Neutral Citation Number: [2022] EWHC 2461 (Comm)

Case No: CL-2020-000630

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2022

Before :

MR JUSTICE CALVER

- -

Between :

Optimares S.p.A.	**Claimant**
- and -	
Qatar Airways Group Q.C.S.C.	**Defendant**

- -
- -

Mark Beeley (instructed by **Orrick, Herrington & Sutcliffe (UK) LLP**) for the **Claimant**
Edward Cumming KC and Emma Hughes (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing dates: 11th July 2022 - 29th July 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 7th October 2022.

Mr Justice Calver :

(A) The Contractual Framework

(i) The Purchase Agreements

1. In 2018 and 2019 the Claimant ("**Optimares**") and the Defendant ("**Qatar Airways**") entered into Purchase Agreements[1] for Optimares to design, manufacture, sell and deliver business class seats for the Boeing 787-9 aircraft, business class seats for the Boeing 777-9 aircraft and both economy and business class seats for the Airbus 321 aircraft ("**the Purchase Agreements**").[2] These contracts covered work done by Optimares prior to the signing of the Purchase Agreements, as well as forward-looking work, and envisaged that Optimares would fabricate a number of "shipsets", that is, groups of seats for installation into the aircraft (known as a "**retrofit**").[3] The Parties provided that Qatar Airways would place orders for the shipsets by issuing purchase orders to Optimares and these purchase orders were governed by the terms of the Standard Conditions and the Purchase Agreement.[4] The prices for the Products were contained in Exhibit No 6 to the Purchase Agreement and all prices were in the Base Year United States Dollars.[5]

2. On delivery of the Product referred to in the relevant purchase order to the satisfaction of Qatar Airways, Optimares would invoice it and that invoice would be payable within 45 days of receipt.[6] The Parties had agreed in the Purchase Agreement that time of delivery was of the essence and that Optimares had to meet the applicable "*on-dock-dates*".[7] The Parties also provided that orders for shipsets would be placed no later than five months prior to the relevant on-dock-date.[8]

3. In addition to payments due on delivery of the Products, the Purchase Agreement also provided for the payment of "non-recurring costs" ("**NRC**") in accordance with an agreed schedule. NRC were, in essence, those costs incurred by Optimares in developing and producing the Product, covering the phases of design, development, engineering and final certification of the seat. Payment of these NRC was to be made in four instalments each of 25% thereof, contingent on Optimares reaching the four milestones in the development and completion of the relevant programme, namely the Initial Technical Meeting ("**ITCM**"),[9] Critical Design Review ("**CDR**"),[10] First Article

[1] References to the Purchase Agreement throughout this judgment refer to the Purchase Agreement for business seats for the B787-9. The Purchase Agreements for the four different programmes were materially identical.
[2] Clause 2.2 of the Standard Conditions. The covered aircraft and aircraft delivery schedule were set out in clauses 3.1 and 3.2 of the Purchase Agreement respectively.
[3] "Shipset" is defined in clause 1.1 of the Standard Conditions as "all the Software, Products and all parts and Material purchased by Qatar Airways for installation in or use on an Aircraft". For the B787-9, 30 shipsets were contracted for, between 2019 and 2023: see clause 3.2 of the Purchase Agreement.
[4] Clause 7.1.1 and 7.1.2 of the Standard Conditions.
[5] Clause 4.1.1 and 4.1.2 of the Purchase Agreement.
[6] Clauses 4.9.1, 4.9.2 and 7.4.2 of the Standard Conditions.
[7] Exhibit No 2 to the Purchase Agreement, clauses 7.2 and 7.3.
[8] Clause 4.10 of the Purchase Agreement.
[9] Clause 4.9.4 of the Purchase Agreement. See also Exhibit No 2 to the Standard Conditions.
[10] Clause 4.9.5 of the Purchase Agreement. See also Exhibit No 2 to the Standard Conditions.

Inspection ("**FAI**")[11] and rectification of all defects raised at FAI.[12] Qatar Airways issued purchase orders from time to time in respect of these non-recurring costs.[13]

4. The Purchase Agreements expressly incorporated Qatar Airways' Standard Conditions[14] and provided that, in the event of inconsistency between the Purchase Agreement and the Standard Conditions, the terms of the relevant Purchase Agreement would prevail.[15] The Product Specification document (Exhibit No 12 to the Purchase Agreement) was subordinate to both of these contractual documents.[16]

5. The relevant Standard Conditions and terms of the Purchase Agreement are set out in Annex 1 to this Judgment.

(B) How the issue of contractual construction arises

6. I agree with the submission of Mr. Edward Cumming KC, who appeared at trial with Ms. Emma Hughes for Qatar Airways, that the Purchase Agreements principally fall to be interpreted by an examination of their terms, the key provisions of which appear in Annex 1 below. Whilst the terms of the Purchase Agreements are clearly favourable to Qatar Airways who no doubt had the whip hand in the negotiations, they were nonetheless subject to some negotiation between the parties (with Optimares suggesting modifications to the drafts after a review of the contracts, including by its IP lawyers). It is clear that Optimares was keen to enter into the Purchase Agreements[17] and made the choice to contract on the terms that it did.

7. At paragraph 4 of the Amended Particulars of Claim, Optimares relies upon two matters for what it describes as the "*backdrop*" to the entering into of the Purchase Agreement, as follows:

> *"(a) Representatives of [Qatar Airways], including Messrs Akbar Al Baker and Rossen Dimitrov, made it clear to Optimares during the course of 2018 that if Optimares wished to win contracts from [Qatar Airways], it should not take on new business for existing clients and/or decline to take on new clients, such that [Qatar Airways] would have priority access to Optimares' production lines.*
>
> *(b) The same representatives of [Qatar Airways] demanded during the course of 2018, as a condition to continuing negotiations, that Optimares secure a bigger plant and make substantial capital investments in its facilities. Optimares met such conditions"*.

8. Qatar Airways disputes both of these points factually. But the outcome of this factual dispute does not matter, as even assuming in Optimares' favour that both points are factually proven, they cannot alter the clear wording of each of the relevant Purchase

[11] Clause 4.9.6 of the Purchase Agreement. See also Exhibit No 2 to the Standard Conditions.
[12] Clause 4.9.7 of the Purchase Agreement. See also Exhibit No 2 to the Standard Conditions.
[13] See SV 21745363, SV 21782467, SV 21825717, SV 21825118, SV 21670398, SV 21635629.
[14] Clause 2.2 of the Purchase Agreement.
[15] Clause 1.3 of the Standard Conditions and clause 2.3 of the Purchase Agreement.
[16] Clause 2.3(c) of the Purchase Agreement.
[17] See the 1st witness statement of Alessandro Braca, paragraph 64.

Agreements in the present case, the proper construction of each of which is, in my judgment, clear.

9. Mr. Beeley (a partner at Orrick, Herrington & Sutcliffe solicitors), who appeared on behalf of Optimares, submitted that Optimares incurred millions of euros in costs in progressing the works and was on the cusp of delivering shipsets when, on 23 March 2020, Qatar Airways served termination notices in respect of all four contracts and the Purchase Orders which had been placed under them. Qatar Airways disputes this and alleges that Optimares was guilty of numerous delays prior to it terminating the contracts. Once again, in my judgment, in view of the clear terms of the Purchase Agreements, the outcome of this dispute does not matter.

10. The termination notices served by Qatar Airways stated as follows:

> "*This letter (this "Letter") constitutes formal written notice that, pursuant to Clause 12.2.3 of the Standard Conditions, we hereby exercise our right to terminate the following (for our convenience and without incurring any liability whatsoever):*
> *(a) the Purchase Agreement (together with the Standard Conditions), with such termination being effective three (3) months from the date of this Letter; and*
> *(b) all Purchase Orders issued under the Purchase Agreement, with such termination being effective fourteen (14) days from the date of this Letter.*
> *Without prejudice to your continuing obligations under the Purchase Agreement and pursuant to Clause 12.3.2 of the Standard Conditions, we hereby demand that you repay the following ("Costs"):*
> *1. all sums previously paid by us to you together with Interest thereon, within ten (10) calendar days of the relevant termination; and*
> *2. all Freight Charges paid or incurred by us for Products and Spare Parts affected by such termination*".

11. This was one day after Optimares had served notices of allegedly excusable delay under all four contracts on 22 March 2022 in the following terms:

> "*The event of Excusable Delay is the outbreak of COVID-19, and in particular the Italian Government's response to it. As Qatar Airways has been aware, since 10 March 2020 the entirety of Italy has been on Government mandated 'lock down'. Further measures taken across the EU have meant that testing and other certification by third parties has been impossible. We are also receiving large number of force majeure declarations from our suppliers.*
> *This has made all manufacturing and related processes effectively impossible, and has removed the Supplier's ability to perform the Purchase Agreement in any meaningful fashion. The circumstances fall within the definition of Excusable Delay as set out in section 13.1.1 of the Standard Conditions.*
> *As matters stand, we are unable to provide a meaningful estimate as to when the Supplier will be able to resume its operations under the Purchase Agreement, but will update Qatar Airways as matters develop. As matters stand, we cannot identify any measures within our control to minimise or overcome the Excusable Delay, but will continue to review this in light of section 13.1.5 of the Standard Conditions…*"

12. In paragraphs 6-10 of its written opening, Optimares submitted as follows:

"*6. Optimares does not dispute that Qatar had in some circumstances a right to terminate for convenience, but says:*

(a) that right was not available where Excusable Delay had been invoked under the contracts (which Optimares had done so days before given the Italian shut-down of all non-essential industry due to the outbreak of COVID-19); and

(b) that right was not exercisable in order to re-award the same works to another contractor at a lower price (to the extent the disclosure has been made by Qatar, it is clear that prior to termination Qatar was deep in discussions with Adient, and it has sought to redact all pricing data in relation to this new contract from its disclosure). Adient is part owned by Boeing, who also owns BGS, who was serving as D's integrator for the B787 and B777 programmes – and who became an increasing impediment to C's forward works at the very time Adient was speaking with D about replacing C.

7. Accordingly, Optimares was wrongfully terminated, and should be entitled to its lost profits and its costs thrown away. In any event, even if the termination were valid, Optimares should be entitled to its costs thrown away. Qatar disputes this, and says that it has an absolute right to terminate the contract at any time prior to delivery of an actual shipset, with effectively zero financial consequence. Such payments as it had made under the contracts, it now seeks to reclaim.

8. This would be a commercially surprising bargain for any party to have entered into, not least a medium sized company whose entire annual turn-over was at risk. At the very least this arrangement would have led to Qatar being in receipt of valuable IP and unjustly enriched by the same, which it has not paid for, and which Optimares should be compensated for.

9. There are further disputes between the parties as to amount of liabilities Optimares incurred, and changes which should have been made to the contract pricing.

10. In short however, C seeks to simply claim the benefit of the bargain it struck:

(c) if the termination was wrongful, it should be entitled to the lost profits it has been denied and its wasted costs actually incurred (or which it is liable to incur),

(d) if the termination was valid, it should be entitled to the costs it has incurred or is liable to incur."

13. In contrast, Qatar Airways submitted in its written opening as follows:

"*6. Clause 12.2.3 of the Standard Conditions gave Qatar Airways an unfettered right to terminate the contracts for convenience at any time. This is the only natural and ordinary meaning that can be given to the words that the parties – who were sophisticated commercial operators – chose to use in that clause and their agreement more widely. The parties expressly stipulated that this right to terminate under clause 12.2.3 applied "[n]otwithstanding anything to the contrary contained in the [contracts]" and would be available for Qatar Airways*

to exercise "without incurring any liability".

7. Notwithstanding these plain words, by these proceedings Optimares effectively seeks to re-write the parties' negotiated bargain so as significantly to restrict Qatar Airways' right to terminate the Contracts for convenience.

8. In seeking to re-write the parties' bargain in this way, Optimares is forced to resort to a creative approach to contractual interpretation and, in the alternative, to arguing for the implication of unnecessary terms – although this alternative argument does not feature in its skeleton argument. In this way Optimares suggests that Qatar Airways' right to terminate under clause 12.2.3 "[n]otwithstanding anything to the contrary contained in the [contracts]" could not be exercised if:

8.1 there was an ongoing "Excusable Delay" (within the meaning of clause 13 of the Standard Conditions); or

8.2 Qatar Airways intended to re-award the work covered by the relevant Contract(s) to another manufacturer: see APOC, ¶16(c).

9. In seeking to make these arguments Optimares' evidence and argument seems to focus on what it considers to be fair or reasonable commercial conduct. Qatar Airways rejects much of Optimares' assertions in this regard, but – perhaps more importantly – Optimares' approach misunderstands the proper function for the court at this trial.

10. It is well established that the purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed…

11. Optimares' case is, however, little more than a plea for the court to relieve it of the consequences of a decision to enter into the Contracts on terms for which Qatar Airways astutely bargained and which Optimares now regrets.

…

13. If Qatar Airways is correct – such that (i) the terms of the contracts mean what they say on their face, and (ii) Optimares' strained arguments on the interpretation of the Contracts and the implication of terms cannot get off the ground – then this should be the end of Optimares' claims. The court will not need to be troubled by the myriad factual issues (of, at best, questionable relevance) that Optimares has insisted on raising (including why Optimares missed both the original on-dock dates for the B787 shipsets – with deliveries commencing in December 2019 – and the postponed on-dock dates for the B787 shipsets – with deliveries commencing in early 2020). It is to these issues – that Qatar Airways contends are ultimately irrelevant – which the vast majority of the parties' disclosure and witness evidence and the entirety of the expert evidence has been directed.

14. With this in mind, it is regrettable that Optimares has throughout chosen to resist any meaningful engagement with the encouragement given by Robin Knowles CBE J, at the first CMC, for the parties to consider the trial of a preliminary issue as to the proper interpretation of the Contracts."

