken assumption to enter into the lease agreements, whilst necessary to render the contract void for common mistake, is not on its own sufficient to render the contract void.
90. I have come to this conclusion without consideration of the factors on which the Claimants rely after Azman became aware of GACA's refusal to approve its participation in the 2016 Hajj airlift. I should point out that I make no specific finding

that Azman prepared the financial statements for Azman Oil & Gas Ltd fraudulently; although the circumstances surrounding their preparation give rise to suspicion, I do not consider that the evidence is sufficiently clear to reach any finding of fraud. In any event, I do not consider that such a finding would be relevant to the task at hand. Further, I do not accept that Azman's post-contractual conduct assists in determining whether the lease agreements were void for common mistake, not least because Azman raised the issue of GACA's decision with the Claimants after it had appealed to the Nigerian Ministry of Foreign Affairs and GACA itself, and proposed walking away from the transaction (although it is also true to say that Azman invoked clause 10.2.1 of the lease agreements, which the Claimants did not consider Azman was entitled to do).

91. Even if I had concluded that the shared mistaken assumption was sufficiently fundamental and/or rendered the lease agreements essentially and radically different from what the parties understood or impossible to perform, I would nevertheless also have concluded that the lease agreements allocated the risk of not obtaining GACA's approval to be borne by Azman, not the Claimants, with the result that the lease agreements are not void. I reach this conclusion for the following reasons:

- (1) The parties entered into the lease agreements in full recognition of the possibility that GACA might withhold its approval for Azman's participation in the 2016 Hajj airlift.
- (2) Clause 8.3.1(a) of the lease agreements provides that "*Lessee's obligations under this Agreement and the other Operative Documents are absolute and unconditional, irrespective of any contingency or circumstance whatsoever, including (but not limited to): ... any other cause or circumstance which (but for this provision) would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement ...*". This provision makes it clear that Azman bears absolute and unconditional obligations under the lease agreements, and that those obligations are unaffected by "*any contingency or circumstance whatsoever*". Such a contingency must have included the failure to obtain GACA's approval, which both parties recognised was a possibility. Mr Newman argued that this provision did not meet the facts of the present case, because this is not a case where the contingency terminated or affected an obligation under the lease agreements. I do not agree, as GACA's withholding of its approval - assuming it was sufficiently fundamental - must have affected Azman's obligations under the lease agreements. In any event, the specified circumstances in clause 8.3.1(a) are not exhaustive.
- (3) Clause 20.1.1(f) of the lease agreements provided that Azman's failure to obtain *any consent, authorisation, licence, certificate or approval of or registration with or declaration to any Government Entity required in connection with the Operative Documents, including, without limitation: ... (iv) any airline licence or air transport licence required by Lessee*" would constitute an "*Event of Default*" and therefore a repudiatory breach on the part of Azman, entitling the Claimants to exercise various remedies, including the termination of the lease agreements, under clause 20.2 (as to an "*event of default*" constituting an allocation of risk, see *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm); [2018] 1 Lloyd's Rep 177, at paragraphs 67-70). I was in two

minds about the effect of this provision, given that it applied only to approvals “*required in connection with*” the lease agreements and it is not immediately obvious that GACA’s approval for participation in the 2016 Hajj airlift was required for the lease agreements. That said, if the mistaken assumption had been fundamental to the lease agreements such that the parties considered it to be critical to the success of the lease agreements, GACA’s approval might well be said to fall within the scope of this provision. Given the premise on the basis of which I am considering whether the lease agreements make provision for the risk of not obtaining GACA’s approval, namely that the common assumption was sufficiently fundamental to the lease agreements, I consider that clause 20.1.1(f) extended to GACA’s approval. In those circumstances, the very matter which failed to materialise was contemplated by the parties by this provision and by the warranty given by Azman set out in clause 1.1(e) of Schedule 2. Even if I had come to the opposite conclusion, I consider that clause 8.3 would have been sufficient on its own to allocate the risk of not obtaining GACA’s approval to Azman.

92. For the above reasons, in my judgment, the lease agreements were and are not void for common mistake.

Quantification of the Claimants’ loss

93. It follows from my finding that the lease agreements were not invalidated by GACA’s refusal to provide its approval to Azman to participate in the 2016 Hajj airlift, that the Claimants are entitled to damages for Azman’s breaches of the lease agreements.
94. Azman required the Claimants to prove their loss.
95. The Claimants submitted that they have suffered four heads of loss:
- (1) The loss of profit which the Claimants would otherwise have earned under the lease agreements with Azman. The Claimants submitted that their damages on this head are to be assessed as the difference between the sums which they would have earned under the lease agreements with Azman and the sums which they would reasonably have earned under substitute leases.
 - (2) The expenses incurred by the Claimants in connection with their attempts to find alternative leases that they would not have incurred had the lease agreements with Azman continued, including storage costs, legal costs, fuel and transport costs.
 - (3) The costs incurred in the negotiation of the lease agreements with Azman, pursuant to clause 23.4(c) of the lease agreements.
 - (4) Interest at a rate 10% above LIBOR pursuant to clause 8.2 of the lease agreements, alternatively interest pursuant to section 35A of the Senior Courts Act 1981.
96. I shall address each of these heads of loss in turn. Mr Patel explained how each of the first three heads of loss were suffered by the Claimants in his second witness statement and was not challenged in his evidence in this regard.