14. This last remark is not an entirely accurate statement of what took place at the first CMC. In fact, after Optimares had opposed the trial of any preliminary issues on construction at the first CMC, Qatar Airways' counsel said as follows:

> "*But we can see the claimant's view and it might be very difficult to agree an assumed state of facts which would allow any sort of preliminary determination to proceed.*"

15. In consequence, the proposal to determine issues of contractual construction by way of preliminary issues was not pursued.

16. However, in opening the case before me, Mr. Cumming KC suggested once again that the disposition of this dispute was "*really very straightforward indeed*" and that "*none of the factual evidence [was] going to make a jot of difference*" to the court's determination of the proper construction of the contract. It followed that if the court was with Qatar Airways on the proper interpretation of the contract, and the termination for convenience clause in particular, then the matter could be "*disposed of today [as] hearing evidence isn't going to change the outcome.*" However, he did not go so far as to make a formal application for the determination of a preliminary issue or for reverse summary judgment, and since Qatar Airways had not pressed for such a course at any earlier stage, I decided it was only fair to Optimares to hear the evidence which both parties had spent a lot of time and money in producing. However, having heard that evidence I have come to the conclusion that Mr. Cumming KC was correct in submitting that it makes no difference to the proper construction of the contract or to the outcome of the case.

17. In the circumstances, I set out my reasoning on the issues of construction at the outset of this judgment because my findings thereon dispose of this claim and none of the evidence of the various witnesses, factual and expert, is capable of altering my conclusion. I accordingly deal with the evidence relatively briefly in this judgment. I should add that despite the submissions of both parties' counsel, I consider that the witnesses on both sides gave, by and large, truthful evidence, or at least evidence which they genuinely believed to be truthful. Whilst those witnesses from time to time strayed into partisan territory, I am willing to excuse that behaviour in view of the understandable strength of feeling on both sides about the issues in this case.

(C) The proper approach to contractual construction in a case such as this

18. The proper approach to construing particular provisions in an agreement such as the Purchase Agreements is now well established: see *Arnold v Britton* [2015] UKSC 36 at [15]-[23], *Wood v Capita Insurance Services Limited* [2017] UKSC 244 at [8]-[15], *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and *Re Sigma Finance Corp* [2009] UKSC 2.

19. The starting point is that where, as here, a contract has been negotiated and prepared with the assistance of skilled professionals, the court is more likely to interpret the agreement principally by textual analysis:

> "*Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express*

> *their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.*" [18]

20. However, in interpreting a provision in any written agreement, as Lord Neuberger stated in *Arnold* at paragraph 15 of his judgment, the principled approach of the court will be as follows:

> "*[The meaning of a clause]has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement] (iii) the overall purpose of the clause and the [agreement] (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …*"

And at paragraph 20 he cautioned as follows:

> "*Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*"

21. More recently, the relevant principles of construction were summarised by the Chancellor in *Deutsche Trustee v Duchess & Others* [2019] EWHC 778 (Ch) at [29] - [30]. They were subsequently approved by the Court of Appeal ([2020] EWCA Civ 521) as an accurate summary of the legal principles which can be derived from the relevant Supreme Court cases and these are the principles which I accordingly apply in the present case:

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

b. The court should focus on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause (ii) any other relevant provisions of the

[18] *Wood v Capita* [2017] AC 1173 at [13]; applied in *Astor Management AG v Atalaya Mining PLC* [2022] EWHC 628 (Comm), per Calver J at [60(iii)].

[agreement] (iii) the overall purpose of the clause and the [agreement] (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions (*Arnold* at [15])

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

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

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

22. Mr. Braca, Optimares' CEO, gave evidence as follows:

"*If I was given a time machine and could go back to when we were negotiating the contracts, and I was told that "If you sign this contract as it is drafted, Qatar can walk away at any time of their option and not pay you a penny", I would not have signed the contracts.*"

23. I have no doubt that Mr. Braca genuinely now thinks that. However, as was explained in *Arnold* by the Supreme Court, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed and the court should avoid re-writing the contract in an attempt to assist an unwise party. I bear this in mind in the present case. Optimares were advised by lawyers, and they were keen to conclude the deal with Qatar Airways on the terms in Annex 1.

(D) Proper Construction of the Purchase Agreement, Standard Conditions and Purchase Orders

The issues of contractual construction to be determined

24. In the light of the parties' dispute about the meaning and effect of the relevant contractual provisions, the following issues of construction fall to be determined:

i) Whether the existence of an "*excusable delay*" which would give rise to a termination right in accordance with clause 13.1.7 of the Standard Conditions precludes reliance by Qatar Airways on the termination for convenience provision in clause 12.2.3 of the Standard Conditions.

ii) What are the financial consequences of a termination in accordance with clause 12.2.3? In particular, (i) what is the meaning of "*without incurring any liability*" in clause 12.2.3 and (ii) do the consequences in clause 12.3.2 apply to a termination for convenience?

iii) Whether clause 12.2.3 of the Standard Conditions creates an unfettered right to terminate at will or whether the clause is qualified by other contractual provisions, notably the duty of good faith in clause 16.13 of the Standard Conditions.

iv) Having construed the contracts, is there scope for a claim for unjust enrichment or restitution in respect of the IP provided by Optimares to Qatar Airways?

I shall address each of these issues in turn.

(i) Does the existence of a right to terminate in accordance with clause 13.1.7 preclude reliance on clause 12.2.3?

25. The interaction between clause 13.1.7 and clause 12.2.3 of the Standard Conditions (see Annex 1) is the central issue in dispute. In essence, the question is whether (i) in the event of an excusable delay arising, it was open to Qatar Airways to terminate, at its option, in accordance with either of these two termination clauses at any one time or (ii) whether, in the event of an excusable delay arising, the termination for convenience clause (clause 12.2.3) ceases to be operable and Qatar Airways is limited to terminating in accordance with the excusable delay provision (clause 13.1.7). Since Qatar Airways purported to terminate only in accordance with clause 12.2.3 (and not clause 13.1.7), the resolution of this issue determines whether the contract was lawfully terminated in accordance with its terms.

26. Optimares contends that on the proper construction of the contract, the more specific clause (clause 13.1.7), once engaged, displaces the more general provision (clause 12.2.3). The basis for this argument is said to be that if clause 13.1.7 and clause 12.2.3 were to be available simultaneously, this would render clause 13.1.7 otiose as it would always be preferable for Qatar Airways to terminate for convenience.

27. In contrast, Qatar Airways submits that the two clauses co-exist. It is irrelevant that Qatar Airways also had the option to terminate, should it wish, for excusable delay. In particular, Qatar Airways relies on the plain language of clause 12.2.3, particularly the language "*[n]otwithstanding anything to the contrary*".

28. I consider that Qatar Airways' submission on this issue is clearly correct.

29. The first point to note is that clause 12 is headed "Duration and Termination". Clause 12.2 then provides for the circumstances in which termination of the Standard Conditions and Purchase Agreement may take place:

    (i) Clause 12.2.1 provides – again "*without in any way limiting or derogating from any other provision hereof*" – that Qatar Airways shall be entitled but not obliged to forthwith cancel the Standard Conditions and Purchase Agreement at any time with written notice, essentially if (a) Optimares suffers serious financial impairment; (b) Optimares is in breach of contract which it fails to remedy; (c) Optimares undergoes a change in control; (d) a 30 day force majeure event occurs; (e) Optimares is guilty of a breach of warranty or representation; or (f) Optimares loses or fails to gain necessary authorisations from the relevant aviation authorities.

    (ii) Clause 12.2.3 separately provides, "*notwithstanding anything to the contrary contained in these Standard Condition[s] or the applicable Purchase Agreement*", that Qatar Airways shall be entitled, upon notice, to terminate the Standard Conditions, Purchase Agreement and/or any purchase order for its convenience and without incurring any liability.

30. Clause 12.3 then provides for the "Effect of Termination". The natural reading of clause 12.3 is that it provides for the effect of termination under both 12.2.1 and 12.2.3, depending upon the provision which Qatar Airways chooses to invoke in order to terminate the Standard Conditions and Purchase Agreement.

31. Clause 13, within which clause 13.1.7 is located, separately provides for the consequences of delays, with excusable delays dealt with in clause 13.1 and non-excusable delays dealt with in clause 13.2.

Clause 12.2.3

32. The appropriate starting point to determine the meaning of clause 12.2.3 is to consider the words used by the parties. The language used by the parties in respect of this termination right is clear and unambiguous. The clause provides that "*notwithstanding anything to the contrary in the Standard Conditions or the applicable Purchase Agreement*", Qatar Airways "*shall be entitled to terminate… for its convenience*". It follows that notwithstanding that Qatar Airways has the right, at its own choice, to cancel the contract under clause 13.1.7, it is entitled instead to terminate the contract for its convenience under clause 12.2.3. The factual matrix relied upon by Optimares cannot be said to affect the interpretation of these unambiguous words.

33. In order to terminate in accordance with this term, Qatar Airways must provide "*three (3) months prior written notice to the Supplier for termination of these Standard Conditions and/or Purchase Agreement"* and, in respect of a purchase order, "*fourteen (14) days prior written notice"*.

Clause 13.1.7

34. Clause 13.1.1 provides the definition of "excusable delay". It provides that an excusable delay "*shall be deemed to have occurred if a Party's delay in performance is due to causes such as an act of God, acts of public enemies, acts of a government war, natural disaster, insurrection or riots, civil commotion, fire, floods, plagues, epidemics or any*

other causes beyond such Party's reasonable control and not occasioned by the intentional acts, omissions or negligence of the relevant Party." There may of course be a factual dispute as to whether this definition is satisfied in any particular case, as there was in this case.[19]

35. Once an excusable delay arises and one of the conditions ((i)-(iii)) in clause 13.1.7 is satisfied, Qatar Airways "*shall have the right, at its own choice and upon written notice to the Supplier, to forthwith cancel all or part of the undelivered portion of these Standard Conditions and the Purchase Agreement.*" Crucially, there is no obligation upon Qatar Airways to cancel the contract in the event of an excusable delay. It has the choice as to whether to do so or not.

36. A further important aspect of this clause is that cancellation has immediate effect: "*Qatar Airways shall have the right at its own choice and upon written notice to Optimares, to forthwith cancel all or part of the undelivered portion of these Standard Conditions and the Purchase Agreement*" (emphasis added). In contrast, if Qatar Airways terminates under clause 12.2.3 then, as I have said, it must give Optimares 3 months' prior written notice to terminate the Standard Conditions and Purchase Agreement (and 14 days' prior written notice for termination of the purchase order). It is obvious that this difference in notice periods under the different clauses might, dependent on the facts of an individual case, have differing financial consequences for Qatar Airways, which might in turn have a significant bearing on its decision to terminate under one clause or the other.

37. Although the length of the notice period under clause 12.2.3 is less favourable to it, Qatar Airways may nevertheless consider it preferable in any given case to terminate under that clause rather than 13.1.17. For example, Qatar Airways may not want to risk an *ex post facto* finding of a court that the relevant qualifying condition ((i), (ii) or (iii)) in clause 13.1.7 was not in fact satisfied and that it had wrongly invoked that termination right; or it may not wish to get into a protracted dispute as to whether an excusable delay has in fact arisen.

38. The consequences of termination may accordingly be different depending upon Qatar Airways' choice of clause for termination purposes. In the same way, a party may decide to terminate in accordance with an express contractual right in circumstances where they would otherwise have been entitled to terminate for repudiatory breach. In that case, the party would only need to demonstrate compliance with the contractual requirements for termination rather than proving repudiatory breach. In those circumstances, unless the contract expressly provides for it, the terminating party will not be entitled to loss of bargain damages which they could have claimed at common law as that would be to re-characterise their decision to terminate in accordance with the contract.[20]

39. Fundamentally, these two clauses have been drafted with different factual circumstances in mind. Termination in accordance with clause 13.1.7 concerns an excusable delay that has interrupted the parties' arrangement. Accordingly, provision

[19] This is not a dispute which it is necessary for me to resolve in this case by reason of my findings on the proper construction of the relevant contractual clauses.
[20] *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm), [2018] 1 Lloyd's Rep. 204, Chitty on Contracts, (34th Edn), at 25-054.

is made for return of payments by Optimares in respect of the "*undelivered*" portion of the contract while Qatar Airways becomes responsible for the costs (as opposed to the price) that have arisen in relation to the labour/parts already performed on or incorporated into the aircraft (i.e. the delivered part of the contract). In contrast, clause 12.2.3 allows for termination purely for Qatar Airways' convenience and accordingly requires a notice period during which delivery may still be rendered and invoices may still potentially be raised. Those invoices, raised in accordance with a contractual right while the contract was alive (clause 4.9.1 of the Purchase Agreement), would provide for payment of the price.

40. It is clear in my judgment that the existence of an "*excusable delay*" which would give rise to a termination right in accordance with clause 13.1.7 of the Standard Conditions does not preclude reliance by Qatar Airways on the termination for convenience provision in clause 12.2.3 of the Standard Conditions. Clause 12.2.3 expressly provides that the right to terminate under that provision exists "*notwithstanding anything to the contrary in the Standard Conditions or the applicable Purchase Agreement*". It accordingly remained open for Qatar Airways to terminate in accordance with either provision, with the financial consequences set out in the applicable provision.

41. One of Optimares' central submissions in arguing that Qatar Airways' construction of clause 12.2.3 renders clause 13.1.7 redundant is that on its construction of clause 12.2.3, Qatar Airways always has the ability to walk away from the contracts, as it puts it, "*scott-free*". In fact, that is not necessarily so. A situation can be envisaged in which the contract is terminated by Qatar Airways after some performance has been rendered by Optimares. If Qatar Airways terminated in accordance with clause 12.2.3, there may be, at least, three different situations:

    i) *Example 1*: Where a purchase order has been raised and there has been delivery, the Supplier can raise an invoice on delivery (clause 4.9.1 of the Purchase Agreement) which would fall due in 45 days in accordance with clause 4.9.2 of the Purchase Agreement. When notice is given in accordance with clause 12.2.3, Qatar Airways would still be liable for that invoice.

    ii) *Example 2*: Where a purchase order has been raised, but no delivery has been made at the time of notice in accordance with clause 12.2.3, the Supplier would have 14 days to make delivery before the purchase order would be terminated. If such delivery was made then (as above) the Supplier can raise an invoice on delivery (clause 4.9.1 of the Purchase Agreement) which would fall due in 45 days in accordance with clause 4.9.2 of the Purchase Agreement. Therefore, Qatar Airways would still be liable for that invoice.

    iii) *Example 3*: Where a purchase order has been raised, there has been no delivery at the time that the notice was made in accordance with clause 12.2.3 and there was no subsequent delivery, no invoice would be raised and, at the point of termination, Qatar Airways would not incur any liability on termination.

42. It is evident, therefore, that clause 12.2.3 does not necessarily allow Qatar Airways to terminate and walk away "*scott-free*". Clause 12.2.3 would not relieve Qatar Airways of any liability incurred in accordance with the contract whilst it was still alive, including during the notice period. Beyond this, however, the clause relieves Qatar Airways of any liability on termination. That is what the parties have expressly agreed.

(ii) *What are the financial consequences of a termination in accordance with clause 12.2.3? In particular, (i) what is the meaning of "without incurring any liability" in clause 12.2.3 and (ii) do the consequences in clause 12.3.2 apply to a termination for convenience?*

43. The next issue to be determined accordingly concerns the financial consequences that arise on termination in accordance with clause 12.2.3. Optimares contends that, if Qatar Airways' interpretation of clause 12.2.3 is adopted, this renders clause 13.1.7 redundant and that this could not have been an interpretation intended by the Parties.

44. Two separate financial consequences must be considered. The first issue concerns the interpretation of the phrase "*without incurring any liability"* in clause 12.2.3. The second question is whether the financial consequences contained in clause 12.3.2 are applicable at all to a termination for convenience.

The meaning of "without incurring any liability" in clause 12.2.3

45. Qatar Airways contends that the wording "*without incurring any liability"* means what it says: that Qatar Airways will not be liable on termination for consequences that would normally arise as a result of the termination of the contract. Optimares seeks to draw finer distinctions. In essence, Optimares submits that "*any liability*" must be construed as a reference only to liability which Qatar Airways would otherwise have had for the future profits which Optimares would have obtained. Optimares submits that on this approach, the phrase "*without incurring any liability*" does not preclude liability for wasted costs already incurred. Optimares suggests that the factual background upon which it relies (in paragraph 7 above) supports this interpretation, namely the significant risk which it agreed to bear in prioritising Qatar Airways' contracts over any other and in agreeing to make significant capital investments in order to service Qatar Airways' contracts.

46. In its written closing, Optimares puts its submission on this point in the following way (paragraph 146):

> "*In the normal course, a party depriving the other of the right to complete its works would be liable for damages (Abbeywell, as noted above at paragraph 35(c)(ii)) being its lost profits and its recovery of sums spent in reliance to that date. The clear intention was that Qatar should be forgiven from damages arising from the act of termination itself, but such language falls a long way short of the express language which would be required to say that Qatar should be excused making good Optimares' costs up to the point of termination. The natural consequence without such language is that it would be exposed to a claim for loss of profits in addition to the costs which Optimares would have been paid* – ***this waiver operates only to excuse the full claim for expectation damages, but not reliance damages, being Optimares' wasted costs which have been thrown away***." (emphasis added)

47. I reject this submission and I agree with Qatar Airways' contention in this respect. The present case concerns a termination for convenience, that is a termination in accordance with a contractual right as opposed to termination following a repudiation. As such, the exercise of the contractual right of termination does not give rise to <u>any</u> entitlement to common law damages. The sole source of the consequences of the exercise of the right

is the term itself[21] and there is no provision contained within the contract for reliance damages to be awarded to the supplier in the event of termination. The only circumstance where such reliance damages may be sought is at common law following a breach of contract. That is not this case.

48. The position is accordingly straightforward: upon termination under clause 12.2.3 Qatar Airways shall not incur any liability to Optimares. Qatar Airways may terminate without incurring liability that would otherwise have arisen if it had not terminated in accordance with its contractual right, including liability for any damages that would have been available at common law (whether loss of bargain or reliance damages). Neither of these types of damages are available and there is no further liability that arises in accordance with the contractual terms.

Are the consequences in clause 12.3.2 applicable to a termination for convenience?

49. In order to determine the (contractual) financial consequences of termination in accordance with clause 12.2.3, it is necessary to consider its interaction with clause 12.3.2. Clause 12.3.2 provides for repayment by the supplier of "*all sums previously paid by Qatar Airways to the Supplier together with Interest thereon"* in the event of termination. The clause further provides that the supplier shall "*reimburse to Qatar Airways all Freight Charges paid or incurred by Qatar Airways for Products and Spare Parts affected by such termination, expiry or suspension.*" This consequence is expressly stated to apply in addition to any award of liquidated damages.

50. Optimares submits that Qatar Airways cannot rely on clause 12.3.2 since, it maintains, that provision was intended to refer only to termination for cause. In contrast, Qatar Airways emphasises that clause 12.2.3 is embedded within the clause 12 regime and that clause 12.3.2 is applicable to both termination for convenience and termination for cause.

51. I do not consider that there is any justification to read down clause 12.3.2 in the way suggested by Optimares. The structure of clause 12 is clear. Clause 12.2 specifies the circumstances in which the contract may be terminated and this is immediately followed by clause 12.3 which sets out the "effect of termination". There is no suggestion in clause 12.3 that it only applies to termination in accordance with clause 12.2.1 and not 12.2.3.

52. I also reject Optimares' submission that the language of "*without incurring any liability*" in clause 12.2.3 provides a self-contained remedial regime, rendering clause 12.3.2 inapplicable. The fact that a termination for convenience under clause 12.2.3 does not incur any liability on the part of Qatar Airways is entirely consistent with the contractual requirement in clause 12.3.2 that Optimares must repay all sums previously paid by Qatar Airways to it.

53. Finally in this regard, Optimares observed that if it were the case that clause 12.3.2 applies to a termination under clause 12.2.3, then if invoices for shipsets were raised and paid, these would need to be paid back in accordance with clause 12.3.2 as falling within "*all sums previously paid*". Optimares outlined the absurdity of a situation where nearly all seats had been delivered and yet Qatar Airways could, after termination for

[21] See Chitty on Contracts (34th Edn), at 25-054.

convenience, be entitled both to keep the seats and receive reimbursement for all of the sums paid for them.

54. In response to this point, Mr. Cumming KC accepted in his opening submissions that payment of the purchase price (for delivered Products) does not fall within the definition of "*all sums previously paid by Qatar Airways to the Supplier*". I consider that concession to be rightly made. These sums are paid for fully performed contractual obligations for Products which have been delivered under the contract. This can be contrasted with the payment of NRC for design work by Optimares throughout the programme. Retention of these NRC was contingent on Optimares reaching the stage at which it delivered or was able to deliver the completed shipsets and invoice for the purchase price; until that time, clause 12.3.2 and clause 13.1.7 envisage that Optimares bears the risk of not reaching completion of their obligations before termination and being required to repay the relevant non-recurring costs which have been advanced to it. Therefore, "*all sums previously paid*" requires the repayment of the paid instalments of the NRC prior to delivery of the Product, but does not require repayment of the purchase price in the case of shipsets which have been delivered and paid for. I return to this below.

55. I should add that whilst I consider this to be the correct construction of clause 12.3.2, the point is academic in the present case, as no completed shipsets were ever delivered by Optimares to, and paid for by, Qatar Airways prior to termination.

(iii) Does clause 12.2.3 create an unfettered right to terminate at will or is it qualified by the duty of good faith in clause 16.13 of the Standard Conditions?

56. The next issue that arises concerns the extent to which the duty of good faith in clause 16.13 of the Standard Conditions limits the exercise of the termination for convenience provision in clause 12.2.3. As Qatar Airways purported to terminate in accordance with clause 12.2.3, any applicable limits on the exercise of that clause are relevant to a determination of whether the contract was lawfully terminated.

57. Optimares submits that clause 12.2.3 does not provide an unfettered discretion to terminate, but rather is qualified by the good faith provision. The starting point for this proposition is the notion, expressed by HHJ Humphrey Lloyd in *Abbey Developments Limited v PP Brickwork Limited* [2003] EWHC 1987 (Tech.), 12, that a "*contract for the execution of work confers on the contractor not only the duty to carry out that work but the corresponding right to be able to complete the work which it is contracted to carry out.*" As such, Optimares contends, relying also upon *Bournemouth & Boscombe AFC v Manchester United FC Ltd* (unreported, judgment of 21 May 1980), that Qatar Airways is under a positive obligation to allow Optimares to perform its work, or at least an obligation not to take steps to frustrate it by terminating the contract.

58. In contrast, Qatar Airways' submission focused more closely on the wording of clause 16.13, emphasising that its duty of good faith applies only to the "*performance of its respective responsibilities and obligations*" and that the exercise of a termination right does not constitute performance of any responsibility or obligation. Qatar Airways also emphasised that clause 12.2.3 is stated to apply "*[n]otwithstanding anything to the contrary*" and provides an unfettered right to terminate for convenience. In contrast to this unyielding provision in clause 12.2.3, the language of clause 16.13 indicates that this clause is subject to anything "*expressly provided to the contrary*".

Clause 16.13

59. Clause 16.13 is an express provision requiring the parties to act in "*in good faith in the performance of their respective responsibilities and obligations under these Standard Conditions and the Purchase Agreement*". The clause further provides that the Parties shall not "*unreasonably delay, condition or withhold the giving of any consent, decision, approval, agreement and/or any similar acts that is either requested or reasonably required by the other Party in order to exercise its rights or to perform its responsibilities and obligations*". Beyond this express provision, the Parties have made clear that the relationship between them is that of independent contractors and that nothing in the Purchase Agreement or Standard Conditions shall be deemed to constitute a partnership, joint venture or similar relationship.[22]

60. The requirement to act in good faith clearly applies to performance of the subject matter of the Purchase Agreement, namely the obligation to deliver the seats and all associated matters that may require cooperation between the Parties. For example, it can be envisaged that such cooperation would be necessary in respect of the technical acceptance process (see Exhibit No 3 of the Purchase Agreement), the provision of training (see clause 8.5 of the Purchase Agreement) and field service support (see clause 8.6 of the Purchase Agreement), to provide just three examples. However, the question with which we are concerned is whether the exercise of a right to terminate for convenience constitutes a responsibility or an obligation within the meaning of the clause. In my judgment it plainly does not.

The interaction between clause 12.2.3 and clause 16.13

i. The Authorities

61. Both parties placed reliance on *TSG Building Services plc v South Anglia Housing* [2013] EWHC 1151 (TCC) which concerned the issue of whether an express duty to act reasonably imposed fetters on the exercise of a termination at will provision. It may be helpful to set out the clause in that case in full (at [33]):

> "*[1] The Partnering Team members shall work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents, and [2] all their respective obligations under the Partnering Contract shall be construed within the scope of such roles, expertise and responsibilities, and [3] in all matters governed by the Partnering Contract they shall act reasonably and without delay*."

62. Akenhead J dismissed the application of part [1] of the clause to the termination clause, finding that it "*does not obviously or at all impinge upon either party's right to terminate at will under Clause 13.3. Termination at will is not a 'responsibility'; it does not give rise to a 'role' or is not dependent upon any 'expertise'*." A similar conclusion was reached in respect of part [2], with the Judge holding that "*respective obligations*" does not relate to a negotiated right to terminate at will. Part [3] of the term gave the

[22] Clause 16.19 of the Standard Conditions.

Judge more pause for thought owing to its broad language ("*in all matters governed by the Partnering Contract*"), but even then Akenhead J held that:

> "*I have formed the view that properly construed Clause 1.1 does not require Anglia to act reasonably as such in terminating under Clause 13.3…There can be no doubt that if either party had applied their mind to this prior to the contract being signed it was clear that there was such an unqualified right available to either party; it was obvious to each that the other could terminate at any time. Clause 1.1 is primarily concerned with the assumption, deployment and performance of roles, expertise and responsibilities set out in the Partnering Documents and the parties in so doing must 'work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Term Programme' and act reasonably and without delay in so doing.*"

I entirely agree with this approach.