97. First, the loss of profit. For this purpose, I also have regard to clause 20.3(a)(i) of the lease agreements, which entitles the Claimants to an indemnity, in the event of Azman's default, in respect of "*any loss of profit suffered by Lessor because of Lessor's inability to place the Aircraft on lease with another lessee on terms as favourable to lessor as this Agreement or because whatever use, if any, to which Lessor is able to put the Aircraft upon its return to lessor is not as profitable to lessor as the terms contained in this Agreement*".
98. The lease agreements with Azman provided for the payment of rent of US\$350,000 per month for 60 months, for each aircraft. That would have represented total revenue in the sum of US\$42,000,000. After the termination of the lease agreements in August 2016, the Claimants negotiated a lease with VIM Airlines in January 2017 for five aircraft, including MSN 27251 and MSN 27252. After the other three aircraft, but not MSN 27251 and MSN 27252, were delivered to VIM Airlines, VIM Airlines did not make all of the payments due and then ceased operations, which meant that no payments were received by the Claimants in respect of the two relevant aircraft (other than security deposits).
99. The Claimants then concluded further leases with IrAero in respect of the three of the five aircraft, including MSN 27251, but not MSN 27252. These three aircraft were delivered to IrAero in April 2018. Accordingly, as at the date of the trial, the Claimants intended to sell MSN 27252.
100. The rent payable by IrAero for MSN 27251 is to be US\$305,000 per month from April 2018 to July 2021, which in total amounts to revenue of US\$12,200,000 for that one aircraft.
101. Mr Midwinter QC on behalf of the Claimants submitted that the loss of profit attributable to MSN 27252 should be calculated in the same manner as that for MSN 27251 and that the intended sale of MSN 27252 should not enter into the equation, because the intended sale was not legally caused by Azman's repudiatory breach and the Second Claimant's termination of the relevant lease agreement, as the decision was made to sell the aircraft for the reason that there was no market available for the lease of the aircraft (as Mr Patel explained in his second witness statement). In this respect, Mr Midwinter QC relied on the analysis undertaken by the Supreme Court in *Fulton Shipping Inc of Panama v Globalia Business Travel SAU* [2017] UKSC 43; [2017] 1 WLR 2581, at paragraphs 29-34). In any event, as I understand the position, the aircraft has not yet been sold. Mr Newman took issue with this analysis and argued that the rent which would have been earned on MSN 27252 under the lease agreement should cease upon the sale of the aircraft.
102. In my judgment, for the reasons submitted by Mr Midwinter QC, the Claimants are entitled to damages in the manner in which they have calculated the loss. After giving credit for a security deposit paid by Azman under the lease agreements and the security deposits received from VIM Airlines, the Claimants are entitled to US\$16,246,020.00 in respect of loss of profit.
103. As to the second head of loss, namely the expenses incurred by the Claimants in connection with their attempts to find alternative leases, Mr Patel gave evidence of these expenses incurred as a result of Azman's refusal to take delivery of the aircraft, including ferry flight, storage, maintenance, insurance and other costs, in the sum of

US\$5,612,958.92, supported by production of the relevant invoices. In my judgment, this head of loss is established in the sum claimed by the Claimants.

104. As to the third head of loss, clause 23.4 of the lease agreements provides that “... *each party shall bear its own costs and expenses (including legal expenses) associated with the preparation, negotiations and completion of this Agreement and the other Operative Documents, provided that if, for whatever reason, the Aircraft is not delivered to Lessee pursuant to this Agreement, Lessee shall reimburse Lessor on first written demand, for all costs and expenses (including legal expenses) incurred by lessor associated with the preparation, negotiation and completion of this Agreement and the other Operative Documents*”. In this case, Azman did not take delivery of the aircraft and so the Claimants are entitled to be reimbursed in respect of the costs and expenses incurred in respect of the negotiation of the leases in the sum attested to by Mr Patel, namely US\$148,910.06.
105. Finally, the Claimants are entitled to interest pursuant to clause 8.2 of the lease agreements, which provides that “*If Lessee fails to pay any amount payable under this Agreement ... on the due date, Lessee shall pay to Lessor on demand from time to time interest at the Default Rate (both before and after judgment) on that amount, from the due date to the date of payment in full by Lessee to Lessor. All such interest will be compounded monthly and calculated on the basis of the actual number of days elapsed and a 360 day year. Interest payable pursuant to this clause 8.2 (Default Interest) which is unpaid at the end of each such period shall thereafter itself bear interest at the rate provided in this clause 8.2 (Default Interest)*”. Accordingly, the Claimants are entitled to interest, compounded monthly, on each head of loss at the rate of LIBOR plus 10% per annum (in accordance with the definition of “*Default Rate*” in Schedule 1 to the lease agreements). Interest is to be calculated in accordance with clause 8.2.
106. Therefore, in my judgment, the Claimants have proved and are entitled to recover damages in the sums set out above, plus interest in accordance with clause 8.2 of the lease agreements.

Conclusion

107. For the reasons explained above, the lease agreements are not void for common mistake and the Claimants are entitled to damages in the following sums: (1) US\$16,246,020.00, (2) US\$5,612,958.92, and (3) US\$148,910.06. The total sum recoverable by the Claimants is US\$22,007,888.98. In addition, the Claimants are entitled to interest on these sums calculated in accordance with clause 8.2 of the lease agreements.
108. The precise form of order will be discussed with counsel.