63. Reliance was also placed by Qatar Airways on the analysis in *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), where it was held per HHJ Pelling KC at [53] that:

> "*Absolute rights conferred by professionally drawn or standard form contracts including but not limited to absolute rights to terminate relationships and roles within relationships are an everyday feature of the contracts that govern commercial relationships and extending Braganza to such provisions would be an unwarranted interference in the freedom of parties to contract on the terms they choose, at any rate where there is no fiduciary relationship created by the agreement.*"

64. The analysis in *TAQA* was primarily concerned with the issue of whether an implied term of good faith could qualify an express right to terminate.[23] The issue is a little different on the present facts given that Optimares maintains that the express provision in Clause 16.13 created a stronger obligation in the exercise of any discretion than would arise under the normal *Braganza* duty. That stated, *TAQA* nonetheless demonstrates the courts' reluctance to qualify an express right to terminate with a duty to act in good faith, such as exists in the present case.

ii. Interpretation

65. The wording of clause 16.13 is narrower than part [3] of the Clause in *TSG* and, in my view, the language chosen by the Parties renders the issue more straightforward than on those facts. The exercise of a right to terminate for convenience neither constitutes a responsibility nor an obligation. Optimares' reliance on *Abbey Developments Limited* is misplaced; by Optimares' own admission that case provides, at its highest, that "*D has a positive obligation to allow C to perform the works, unless it has an express right to terminate*". However, in the present case, Qatar Airways *does* have an express right to terminate contained in clause 12.2.3. It is circular to argue that Qatar Airways has a duty to allow Optimares to perform the work unless it has an express right to terminate

[23] See in this respect the illuminating analysis of David Foxton QC (now Foxton J) in Lloyd's Maritime and Commercial Law Quarterly, "*Good faith Obligations and Contractual Termination Rights*", pp. 360-384.

but that it has no such express right to terminate because it was under a duty to allow Optimares to perform the work.

66. *Bournemouth & Boscombe* does not provide any support for Optimares' case, as that was a case in which the court *implied* a term that Manchester United would not without reasonable cause do anything to prevent the earning of the £25,000. The present case concerns an *express* contractual entitlement to terminate for convenience. There is no room to imply any such term and in any event the exercise of a right to terminate for convenience neither constitutes a responsibility nor an obligation.

67. If any further confirmation was needed, it is notable that clause 12.2.3 applies "*[n]otwithstanding anything to the contrary*". The Parties expressly provided that clause 12.2.3 would not be disapplied or fettered by any other clauses contained within the Purchase Agreement.

68. It follows that clause 12.2.3 provides a right to terminate for convenience and clause 16.13 does not apply to restrict the exercise of that termination right.

69. There is also no merit in Optimares' separate argument that Qatar Airways is in repudiatory breach of contract by wrongly invoking clause 12.2.3. It had every right to invoke clause 12.2.3. I further accept the submissions of Qatar Airways in paragraphs 157-161 of its written closing in this respect.[24]

70. It follows that the adverse inferences which Optimares invited the court to draw by reason of Qatar Airways' failure to call certain witnesses and the alleged lacunae in and redactions of the documentary record[25] are irrelevant.

71. I should add that, in any event, having heard all of the evidence I would not have found that the termination of the contract by Qatar Airways was made in bad faith. Indeed, there is no plea that it was made in bad faith. Rather, all that Optimares pleads is that the purported termination was in favour of the re-award of the same scope of works to Adient Aerospace, and that this decision to re-award the works was wrongful and made prior to the termination of the Purchase Agreement (paragraphs 9, 30 and 32(c) of the Amended Particulars of Claim); and by paragraph 59(a) of the Amended Reply Optimares merely puts Qatar Airways "*to proof as to the status of its contracting with Adient and the timing of the same*".

72. I find as a fact that the relationship between Optimares and Qatar Airways had broken down for a mixture of reasons by February 2020. Optimares had failed to deliver any shipsets under the B787 Contract by this date, despite the fact that the parties had agreed that the targeted 'on dock date' ("**ODD**") for the first shipset would be 31 January 2020, and that the targeted ODD for the second shipset would be 15 February 2020 – and it

[24] Contrary to Optimares' submission, the fact that Qatar Airways may have other, additional contractual entitlements to adjust the delivery schedule without liability (clause 3.2.3 of the Purchase Agreement); or to liquidated damages where there has been late delivery (ibid, clause 7.5); or to terminate the Purchase Agreement forthwith or at any time under clause 12.2.1 of the Standard Conditions does not in any way support or compel the conclusion that Qatar Airways can only exercise its right to terminate under clause 12.2.3 in good faith.
[25] See paragraphs 211 and 215 of its written closing submissions. I would not have drawn the suggested inference concerning bad faith in paragraph 215(c) in any event; and there is no justification for drawing the inference suggested in paragraph 215(d)(iii) in respect of the new design (as opposed to the old design).

was the genuinely held perception of Qatar Airways that there was complete uncertainty as to when the first shipset would be delivered.

73. Indeed, on 23 March 2020, Optimares purported to give notice of an event constituting an excusable delay, by writing to Qatar Airways to say that Covid-19 and restrictions that the Italian government had imposed in response to it, "*ha[d] made all manufacturing and related processes effectively impossible*", and "*removed [Optimares'] ability to perform the Purchase Agreement in any meaningful fashion.*" Further, Optimares wrote that it was "*unable to provide a meaningful estimate as to when [it would] be able to resume its operations under the Purchase Agreement*" and did not "*believe a meeting for the purposes of section 13.1.6 will be achievable"*.

74. As Mr. Cumming KC rightly submitted, against this backdrop, it is unsurprising that – at this point – Qatar Airways sought to exercise its right to terminate the Purchase Agreement for convenience. That cannot be said to be a bad faith action on its part.

75. Nor was it an act of bad faith on Qatar Airways' part that, in view of its loss of confidence in Optimares (which I find as a fact), in or around February 2020, it looked to place the contract elsewhere and in particular with Adient (which led to the programme being pushed back by a year). It should be noted that the scope of work awarded to Adient was different to that awarded to Optimares, and Adient did not use Optimares' intellectual property. It used its own Ascent system.

76. I accept Optimares' submission on the evidence to this extent: that it is likely that the B787 contract was terminated in favour of it being re-awarded to Adient (Qatar Airways did not re-award the B777 or the A321 contracts to Adient) and the tender process for the new contracting partner was used by Qatar Airways as a means to seek to drive down Adient's quotation for the work, as revealed in the internal Qatar Airways' email from Mr. Muhiddin to Mr. Armas of 14 May 2020:

> "*Hi Ruyma*
> *On the B787-9 the only candidate for this acquisition is Adient, others were just to comply with formalities and make Adient aware that we are not only talking to them for price negotiation reasons, please arrange for the Adient seat to be viewed by GCEO ASAP, many thx*
> *Kadri Muhiddin*"

77. However, I do not consider that the evidence supported Optimares' suggestion that Qatar Airways took the decision to terminate Optimares' contract purely on the ground of obtaining a cheaper price for the work from Adient. But even if it had done so, Qatar Airways would have been entitled to do so under clause 12.2.3 of the Standard Conditions in any event.

(iv) Is there scope for a claim for unjust enrichment in respect of the IP provided by Optimares to Qatar Airways?

78. The last issue of principle to be determined is whether, if Optimares has no contractual entitlement to any payment for its work done prior to termination of the contract, Qatar Airways was nevertheless unjustly enriched by reason of it receiving the benefit of the intellectual property developed by Optimares, which was transferred to Qatar Airways pursuant to the terms of the contract. I consider this argument to be hopeless.

79. The Court of Appeal has recently reiterated that a claim for unjust enrichment must not undermine the contractual allocation of risk: see *Dargamo Holdings Ltd v Azitio Holdings Limited* [2021] EWCA Civ 1149, [2022] 1 All ER (Comm), per Carr LJ at [67]:

> "*However, as demonstrated by Roxborough (considered further below), invalidity of a relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment. That is not to say that claims in unjust enrichment must not respect contractual regimes and the allocations of risk agreed between the parties. On the contrary, as explained by Professor Burrows in The Restatement (at 3(6)), an 'often overlooked but crucial' element of the unjust factors scheme is:*
>
> > *'...that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant's expense is not unjust...'*
>
> *This orthodox position in England was articulated in Kleinwort Benson (at 407-408). Lord Hope identified that a third question for consideration was 'Did the payee have a right to receive the sum which was paid to him?' That question was relevant as follows:*
>
> > *'The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground.'*"

80. It is therefore necessary to determine whether Qatar Airways had a right to receive the intellectual property which was provided to it in accordance with the provisions relating to Foreground IP.

81. Foreground IP is defined in clause 8.7.2 of the Purchase Agreement as IP "*subsisting or arising in relation to (i) the Design and Concept and/or the Product(s); (ii) any materials, data, documents supplied to the Supplier whether before or during the Agreement; and (iii) the performance of this Agreement.*"[26] Optimares' background IP as defined in 8.5.5 falls outside of this definition and Qatar Airways is granted only a license in respect of this background IP.[27] In relation to Foreground IP, however, clause 8.4.4.3 of the Purchase Agreement provides that "*all Foreground IP (as defined in clause 8.7 below), without limitation, in the Design and Concept and/or the Product and all right, title and interest in the Design and Concept and/or the Product, vests unconditionally, immediately and fully, in Qatar Airways, without any payment additional to the consideration under this Agreement, the adequacy of which is hereby acknowledged by the Supplier*."

82. This is reiterated in clause 8.7.3 of the Purchase Agreement which provides that Qatar Airways is the "*sole legal and beneficial owner of all the Foreground IP and all right, title and interest therein shall immediately vest in Qatar [Airways].*" Further, in respect

[26] See also clause 8.7.1 of the Purchase Agreement.
[27] Clause 8.5.1 of the Purchase Agreement.

of this foreground IP, Optimares assigned a full title guarantee[28] and had no right to use, sell, transfer or licence the Foreground IP.[29] The obligations and rights in Clause 8 are for an unlimited period and survive the termination of the Agreement.[30]

83. Clause 15.3 of the Standard Conditions provides similarly that Optimares "*hereby grants to Qatar Airways, a perpetual, assignable, non-exclusive, royalty-free license to use any concept, product or process, patentable or otherwise, copyrighted material (including without limitation documents, specifications, calculations, notes, reports, Data, models, and electronic software) and confidential information owned by the Supplier and used by the Supplier or furnished or supplied to Qatar Airways by the Supplier in the performance of its obligations under these Standard Conditions and the Purchase Agreement.*"

84. It is reiterated in clause 15.3.2 that this "*shall be the property of Qatar Airways upon creation, whether or not delivered to Qatar Airways at the time of creation, and shall upon request by Qatar Airways be delivered to Qatar Airways.*" It is clear, therefore, that the Parties included detailed provisions in relation to the Foreground IP generated throughout the programmes with the intention that this IP would immediately vest in Qatar Airways upon the signing of the contract.

85. The Parties did not include any provision indicating that the Foreground IP would be provided at an additional cost to Qatar Airways. On the contrary, there are a number of provisions which indicate that the IP would be provided without charge. Notably, clause 6.3 of the Standard Conditions states that "*technical Data*" shall be provided "*free of charge*", clause 8.3.1(a) of the Standard Conditions indicates that "*Data and Materials*" will be provided "*at no charge to Qatar Airways*" and clause 8.3.3 provides that the Supplier "*is required to provide at no charge to Qatar Airways copies of the Data and Materials*".

86. It is clear, therefore, that the rights in the Foreground IP vested in Qatar Airways at the time of the creation without any additional cost. Accordingly, Qatar Airways had a legal right to receive the IP and there is no room for any claim in unjust enrichment as alleged by Optimares.

87. There are two further points to make about this element of Optimares' claim.

88. First, as Qatar Airways pointed out, the Amended Particulars of Claim fail to identify the "*consideration for*" or "*basis upon*" which Optimares is said to have conferred benefits on Qatar Airways that are said to have "*totally failed*": see Amended Particulars of Claim, paragraph 38(c). The most detail which Optimares provided of its case in this respect is contained in paragraph 65 of the Reply and Defence and Counterclaim, where it states:

> "*Optimares transferred the relevant intellectual property on the basis and in consideration for the continued operation of the B787 Contract, pursuant to which it expected to deliver the Shipsets in exchange for payment by [Qatar*

[28] Clause 8.7.4 of the Purchase Agreement.
[29] Clause 8.7.5 of the Purchase Agreement.
[30] Clause 8.11 of the Purchase Agreement.

Airways]. That basis having failed (by the termination of the B787 Contract), Optimares is entitled to restitution for unjust enrichment".

89. This is untenable. After Optimares transferred the intellectual property, the Purchase Agreements continued in operation in accordance with their terms which (a) gave Qatar Airways (i) the right to terminate them for its convenience (in addition to the termination rights at clauses 12.2 and 13.1.7), and (ii) unqualified and unconditional rights in relation to any intellectual property which did not depend on the Purchase Agreements running their full term, nor on Optimares receiving full counter-performance from Qatar Airways; and (b) obliged Optimares to provide intellectual property to Qatar Airways (without extra payment) in performance of its obligations under the Purchase Agreements.

90. The claim in restitution would run contrary to the right to terminate for convenience (as well as the further termination rights under clauses 12.2 and 13.1.7). There is no failure of basis, and by clause 8.11 of the Purchase Agreement, the obligations and rights in clause 8 of the Purchase Agreement – which includes Qatar Airways' right to the Foreground IP – survive the termination of the Purchase Agreement.

91. It follows that Optimares' submission that this case falls within the limited exceptions to the normal rule that unjust enrichment will not arise where there is a subsisting contract, by reason of the fact that Qatar Airways has had transferred to it by Optimares valuable Foreground IP and the failure of basis for that transfer is total, is hopeless.

92. Lastly, on this topic, Optimares' claim in restitution has never been properly pleaded and proved in any event. Optimares pleaded only the lists set out in the Amended Particulars of Claim at (i) paragraph 23 (in respect of the B787 Contract); (ii) paragraph 51 (A321 Business Contract); (iii) paragraph 70 (A321 Economy Contract) and (iv) paragraph 86 (B777 Contract), which merely itemise various items of technical data and design information concerning the seats and certifications (including, only in the case of the B787 Contract, patent applications). Optimares' evidence at trial made the position no clearer as to the precise nature of the allegation. The plea that Qatar Airways proceeded to use this alleged IP was simply not made good by Optimares on the evidence.

Conclusions in respect of the construction issues:

93. My conclusions on the construction arguments can accordingly be summarised as follows:

    i) *Issue 1:* The existence of an "*excusable delay*", giving rise to a termination right in accordance with clause 13.1.7 does not displace clause 12.2.3 of the Standard Conditions. Qatar Airways was contractually entitled to terminate for its convenience.

    ii) *Issue 2:* Clause 12.2.3 creates an unfettered right to terminate for convenience. Clause 16.13 is not applicable to clause 12.2.3 since the exercise of a right to terminate does not constitute a "*responsibility*" or "*obligation*".

    iii) *Issue 3:* The financial consequences of termination in accordance with clause 12.2.3 are that Qatar Airways does not incur any liability on termination save

that it is liable for any contractual liability to pay the purchase price for completed shipsets. Clause 12.3.2 is applicable to a termination for convenience such that Optimares will be required to "*repay or credit to Qatar Airways, at Qatar Airways' option, within ten (10) calendar days after the date of termination, expiry or suspension, all sums previously paid by Qatar Airways to the Supplier together with Interest thereon*." Further, Optimares will be required to "*reimburse to Qatar Airways all Freight Charges paid or incurred by Qatar Airways for Products and Spare Parts affected by such termination, expiry or suspension*."

iv) *Issue 4:* There is no scope for an unjust enrichment claim in respect of the IP since the legal right to receive the IP in accordance with clauses 8.4.4.3 and 8.7.1-8.7.5 of the Purchase Agreement and clause 15.3 of the Standard Conditions nullifies the allegedly unjust factor.

94. As I have stated, the contractual arrangements are evidently weighted in Qatar Airways' favour and impose significant risk on a supplier who has devoted considerable time and expense to this endeavour. Nevertheless, this imbalance was envisaged by both parties at the time of contracting. The contractual arrangements are clear and it is not for this court to rewrite the parties' bargain.

Quantum findings on facts of the present case

95. It is next necessary to determine the financial consequences for the parties upon the proper application of clause 12.3.2 to the facts of the present case. Clause 12.3.2 provides in relevant part:

> "*12.3.2 The Supplier shall repay or credit to Qatar Airways, at Qatar Airways' option, within ten (10) calendar days after the date of termination, expiry or suspension, all sums previously paid by Qatar Airways to the Supplier together with Interest thereon. The Supplier shall also reimburse to Qatar Airways all Freight Charges paid or incurred by Qatar Airways for Products and Spare Parts affected by such termination, expiry or suspension*".

96. By paragraph 156 of its counterclaim, Qatar Airways claims the following under clause 12.3.2 of the Standard Conditions:

> "*156. The total sum due and payable to Qatar under clause 12.3.2 (as fully detailed in Schedule 1) hereof will be substantially more than US$3,754,526.21 and €115,500 (the "Reimbursement Sum"). The Reimbursement Sum comprises:*
>
> *156.1. US$3,004,976.91, being the repayment due and payable in respect of all Previous Payments paid by Qatar as non-recurring costs in accordance with the payment schedule at clause 4 of the Contracts;*
>
> *156.2. interest (calculated at the Contractual Rate of Interest) due in respect of all Previous Payments and payable for the period from when each of the Previous Payments was made to Optimares until the 17 April 2020 inclusive (the date by which the Previous Payments were required to be repaid to Qatar), after which interest began to accrue on the Reimbursement Sum as a whole (as pleaded below) (alternatively, Qatar claims interest on the Previous Payments for this*

period (under clause 12.3.2) calculated by reference to the statutory rates of interest under either the Late Payment Commercial Debts (Interest) Act 1998 or the Senior Courts Act 1981);

156.3. US$352,056.54 representing the costs incurred by Qatar in shipping BFE to Optimares prior to termination, due as a Freight Charge paid or incurred by Qatar in relation to Products (as defined by clause 1.1 of the Standard Conditions to include BFE) affected by termination;

156.4. US$45,338.00, representing the cost to Qatar of an insurance guarantee in respect of import duties and taxes for BFE which was shipped to Optimares, as a Freight Charge paid and incurred by Qatar in relation to Products (as defined by clause 1.1 of the Standard Conditions to include BFE) affected by termination;

156.5. €115,500 and US$352,154.76, representing the costs that Qatar paid to Optimares on or around 19 July 2021 and which Qatar has incurred in arranging for the return of the BFE to Qatar in accordance with the BFE Agreement set out above, due as a Freight Charge paid or incurred by Qatar in relation to Products (as defined by clause 1.1 of the Standard Conditions to include BFE) affected by termination …"

97. At Annex 2 to this Judgment is a document prepared by the parties which shows their respective cases in respect of Qatar Airways' counterclaim for the return of these sums said to have been paid to Optimares together with interest. Before turning to the parties' cases as set out therein, it is necessary to consider further arguments of Optimares on the proper construction of the Purchase Agreement, which were set out in paragraph 13 of its Closing Submissions.

98. In particular, Optimares submits that the NRCs are part of the contract price, and are payment for work actually done. It points to the fact that NRC is fixed in Exhibit 6 to the Purchase Agreements – an exhibit entitled 'price'- and which sets out the NRC price in the same table as the shipset unit prices, without distinction. It submits that clause 4.1 of the Purchase Agreement makes clear that "*the **prices for each item** of the Products shall be as detailed in Exhibit No.6 to this Agreement*". (bold, underline added) and there is no basis to suggest (as Qatar Airways now attempts to do so) that the NRC did not form part of the "*price*" (which it accordingly is not obliged to repay – see paragraph 54 above).

99. Optimares further submits that the NRC payment schedule is set out as part of the Payment Terms in clause 4.9 generally. Payments under clauses 4.9.4-4.9.7 are treated in the same way as other payments under the contract, and are expressed to be earned on key activity milestones – the ITCM, the CDR, FAI and remedy of all defects. They are characterised as "NRC **Charges**" (bold, underline added). The first trigger event is expressed to be a "*down payment*", the natural and ordinary meaning of which is "*a payment of part of the total cost of something that you make when you buy it. The rest of the cost is usually paid over a period of time.*"[31]

100. I do not accept these submissions.

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[31] Cambridge Dictionary.

101. The NRC Payment Schedule provides as follows:

> "*NRC Payment Schedule*
> *4.9.4 A down payment in the amount of twenty-five percent (25%) of the non-recurring costs shall be invoiced by the Supplier upon completion of the Initial Technical Coordination Meeting (ITCM);*
> *4.9.5 A progress payment in the amount of twenty-five percent (25%) of the non-recurring costs shall be invoiced by the Supplier upon completion of the Critical Design Review (CDR);*
> *4.9.6 The payment in the amount of twenty-five percent (25%) of the non-recurring costs shall be invoiced by the Supplier upon completion of the First Article Inspection (FAI); and*
> *4.9.7 The remaining payment in the amount of twenty five percent (25%) of the non- recurring costs shall be invoiced by the supplier upon rectification of all defects as raised in FAI or on production of a commitment letter with a target date of closure at the time of delivery of aircraft.*
> *Qatar Airways will make payments in US Dollars for the NRC charges to the bank account detailed on the Supplier's invoice within forty-five (45) days from receipt of the Supplier's original invoice following completion of each of the above NRC payments schedule*."

102. Exhibit No 2 to the Purchase Agreement provides that the FAI of the Products shall be conducted at Optimares' facility and a complete shipset of all Products shall be presented during the FAI (clauses 5.1, 5.2).

103. These four payments of NRCs relate to costs incurred by Optimares in designing the Product up to the rectification of all defects in the Product which had been identified during the FAI. Once that stage is completed, the Product is delivered. Until that stage is reached, these are effectively on account payments made by Qatar Airways to assist Optimares with the cost of the design process.

104. Contrary to Optimares' submission, its case is not assisted by clause 4.1.1 of the Purchase Agreement. That clause provides that "*[t]he prices for each item of the Products shall be as detailed in Exhibit No. 6 to this Agreement*." (emphasis added)

105. "Products" is defined in clause 1.2 of the Purchase Agreement to mean: "*the Business Class passenger seats as further defined in the Product Specification Document, including all parts, item, equipment (electronic or otherwise) and all related functional and operational software and applications including (but not limited to) all databases.*"

106. Exhibit No. 6 contains the List Price for the Shipset, that is for 30 Business Class Seats. It confirms that the "*Product design features and components which are included in, or excluded from, in the above Shipset pricing are set out in the Product Specification Document and the Visual Renderings of the Product Design.*" "Shipset" is defined in clause 1.2 to mean "*the complete set of all Products installed or to be installed on each of the Aircraft*".

107. Whilst Exhibit No 6 does include the price for "Optimares NRC" (in the sum of USD 970,000), that is a separate item from the "Product". NRCs are accordingly not part of the price for the Product. They form a separate series of payments for non-recurring costs.

108. This is confirmed by clause 4.9 of the Purchase Agreement. That provides for the issuing of invoices for Buyer Furnished Equipment ("**BFE**") procured by Qatar Airways from Optimares (clause 4.9.1) and, separately, the NRC Payment Schedule (clauses 4.9.4 – 4.9.7).

109. The point is, however, put beyond doubt by clauses 11.3.1 and 11.3.2 of the Standard Conditions. Those clauses distinguish between invoicing for the "purchased Products" and for "Services" and payment by Qatar Airways following delivery and acceptance of the "Products" and of the "Services" respectively to which the relevant invoice relates. Clause 1.1 of the Standard Conditions contains the separate definitions of "Product" and "Services". It is plain from those definitions that the "Product" is the aircraft equipment or parts (including the seats) and "Services" consists of "*any services that may be provided by Optimares to Qatar Airways to assist in <u>including the design</u> … of any Product*" (underlining added).

110. It follows that, turning back to clause 12.3.2, any NRC payments made by Qatar Airways which relate to Products which have not yet been delivered – so, for instance, where the ITCM or the CDR have been completed but FAI has not yet been reached, these are "*sums previously paid by Qatar Airways to Optimares*" for ongoing design work on the Product prior to the termination of the Purchase Agreement and which accordingly fall to be repaid by Optimares.

111. In principle Freight Charges must also be repaid by Optimares under clause 12.3.2 if, as here, they have been "*affected by the termination*". If they had been incurred in relation to completed, delivered Products, they would not then have been "affected by the termination". But no completed Products were delivered by Optimares in this case. Freight Charges are defined in clause 1.1 of the Standard Conditions as follows:

> "*… all charges, fees and expenses related to the import, export, freight, insurance, packaging, customs duties, handling and all other cost to transport a Product or Spare Part in terms of these Standard Conditions and the Purchase Agreement including the cost to remove and install a Product from an Aircraft*."

112. Applying this approach and turning to the counterclaims set out in Annex 2 to this judgment, on the facts I find the following.

113. <u>Item (a)</u>: All of the payments of NRCs for the *new* design of the seat are recoverable by Qatar Airways, namely (i) US$485,000; (ii) US$242,500; (iii) EUR 756,178.50; (iv) US$475,000.

114. <u>Item (b)</u>: It is agreed between the parties that interest on the NRCs shall be at US prime rate, in a sum to be agreed between the parties.

115. So far as the *old* seat design (Aria) is concerned, I find as follows.

116. A total of US$970,000 was paid for work on this design in two tranches: (i) US$237,500 was paid by Qatar Airways on 3 June 2019 and (ii) US$732,500 was paid by it on 16 January 2020.

117. Mr. Braca gave oral evidence on behalf of Optimares. He said that these payments for the NRC on the old design were agreed at a meeting with Mr. Al Baker in October

2019. He said that Mr. Al Baker "agreed to pay in full our line of orders open for the non-recuring costs of the old design and to open new line orders for the new design based on the milestones."

118. Consistently with this, Optimares issued an invoice to Qatar Airways on 31 October 2019 in the sum of US$970,000.

119. During the trial, I drew Mr. Beeley's attention to the Qatar Airways' internal email exchange in the trial bundle at N2/453.[32] Mr. Nawaid emailed Mr. Al Baker on 12 December 2019 and stated as follows:

> "*Optimares is asking us to pay full NRE (Non-Recurring Engineering) of USD 970,000 for previous design of B787-9 BC seat. This project was halted at CDR stage and then we embarked on to the new design.*
> *Our NRE payment terms as per contract are:*
> *25% at ITCM - Already Paid*
> *25% at CDR - Agreed to pay*
> *25% at FAI - Not materialized*
> *25% upon rectification of all defects raised during the FAI - Not materialized*
> *I have advised Optimares that as per the contract they are eligible for 50% of NRE, i.e., USD485,000. Since we have already paid them 25% of NRE at ITCM, we will now pay them another 25% for CDR.*
> *Mr. Marco Tonucci is insisting on full 100% NRE payment, for which I have informed him that we will check internally whatever is contractually due and will revert accordingly*."

Mr. Al Baker replied on 16 December 2019 as follows regarding the full sum of US$970,000:

> "*I think it's a small amount and we should pay them soonest*."

120. This is consistent with Mr. Braca's evidence and I accordingly consider that he is telling the truth about this. In other words, although only the first two stages of the NRC Payment Schedule in respect of the old seat design had been reached (i.e. clauses 4.9.4 and 4.9.5 of the Purchase Agreement), Mr. Al Baker agreed with Mr. Braca that Optimares would be deemed to have completed all four stages (i.e. also clauses 4.9.6 and 4.9.7) and would be paid accordingly.

121. By clause 11.3 of the Standard Conditions, it is provided that:

> "*11.3.1 The Supplier shall issue invoices for the purchased Products, Services or Spare Parts in accordance with the terms set forth in these Standard Conditions (and where applicable the Purchase Agreement).*

[32] Optimares' legal team's failure to spot this important document may be explained by the fact that no adequate core bundle was supplied to the court, contrary to the commercial court guide and the court's request, until almost the last day of the trial. In response to the court's request for a useable core bundle, four "core bundles" were made up as the trial progressed. Every time a document was referred to, it was indiscriminately added to these bundles. This was of no assistance to the court, as a Judge is not allocated time to read four core bundles after a trial has concluded.

11.3.2 Qatar Airways shall effect payment of the undisputed portion of a Supplier's invoice within forty-five (45) days after the date the invoice is received by Qatar Airways following delivery and acceptance of the Products, Services (or Spare Parts) to which such invoice relates."

By clause 1.1 of the Standard Conditions, the definition of "Services" includes the design of the Product.

122. I find that in agreeing to pay the full sum of US$970,000, Qatar Airways agreed that this sum was undisputed and that each of the design milestones referred to in clauses 4.9.4 – 4.9.7 of the Purchase Agreement were deemed to have been delivered to it and accepted by it. In those circumstances, since (as Mr. Cumming KC rightly accepted in his opening submissions) payment of the purchase price (for delivered Products) would not fall within the definition of "*all sums previously paid by Qatar Airways to the Supplier*", so too Qatar Airways' deemed completed delivery of, and payment for these services cannot fall within the scope of clause 12.3.2 so as to allow it to renege on its agreement and demand their repayment. Qatar Airways' claim for the return of this sum accordingly fails. I add that Mr. Cumming KC realistically (and correctly) accepted in closing, when I put this analysis to him, that the material could indeed be interpreted in this way in respect of the US$970,000 payment.

123. The same result might have been reached by a slightly different analysis, namely that the agreement with Mr. Braca amounted to a separate oral agreement with its own consideration supplied by Optimares, being its agreement to cease work on the old design and instead immediately to begin work on the new design. However, Optimares failed to plead any such case and accordingly I do not reach the conclusion that the sum is not repayable by reason of this analysis.

124. Item (c): Costs incurred by Qatar Airways in shipping BFE to Optimares *prior to* termination in the sum of US$352,056.54. Optimares puts Qatar Airways to proof of this sum. There is no purchase order relied upon by Qatar Airways to make good this sum and no underlying documentary evidence to support it. Instead, it relies upon paragraphs 29-30 of the witness statement of Mr. Armas, which contains hearsay evidence. He stated as follows:

"*29. I was not involved with the financial aspect of the Optimares projects and I did not participate in the invoicing or payment processes. However, while preparing for this interview and statement, I have discussed the payments made by Qatar Airways to Optimares with our finance department and they have confirmed the following to me:*

…

30. The Qatar Airways finance department also confirmed that a payment of USD 352,056.54 for logistics relating to the Optimares projects was made to Panasonic."

125. I do not consider that Qatar Airways has sufficiently proved its entitlement to recover this sum either as to the amount, or as to the contractual basis for the alleged payment. Mr. Cumming KC accepted that one could infer that there would have been a purchase order for this item had it been incurred but that none was in evidence. In the event, this aspect of the counterclaim fails.

126. Item (d): This concerns payment in respect of the cost of an insurance policy and custom operator fees concerning the temporary importation of IFE/BFE parts (in the sum of US$45,338). But these sums were paid under purchase order SV 21777062 which was issued under a separate fiscal representative contract entered into by the parties for which separate consideration was given by Optimares (i.e. separate from the Purchase Agreement) and not under the Purchase Agreement. Nor are these Freight Charges which have been "affected by such termination" within the meaning of Standard Conditions, clause 12.3.2. Moreover, the fiscal representative contract contains an exclusive jurisdiction clause in favour of the Court of Latina – Italy in respect of any dispute arising from or connected with the agreement or its consequences. In all the circumstances, I do not consider that this sum is repayable under Standard Condition 12.3.2 of the Purchase Agreement.

127. So far as item (e) is concerned in the sum of US$352,154.76 and EUR 115,500, Optimares admits that these payments were made to it by Qatar Airways, being paid on 19 July 2021 (see the unnumbered paragraph of its Amended Reply and Defence to Counterclaim, following paragraph 108). The payments were made by Qatar Airways to Optimares in return for allowing Qatar Airways to take back Panasonic parts installed on Aria Suite seats which required to be unbolted and removed from the aircraft, for management time, negotiation fees and for insurance and storage costs. However, these sums were paid under a separate BFE Agreement entered into by the parties on 1 June 2021: see clause 3.2 thereof. By clause 3.6 of the BFE Agreement, these sums were paid "*free of all set-off and deduction and the existence of any claims, legal proceedings or disputes of any nature between the parties shall not excuse non-payment or withholding of these sums*". In the circumstances, I consider that these sums do not fall to be repaid to Qatar Airways under the terms of a different agreement, namely the Purchase Agreement, and in particular clause 12.3.2 of the Standard Conditions. These sums were invoiced by, and paid to Optimares under the terms of the BFE Agreement. This aspect of the counterclaim accordingly fails.

Conclusion

128. In the circumstances, Optimares' claim is dismissed. The counterclaim of Qatar Airways succeeds to the extent set out above (namely, the return of the NRCs for the new seat design, together with interest thereon).

ANNEX 1

The Standard Conditions

The Standard Conditions which were incorporated into each of the Purchase Agreements provided in particular as follows:

> "***2.2 SALE AND PURCHASE***
>
> *The Supplier shall design, manufacture, sell and Deliver to Qatar Airways and Qatar Airways shall buy and take Delivery of the Products (and the Spare Parts to maintain and support the Products) on the Delivery Date(s) and at the Delivery Location(s) and upon the terms and conditions contained in these Standard Conditions and the Purchase Agreement.*"
>
> ***2.3 LIMITATION ON CHARGES***
>
> *2.3.1 All Materials, Products, Aircraft Software, Proprietary Information, copyright licenses, Product Support, Product Assurance Services and other forms of support provided by the Supplier to Qatar Airways under these Standard Conditions are provided at no charge except as otherwise specifically set forth in these Standard Conditions or the Purchase Agreement.*
>
> …
>
> ***5.3 CERTIFICATIONS***
>
> *5.3.1 The Supplier shall obtain all Aviation Authorities' certificates and all other required governmental approvals as may be required upon delivery of the first Product of each type to Qatar Airways. In addition, the Supplier shall at no cost assist Qatar Airways, the Installer or the Aircraft Manufacturer in obtaining any supplemental Aviation Authorities' certificates or other governmental approvals, which may be required by Qatar Airways, the Installer or the Aircraft Manufacturer in order for Products to be installed and certified in the Aircraft and for Qatar Airways to operate and maintain the Products.*
>
> *5.3.2 The Supplier shall be responsible for all certification, testing, data submission and any Modifications or changes as may be required by the applicable Aviation Authorities, the Installer or the Aircraft Manufacturer. Any failure by the Supplier to obtain the necessary certification shall be considered a Non- Excusable Delay.*
>
> *The Supplier, at its cost and expense, shall comply with all production, installation and certification requirements and regulations of the Aircraft Manufacturer. Specifically, the Supplier shall comply with the following:*
>
> *(a) All applicable FAA and EASA design and certification requirements;*
>
> *(b) All Aircraft Manufacturer's design requirements;*
>
> *(c) All Aircraft Manufacturer's Product interface requirements;*

(d) All Aircraft Manufacturer's installation requirements;

(e) All Aircraft Manufacturer's data submittal requirements.

The Aircraft Manufacturer's or Qatar Airways' approval or agreement on the Supplier's drawings or designs does not relieve the Supplier of the responsibility to comply with the Aircraft Manufacturer's applicable TSOs and all FAA/EASA regulations or other regulatory requirements."

…

6.3 TECHNICAL DATA

6.3.1 Prior to delivery of the Products, the Supplier shall provide free of charge to Qatar Airways the technical Data required to support the installation of the Product. The technical Data to be provided shall include (but not be limited to) Product descriptions, dimensions, weight, operational characteristics, envelope, assembly and installation drawings, and installation instructions.

6.3.2 The Supplier shall not revise, reissue or amend any Supplier Data that may be required by these Standard Conditions or the Purchase Agreement when the sole reason for the revision, reissue or amendment is to correct minor errors which do not alter the technical content of the Data."

…

7.1 PURCHASE ORDERS

7.1.1 Qatar Airways shall issue Purchase Orders to the Supplier when purchasing any Product, Spare Part or Services covered under these Standard Conditions or the applicable Purchase Agreement.

7.1.2 Each Purchase Order shall be governed by the terms and conditions of these Standard Conditions and the applicable Purchase Agreement."

…

7.4 INSPECTION AND ACCEPTANCE

…

7.4.2 Inspection and acceptance by Qatar Airways shall be subject to the Products, Spare Parts and Services being to the satisfaction of Qatar Airways and in full compliance with the requirements of the Specification and the terms set forth in these Standard Conditions, the applicable Purchase Agreement and/or the applicable Purchase Order."

…

8.3 DATA AND MATERIALS

8.3.1 GENERAL

(a) Data and Materials as detailed under this provision shall be provided at no charge to Qatar Airways."

…

8.3 DATA AND MATERIALS

…

8.3.3 COPIES AND REPRODUCTION COSTS

The Supplier is required to provide at no charge to Qatar Airways copies of Data and Materials as specified by Qatar Airways or the QCAA."

…

11.3 INVOICING

11.3.1 The Supplier shall issue invoices for the purchased Products, Services or Spare Parts in accordance with the terms set forth in these Standard Conditions (and where applicable the Purchase Agreement).

11.3.2 Qatar Airways shall effect payment of the undisputed portion of a Supplier's invoice within forty-five (45) days after the date the invoice is received by Qatar Airways following delivery and acceptance of the Products, Services (or Spare Parts) to which such invoice relates."

…

12. DURATION AND TERMINATION

12.1 DURATION

These Standard Conditions shall be become effective from the Effective Date and shall, subject to the terms set forth in the Agreement, continue for the Support Period.

12.2 TERMINATION

12.2.1 Without in any way limiting or derogating from any other provision hereof, Qatar Airways shall be entitled, but shall not be obliged, to forthwith to cancel these Standard Conditions and the Purchase Agreement at any time by addressing written notice to that effect to the Supplier (without prejudice to any other rights of Qatar Airways in law or in terms of these Standard Conditions or the Purchase Agreement and in particular, but without limitation, its right to claim damages), if:

> *(a) the Supplier compromises or attempts to compromise or defer payment of its debts owing by it to its creditors generally or the Supplier is not able to pay its debts generally as they become due; or*

(b) the Supplier is provisionally or finally liquidated, wound-up, removed from the register of companies or placed under judicial management or any administration order whatsoever or takes any steps for its voluntary winding-up or liquidation; or

(c) the Supplier generally does or omits to do or suffers anything to be done which may in any way potentially prejudice Qatar Airways' rights under these Standard Conditions or the Purchase Agreement; or

(d) the Supplier commits any breach of any provision of these Standard Conditions or the Purchase Agreement and fails to remedy such breach within 14 (fourteen) calendar days of the date of written notice from Qatar Airways requiring the breach in question to be remedied; or

(e) the Supplier undergoes a change of control, in that the shareholders who have the right to vote the majority of the votes attaching to its entire issued share capital cease to control such votes for any reason whatsoever (in which event, the Supplier shall forthwith notify Qatar Airways of such change of control in writing); or

(f) the Supplier undergoes a material adverse change in financial position (as determined by Qatar Airways within its reasonable discretion); or

(g) in the event that performance of these Standard Conditions or the Purchase Agreement by Supplier shall have been rendered impossible for a period of thirty (30) calendar days by reason of a Force Majeure Event; or

(h) any representations or warranties to Qatar Airways in terms of these Standard Conditions or the Purchase Agreement or otherwise in terms of the provision hereof, which proves to be incorrect in any material manner or respect whatsoever; or

(i) any consent, authorisation, licence or approval from amongst others, the FAA, EASA, QCAA or any other applicable Aviation Authority or the Aircraft Manufacturer necessary in order to enable the Supplier to comply with its obligations in terms of these Standard Conditions or the Purchase Agreement is modified or is not granted or is revoked, suspended, withdrawn or terminated or expires and is not renewed .

12.2.2 Without in any way limiting or derogating from any other provision of these Standard Conditions or the Purchase Agreement, if the Supplier fails to comply with or breaches any of its obligations in terms of these Standard Conditions or the Purchase Agreement, Qatar Airways shall be entitled, but shall not be obliged, to without prejudice to any other remedies available to it at law or in terms of these Standard Conditions or the Purchase Agreement arising from such failure or breach, to remedy such failure or breach on behalf of the Supplier and to recover, on written demand, from the Supplier all costs of whatsoever nature and howsoever arising incurred by Qatar Airways by reason of or pursuant to it having remedied such failure or breach as aforesaid.

12.2.3 Notwithstanding anything to the contrary contained in these Standard Condition or the applicable Purchase Agreement, Qatar Airways shall be entitled to terminate these Standard Conditions, the Purchase Agreement and/or any Purchase Order for its convenience and without incurring any liability by providing three (3) months prior written notice to the Supplier for termination of these Standard Conditions and/or Purchase Agreement and fourteen (14) days prior written notice for termination of the Purchase Order.

12.3 EFFECT OF TERMINATION

12.3.1 Except as expressly provided herein, the expiration or termination of these Standard Conditions and the Purchase Agreement shall not affect or impair the rights of Qatar Airways or the liabilities and obligations of the Supplier pursuant to these Standard Conditions and the Purchase Agreement existing prior to such expiration or termination, nor shall such expiration or termination relieve the Supplier of any obligation or liability accrued under these Standard Conditions and the Purchase Agreement prior to such expiration or termination.

12.3.2 The Supplier shall repay or credit to Qatar Airways, at Qatar Airways' option, within ten (10) calendar days after the date of termination, expiry or suspension, all sums previously paid by Qatar Airways to the Supplier together with Interest thereon. The Supplier shall also reimburse to Qatar Airways all Freight Charges paid or incurred by Qatar Airways for Products and Spare Parts affected by such termination, expiry or suspension. All such payments shall be in addition to any liquidated damages payable or claimable pursuant to these Standard Condition and the Purchase Agreement.

12.3.3 The remedies provided in this clause shall be in addition to any other contractual, legal or equitable rights or remedies Qatar Airways may have against the Supplier."

…

13 DELAYS AND LIQUIDATED DAMAGES

13.1 EXCUSABLE DELAYS

13.1.1 DEFINITION

Neither Party shall be responsible to the other Party for any excusable delay ("Excusable Delay") in the performance of their respective duties and obligations under these Standard Conditions or the Purchase Agreement. An Excusable Delay shall be deemed to have occurred if a Party's delay in performance is due to causes such as an act of God, acts of public enemies, acts of a government war, natural disaster, insurrection or riots, civil commotion, fire, floods, plagues, epidemics or any other causes beyond such Party's reasonable control and not occasioned by the intentional acts, omissions or negligence of the relevant Party."

…

13 DELAYS AND LIQUIDATED DAMAGES

13.1 EXCUSABLE DELAYS

…

13.1.6 RECOVERY PROGRAMME

(a) Upon the occurrence of an Excusable Delay event, the Supplier and Qatar Airways shall meet as soon as possible at Qatar Airways' facilities to discuss whether a recovery programme, both in terms of delivery dates and content, is possible or not.

(b) If such recovery programme is agreed as feasible by both Parties, then Qatar Airways and the Supplier shall define and act in good faith to agree the terms and conditions of such recovery programme. In doing so, the Supplier commits to treat its obligations under these Standard Conditions and the Purchase Agreement as its first priority amongst its various activities in order to ensure the most efficient and prompt recovery programme for Qatar Airways.

(c) Should the milestone chart be extended as consequence of such recovery programme then any predelivery payment schedule shall be extended accordingly."

…

13 DELAYS AND LIQUIDATED DAMAGES

13.1 EXCUSABLE DELAYS

…

13.1.7 TERMINATION OR CANCELLATION FOR EXCUSABLE DELAYS

If (i) such Excusable Delay lasts or could reasonably be expected to last for more than thirty (30) calendar days; or (ii) the recovery programme is in the sole opinion of Qatar Airways regarded as not being feasible; or (iii) if no agreement is reached on the recovery programme within thirty (30) calendar days from the date of commencement of the Excusable Delay, then Qatar Airways shall have the right, at its own choice and upon written notice to the Supplier, to forthwith cancel all or part of the undelivered portion of these Standard Conditions and the Purchase Agreement. In such cases of cancellation, Qatar Airways shall have no liability whatsoever other than payment by Qatar Airways of properly substantiated costs incurred by the Supplier for labour already performed on, and parts already installed on the Aircraft prior to such date of commencement of the Excusable Delay, provided that the Supplier shall on written demand from Qatar Airways reimburse to Qatar Airways all predelivery payments and other payments already effected by Qatar Airways that the Supplier is not able to substantiate in accordance with the foregoing."

…

15.3 RIGHT TO WORK PRODUCT

15.3.1 Qatar Airways shall have, and the Supplier hereby grants to Qatar Airways, a perpetual, assignable, non-exclusive, royalty-free license to use any concept, product or process, patentable or otherwise, copyrighted material (including without limitation documents, specifications, calculations, notes, reports, Data, models, and electronic software) and confidential information owned by the Supplier and used by the Supplier or furnished or supplied to Qatar Airways by the Supplier in the performance of its obligations under these Standard Conditions and the Purchase Agreement.

15.3.2 Any concept, product, process (patentable or otherwise), copyrightable material (including without limitation documents, specifications, calculations, notes, reports, data, models, and electronic software) or Confidential Information first developed, produced or reduced to practice by the Supplier or any of its employees in the performance of these Standard Conditions and the Purchase Agreement (collectively, "Work Product") shall be the property of Qatar Airways upon creation, whether or not delivered to Qatar Airways at the time of creation, and shall upon request by Qatar Airways be delivered to Qatar Airways (but in no event later than thirty (30) calendar days from the date of cancellation of the Standard Conditions ·or the Purchase Agreement). Upon request by Qatar Airways, from time to time, the Supplier agrees to do all things reasonably necessary, at Qatar Airways' expense and as Qatar Airways may direct, to obtain patents or copyrights on any portion of such Work Product, to the extent the same may be patentable or copyrightable by other. The Supplier further agrees to execute and deliver or cause to be executed and delivered such documents, including in particular instruments of assignment, as Qatar Airways may in its discretion deem necessary or desirable to assign and transfer title to such Work Product as Qatar Airways may direct and to carry out the provisions of this Clause."

…

15.4 LIABILITY

UNLESS IN THE EVENT OF ITS GROSS NEGLIGENCE OR WILFUL MISCONDUCT, NEITHER PARTY SHALL HAVE ANY LIABILITY OR RESPONSIBILITY FOR ANY SPECIAL, INDIRECT, INCIDENTAL, EXEMPLARY, CONSEQUENTIAL OR PUNITIVE DAMAGES ARISING OUT OF OR IN CONNECTION WITH THESE STANDARD TERMS AND THE PURCHASE AGREEMENT, INCLUDING, WITHOUT LIMITATION, LOSS OF PROFIT OR REVENUE."

…

16.10 ENTIRE AGREEMENT

These Standard Conditions and the Purchase Agreement, including their respective exhibits and appendices, contain and constitute the entire understandings and agreement between the Supplier and Qatar Airways with respect to the subject matter hereof and supersedes and cancels any and all

previous understandings, agreements, commitments or representations whatsoever oral or written in respect thereto. These Standard Conditions and the Purchase Agreement shall not be varied, discharged, released, abandoned, supplemented, changed or modified in any manner whatsoever, orally or otherwise, except by an instrument in writing concurrent or of date even herewith or subsequent hereto executed and delivered by both Qatar Airways and the Supplier or by their duly authorised representatives or officers making specific reference to these Standard Conditions and the Purchase Agreement and to the respective provisions or clauses being released , discharged, abandoned, supplemented, changed, or modified."

…

16.13 REASONABLE ACTS

Both Parties shall act in good faith in the performance of their respective responsibilities and obligations under these Standard Conditions and the Purchase Agreement and shall not, except as otherwise expressly provided to the contrary, unreasonably delay, condition or withhold the giving of any consent, decision, approval, agreement and/or any similar acts that is either requested or reasonably required by the other Party in order to exercise its rights or to perform its responsibilities and obligations under these Standard Conditions and the Purchase Agreement."

…

16.17 AMBIGUITY

If any claim is made by a Party relating to any conflict, omission or ambiguity in the provisions of these Standard Conditions or the Purchase Agreement, then no presumption or burden of proof or persuasion will be implied because these Standard Conditions or the Purchase Agreement was prepared by or at the request of any Party."

…

16.19 SUPPLIER AS INDEPENDENT CONTRACTOR

The relationship of the Parties hereto is that of independent contractors. The Supplier is an independent contractor and not an agent of Qatar Airways and shall not represent differently to any third party. Nothing in these Standard Conditions or the Purchase Agreement shall constitute or be deemed to constitute a partnership, joint venture, association or similar relationship between the Parties hereto or constitute either Party as agent for the other for any purpose whatsoever. Neither Party shall have the authority or power to bind the other or to contract in the name of or create a liability against the other as against any third party in any way or for any purpose. The Supplier shall be solely responsible for personal injury, death, loss, damage and/or destruction resulting from the quality of or the manner in which the Products and Spare Parts are designed, manufactured, assembled or in which the Services are performed. All persons performing the Services shall be under the exclusive

control of the Supplier, which alone shall direct and control such persons in performing the Supplier's obligations under these Standard Conditions and the Purchase Agreement. All facilities, equipment, tools, Components, Materials, Products, tooling, parts and supplies necessary to perform the Supplier's obligations shall be the responsibility of the Supplier."

…

"EXHIBIT No 2 PROGRAMME MANAGEMENT

1. THE PROGRAM MANAGER

…

1.6 The Supplier shall develop and submit to Qatar Airways a schedule depicting critical milestones in the design, development, and manufacturing process of the Products in accordance with milestones as may be defined by the Aircraft Manufacturer and/or Qatar Airways, which shall include the following:

(a) Initial Technical Coordination Meeting (ITCM)

(b) Preliminary Design Reviews (PDR)

(c) Critical Design Reviews (CDR)

(d) Critical Design Freeze (CDF)

(e) Certification (DTP, DTR)

(f) First Article Configuration Inspection (FAI)

5.2 A complete Shipset of all Products shall be presented during the FAI.

The Purchase Agreement

The Purchase Agreement provided in particular as follows:

"2.1 *The terms and conditions contained in the Standard Conditions are hereby incorporated by reference into this Agreement and shall constitute an integral, non-severable part and shall fully apply to this Agreement.*"

2.3. To the extent that any ambiguities, inconsistencies or conflicts between the terms and conditions contained in this Agreement, the Standard Conditions, and the Specification exist or would arise, then the following order of precedence shall apply:

(a) this Agreement;

(b) the Standard Conditions as attached Exhibit N°11 -Standard Terms And Conditions For Purchase of Aircraft Products And Services (STC-005);

(c) the Specification including Exhibit N°12 - Product Specification Document."

3.1 COVERED AIRCRAFT

This Agreement covers the sale and purchase of the Products and Services for the following Aircraft:

Aircraft: Thirty (30) Boeing 8787-9"

"***3.2 AIRCRAFT DELIVERY SCHEDULE***

Aircraft	*2019*	*2020*	*2021*	*2022*	*2023*	*Total*
B787-9	*7*	*7*	*6*	*8*	*2*	*30*

3.2.1 The first Aircraft delivery is scheduled for the end of September 2019.

3.2.2 Details of Aircraft scheduled delivery shall be as notified in writing, from time to time, by Qatar Airways to the Supplier.

3.2.3 Qatar Airways reserves the right to modify the number of Aircraft, to change the Aircraft model, and to adjust the delivery schedule of any Aircraft as it may agree with the Aircraft Manufacturer to suit its operational requirements without incurring any liability to the Supplier and without any compensation to the Supplier or increase in the price of the Products."

4. PRICING, INVOICING AND PAYMENTS

4.1 PRODUCT PRICES

4.1.1 The prices for each item of the Products shall be as detailed in Exhibit N°6 to this Agreement.

4.1.2 All prices are established in the Base Year United States Dollars."

…

"***4.9 PAYMENT TERMS***

4.9.1 Invoices for Products procured as BFE by Qatar Airways from the Supplier for installation in the Aircraft shall be issued by the Supplier following delivery of the Product in full compliance with the terms and conditions set forth in this Agreement to Qatar Airways, the Aircraft Manufacturer or the Installer. The Supplier shall send all invoice(s) to the following address:

Qatar Airways Accounts Payable
Finance Department
Qatar Airways Tower 2

Airport Road
P.O. Box 22550
Doha, State of Qatar
With a electronic copy sent to: accountspayable@gatarairways.com.ga

4.9.2 Qatar Airways will make invoice payments in US Dollars to the bank account detailed on the Supplier's invoice within forty five (45) days from receipt of the Supplier's original invoice.

4.9.3 For all other Supplier's invoices, Qatar Airways will pay the Supplier in accordance with the terms of the Standard Conditions.

NRC[33] Payment Schedule

4.9.4 A down payment in the amount of twenty-five percent (25%) of the non-recurring costs shall be invoiced by the Supplier upon completion of the Initial Technical Coordination Meeting (ITCM);

4.9.5 A progress payment in the amount of twenty-five percent (25%) of the non-recurring costs shall be invoiced by the Supplier upon completion of the Critical Design Review (CDR);

4.9.6 The payment in the amount of twenty-five percent (25%) of the non-recurring costs shall be invoiced by the Supplier upon completion of the First Article Inspection (FAI); and

4.9.7 The remaining payment in the amount of twenty five percent (25%) of the non- recurring costs shall be invoiced by the supplier upon rectification of all defects as raised in FAI or on production of a commitment letter with a target date of closure at the time of delivery of aircraft.

Qatar Airways will make payments in US Dollars for the NRC charges to the bank account detailed on the Supplier's invoice within forty-five (45) days from receipt of the Supplier's original invoice following completion of each of the above NRC payments schedule."

…

GENERAL PROVISIONS

7.9.4 The terms and conditions of this Agreement supersede those of all previous agreements, understandings and arrangements, whether written or oral, between [Optimares] and Qatar Airways relating to the Products and shall not be varied otherwise than by an instrument in writing of the same date as, or subsequent to this Agreement, executed by both Parties or by their duly authorised representatives.

…

[33] Non-recurring costs.

"***7.10 OTHER AGREEMENTS AND COSTS DISCLAIMER***

7.10.4 Other than for the prices and fees agreed herein for the Products, the Spare Parts and the Services, Qatar Airways shall not be required to pay the Supplier (or any other person or any third party) any other fees or charges, including but not limited to, service fees, support fees, licensing fees, recurring fees, software or applications fees, management fees, operational fees or maintenance fees or charges or any other similar fees or charges whatsoever in nature (the "Other Costs"), in order for Qatar Airways to be able, for the duration of the Support Period, to (i) enjoy the full, beneficial and continuous operation of the Products; and (ii) maintain and service the Products in the most cost effective and efficient manner. The Supplier hereby agrees to indemnify and hold harmless Qatar Airways against any and all Other Costs incurred by Qatar Airways for the duration of the Support Period which are not covered or explicitly mentioned or detailed in this Agreement."

…

8.4 ***Design and Concept***

…

8.4.4.3 all Foreground IP (as defined in clause 8.7 below), without limitation, in the Design and Concept and/or the Product and all right, title and interest in the Design and Concept and/or the Product, vests unconditionally, immediately and fully, in Qatar Airways, without any payment additional to the consideration under this Agreement, the adequacy of which is hereby acknowledged by the Supplier."

…

8.7 ***Foreground IP***

8.7.1 The Parties acknowledge and agree that any Intellectual Property Rights developed or created in relation to the Products and/or the Design and Concept shall be "Foreground IP".

8.7.2 The Parties acknowledge and agree that Foreground IP includes but is not limited to the Intellectual Property Rights subsisting in or arising in relation to (i) the Design and Concept and/or the Product(s); (ii) any materials, data, documents supplied to the Supplier whether before or during the Agreement; and (iii) the performance of this Agreement.

8.7.3 Qatar Airways is the sole legal and beneficial owner of all the Foreground IP and all right, title and interest therein shall immediately vest in Qatar Airways either (i) on the Effective Date in respect of any preexisting Foreground IP; or (ii) immediately upon such creation or development of Foreground IP, whether or not it is declared or delivered at the time of creation to Qatar Airways. The Supplier shall notify Qatar Airways in writing with full details of any Foreground IP promptly upon its creation.

8.7.4 Without prejudice to the provisions of Clause 8.7.3, the Supplier hereby assigns Qatar Airways with full title guarantee by way of present and future assignment all Foreground IP which may vest in the Supplier.

8.7.5 The Supplier shall have no right to use, sell, transfer or licence Foreground IP or any part of it and shall not register nor attempt to register any of it, unless requested to do so in writing by Qatar Airways.

…

8.7.7 The Foreground IP shall include (without limitation) all Intellectual Property Rights in inventions which [Optimares] considers may be patentable.. including but not limited to:

8.7.7.1 The door emergency mechanism

8.7.7.2 The seat design

8.7.7.3 The seat peculiarity; and

8.7.7.4 the double-folding video movement."

…

8.11 The obligations and rights in this Clause 8 are for an unlimited period and survive the termination or expiry of this Agreement."

Exhibit No 2 further provided:

"*2.* ***TIME OF DELIVERY***

For all equipment, parts, services and other goods to be provided by [Optimares] to Qatar Airways in term of the Agreement, Qatar Airways shall be entitled to stipulate, at its discretion, the time of supply of such equipment, parts, services or goods.

7. ON-DOCK-DATES

In the event that Qatar Airways elects to carry out a retrofit for any Aircraft:

7.1 The Supplier undertakes to ensure the delivery of all such Products with the latest standard modification status and latest certified part numbers then available at the time of shipment of the Products.

7.2 The Supplier shall meet all on-dock-dates of the Installer, the Aircraft Manufacturer, (and where applicable, the seats suppliers, the galleys suppliers and partition suppliers) and any other on- dock-dates that maybe determined during the ITCM.

7.3 DELIVERY OF THE ESSENCE. THE SUPPLIER MUST MEET THE ON-DOCK-DATES FOR EACH ITEM OF THE PRODUCTS AND FOR EACH AIRCRAFT AS NOTIFIED FROM TIME TO TIME BY THE AIRCRAFT MANUFACTURER. THE SUPPLIER ACKNOWLEDGES AND AGREES TO FULLY COMPLY WITH ALL THE DELIVERY TERMS AND CONDITIONS OF THIS AGREEMENT AND THE STANDARD CONDITIONS, INCLUDING WITHOUT LIMITATION ALL ITS OBLIGATIONS AND QATAR AIRWAYS RIGHTS OF LIQUIDATED DAMAGES, AGREEMENT TERMINATION AND/OR ORDER CANCELLATION WITHOUT LIABILITY OR COMPENSATION WHATSOEVER TO THE SUPPLIER."

Exhibit No 2, clause 21 provided:

21. CHANGES

21.1 The Supplier shall accommodate Qatar Airways' reasonable changes in both design and schedule. These changes shall be accommodated in an efficient and responsive manner.

21.2 Design Changes up to the CDR shall be incorporated by the Supplier at no additional cost to Qatar Airways.

21.3 Seat Refresher:

At no additional cost to Qatar Airways, the supplier shall incorporate the trim & finish and IFE upgrade that may be requested by Qatar Airways during mid-program.

21.4 Minor Changes:

Minor changes up to the FAI shall be incorporated by the Supplier at no cost to Qatar Airways for example:

(i) Change of tedlar material color,

(ii) Change of Ultra leather or fabric color,

(iii) Change or alteration to trim and finish within the specified materials range.

21.5 Major Changes:

Major changes are defined as those changes requested by Qatar Airways that do not fit the parameter of minor changes for example:

(i) Substantial changes in material fit, form and function,

(ii) Addition or deletion of electrical components other than those required to comply with the Aircraft Manufacturer's requirements or specifications,

(iii) Changing lower attachments."

ANNEX 2

Claimant's position on Defendant's summary of sums claimed on the counterclaim as at 26 July 2022

DEFENDANT'S POSITION	**CLAIMANT'S POSITION (per the Claimant)**	**QUANTUM CLAIMED (with Claimant's comments marked)**	**Optimares response to Qatar's position**	**What do these payments represent?**
(a) Counterclaim ¶156.1 {**A/7/53**}	Amended Reply and Defence to Counterclaim ¶108 {**A/10/26**}	*NRC details*: B787 BC Seats - (ARIA - Old Design) *Amount paid*: US$970,000 *Date paid*: $237,500: 03.06.19; $732,500: 16.01.20	Optimares position is set out in the Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}. Optimares admit that these two payments were made; Amended Reply and Defence to Counterclaim ¶23(a) {**A/10/7**}. The date of payment of $732,500 is 16 January 2020, not 11 March 2020 (see Appendix 9 to First Expert Report of Mr Humphrey {**J4/10**}).	Optimares agree that these two payments relate to ARIA – Old Design. The payment of $237,500 on 3 June 2019 was made under purchase order SV 21745363 {**L/10/1**} to cover NRC in relation to the Old Design following the ITCM having been achieved, which had been agreed between Optimares and Qatar Airways. The payment reflects the first milestone payment upon completion of the ITCM set out in the NRC Payment Schedule in clause 4.9.4 of the B787 Contract {**L/7/8**}, which was at the time not yet signed. The payment of $732,500 on 16 January 2020 was made under SV 21782467 {**L/25/1**} pursuant to an agreement between Mr Braca of Optimares and Mr Al Baker of Qatar Airways in October 2019 (see Day 5 pages 22-27) to cover

				the balance of the NRC milestone payments in respect of the Old Design following the agreement between the parties to proceed with the New Design.
		B787 BC Seats - (ARIA - New Design) US$485,000 12.03.20	Optimares position is set out in the Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}. Optimares admit that this payment was made. The date of payment is 12 March 2020 {**J4/10**}.	The sums were paid pursuant to purchase order SV 21825717 {**L/35/1**} in relation to NRC under the B787 Contract in respect of the ARIA New Design. The B-787 Contract at clauses 4.9.4 to 4.9.7 sets out an NRC Payment Schedule with milestone payments {**L/7/8**}. The sum was paid in respect of the two milestones set out in clauses 4.9.4 and 4.9.5, respectively, for the completion of the ITCM and the CDR.
		B-777 BC Seats US$242,500 27.02.20	Optimares' position is set out in the Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}. Optimares admits that this payment was made.	The sums were paid pursuant to purchase order SV 21825118 {**L/34**} in relation to NRC under the B777 Contract.

			The date of payment is 27 February 2020 (see {**J4/10**}).	The B-777 Contract at clause 4.9.4 sets out an NRC Payment Schedule with milestone payments {**L/6/8**}. The sum paid on 6 December 2018 was paid against the first milestone payment under clause 4.9.4, which provides that a payment in the amount of 25% of the NRC shall be invoiced by Optimares upon completion of the ITCM {**L/6/8**}.
		A321 EC Seats ~~US$832,476.91~~ EUR 756,178.50 EUR 378,089.25 ~~$416,238.46~~: 17.12.18 EUR 378,089.25 ~~$416,238.46~~: 26.9.19	Claimant's position is set out in the Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}. Optimares admit that Qatar made two EUR denominated payments to Optimares of EUR 378,089.25 each, in total EUR 756,178.50 under purchase order SV 21670398; Amended Reply and Defence to Counterclaim ¶88 {**A/10/23**}. The payments were made on 17 December 2018 and 26	The sums were paid pursuant to purchase order SV 21670398 {**L/9**} in relation to NRC under the A321 EC Contract. The A321 EC Contract at clauses 4.9.4 to 4.9.7 sets out an NRC Payment Schedule with milestone payments {**L/5/10**}. The sum paid on 17 December 2018 was paid against the first milestone payment under clause 4.9.4, which provides that a payment in the amount of 25% of the NRC shall be invoiced by Optimares upon completion of the ITCM {**L/5/10**}.

				September 2019, respectively {J**4/10**}.	The sum paid on 26 September 2019 was paid against the second milestone payment under clause 4.9.5, which provides that a progress payment of 25% of the NRC shall be invoiced by Optimares upon completion of the CDR {**L/5/10**}.
		A321 Seats	BC US$475,000.00	$237,500: 6.12.18 $237,500: 22.11.19 | Claimant's position is set out in the Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}. Optimares admit that these two payments of in total US$ 475,000 were made to Optimares; Amended Reply and Defence to Counterclaim ¶105 {**A/10/25**}. The dates of payment are 6 December 2018 and 22 November 2019, respectively (see {**J4/10**}).	The sums were paid pursuant to purchase order SV 21635629 {**L/8**} in relation to NRC under the A321 BC Contract {**L/3**}. The A321 BC Contract at clauses 4.9.4 to 4.9.7 sets out an NRC Payment Schedule with milestone payments {**L/3/7**}. The sum paid on 6 December 2018 was paid against the first milestone payment under clause 4.9.4, which provides that a payment in the amount of 25% of the NRC shall be invoiced by Optimares upon completion of the ITCM {**L/3/7**}. The sum paid on 6 December 2018 was paid against the second milestone payment under clause

				4.9.5, which provides that a progress payment of 25% of the NRC shall be invoiced by Optimares upon completion of the CDR {**L/3/8**}.
(b) Counterclaim ¶156.2 {**A/7/53**}	Amended Reply and Defence to Counterclaim ¶105 {**A/10/25**}	Interest on NRCs (US Prime Rate) **US$74,571.62**	It is understood to now be common ground that the appropriate interest rate for the Defendant's US dollar claims is the US Prime Rate. The calculation of the same remains in discussion between the parties, and will be impacted by when the payment dates were, and the proposed treatment of the Euro dominated payments.	
(c) Counterclaim ¶156.3 {**A/7/53**}	Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}	As a Freight Charge, BFE shipments to Optimares: Costs incurred by Qatar Airways in shipping BFE to Optimares prior to termination: **US$352,056.54**	Optimares position is that Qatar is put to proof as to the sums it claims to have incurred in shipping BFE to Optimares prior to termination; Amended Reply and Defence to	It is understood that to the extent this sum is proved, then it relates to Freight Chares which are said to have been incurred by Qatar Airways for services rendered by freight forwarders for the shipping of BFE material.

			Counterclaim ¶108 (under (B)) {**A/10/26**}.	
(d) Counterclaim ¶156.4 {**A/7/53**}	Amended Reply and Defence to Counterclaim ¶108 {**A/10/26**}	<u>As a Freight Charge, Insurance Guarantee:</u> Costs incurred by Qatar Airways of an insurance guarantee in respect of import duties and taxes for BFE shipped to Optimares prior to termination: **US$45,338**	The Claimant's position is set out in the Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}. Optimares admit that this sum was paid by Qatar Airways to Optimares; Amended Reply and Defence to Counterclaim ¶64(a) {**A/10/19**}. The payment was made pursuant to purchase order SV 21777062 {**N4/473**} issued pursuant to a separate fiscal representative contract entered into between the parties {**M1/242/1**}, not the B787 Contract. The fiscal representative contract contains an exclusive jurisdiction clause in favour of the Courts of Latina, Italy; Amended Reply	The payment is in respect of cost of insurance policy and custom operator fees in respect of the temporary importation of Panasonic IFE / BFE parts {**M1/242/3**} {**N4/473/1**}.

			and Defence to Counterclaim ¶64(a) {**A/10/19**}. Optimares note that this sum was paid on 21 November 2019 {**J4/10**}.	
(e) Counterclaim ¶156.5 {**A/7/53**}	Amended Reply and Defence to Counterclaim ¶108 (under (B)) **{A/10/26**} Quantum admitted at Amended Reply and Defence to Counterclaim ¶108 (under (B))	<u>As a Freight Charge, BFE return to Qatar Airways:</u> US$ **352,154.76 and €115,500**	Claimant's position is set out in its Amended Reply and Defence to Counterclaim ¶108 (under (B)) {**A/10/26**}. Optimares admit that these payments were made by Qatar to Optimares {**A/10/26**}. The sums were paid on 19 July 2021 {**J4/10**}.	This was a payment for freight charges for the return of the BFE to Qatar Airways (or its designee).
		Removal, packaging, shipment fees €28,500	The total sum of $115,000 was paid against invoice no 48/2021 dated 13 July 2021 {**N6/111**}.	Optimares agree that these sums relate to the removal, packaging, shipment fees, the negotiation fee and the management fee due under the BFE Agreement.
		Negotiation Fee €72,000		
		Management Fee €15,000		
		Insurance and Storage costs $352,154.76	The sum was paid against invoices no 79/2020, 80/2020, 86/2020, 01/2021, 15/2021 and 38/2021 {**N5/419**}.	That these sums relate to costs for insuring and storing Panasonic IFE/ BFE equipment and for custom insurance policy.