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Case No: CL-2013-000238

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2016

Before:

MR JUSTICE LEGGATT

- -

Between:

NOVUS AVIATION LIMITED	**Claimant**
- and -	
ALUBAF ARAB INTERNATIONAL BANK BSC(c)	**Defendant**

- -
- -

Paul Sinclair (instructed by **Wallace LLP**) for the **Claimant**
Andrew Ayres QC & Narinder Jhittay (instructed by **Eversheds LLP**) for the **Defendant**

Hearing dates: 26-28 April and 3-5 May 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Leggatt :

Introduction

1. The central question in this case is whether or not the claimant, Novus Aviation Limited ("Novus"), and the defendant, Alubaf Arab International Bank BSC(c) ("Alubaf"), made a contract under which Alubaf agreed to provide equity funding for the purchase of an aircraft to be leased to Malaysian Airlines. It is common ground that between April and June 2013 Novus and Alubaf discussed such a transaction and that Alubaf withdrew before the aircraft was purchased. Novus contends that Alubaf was thereby in repudiatory breach of contractual obligations contained in a commitment letter dated 6 May 2013 and a management agreement dated 15 May 2013. Alubaf denies on a number of grounds that these documents record any contractually binding obligation or, alternatively, any such obligation of which it was in breach.

The parties and their witnesses

2. Novus is a company which arranges finance for the acquisition and leasing of commercial aircraft. It is incorporated in the Bahamas and operates out of four offices in Europe, Asia and the Middle East. The CEO and President of Novus is Mr Safwan Kuzbari. His son, Mr Hani Kuzbari, is also a director and shareholder of Novus and was the principal point of contact with Alubaf. Mr Hani Kuzbari was the only witness of fact who gave evidence for Novus at the trial.

3. Alubaf is a bank incorporated and carrying on business in Bahrain. Three employees of Alubaf gave oral evidence: its Head of Treasury and Investments, Mr Ali Abdullah; its Head of Risk Management and Compliance, Mr Mohamed A Hameed A Qader; and the CEO of Alubaf, Mr Hassan Abulhasan. In addition, Alubaf relied as hearsay evidence on a witness statement from Mr Matthew Sandy, the former Head of its Investments Desk.

4. The dealings between the parties are well documented, mainly in email correspondence, and there are only a few significant disputes of fact. Where testimony given by witnesses based on their recollection of events was not consistent with documents created at the time or with inferences that can reasonably be drawn from such documents, I have based my conclusions on the contemporaneous record which I regard as much more reliable evidence of what occurred.

5. The court also received evidence from experts in aviation finance. Although, as I will explain later, that evidence did not establish the alleged market practice which was the reason for allowing it, the expert witnesses gave a helpful insight into the commercial background by explaining ways in which the purchase and leasing of aircraft are arranged and financed.

Genesis of the relationship

6. In late March 2013, Novus was contacted by Mr Sandy on behalf of Alubaf to express Alubaf's interest in investing with Novus in the acquisition/financing of passenger aircraft. Following a telephone conversation between them, Mr Hani Kuzbari outlined in an email to Mr Sandy on 27 March 2013 two investment opportunities.

The first involved a new Airbus 330-200 aircraft due to be delivered in April 2013 to Garuda Indonesia Airlines ("Garuda"). As Mr Kuzbari told Mr Sandy, Novus had previously been proceeding with another prospective investor, which had pulled out at a late stage because of failure to get internal approval for the investment. The second opportunity involved a new Airbus 330-300 aircraft, due to be delivered to Malaysia Airlines ("MAS") in June/July 2013.

7. In each case Novus was looking for equity investment to finance the acquisition of the aircraft, in combination with bank borrowing. The aircraft would then be leased to the airline on a 12 year lease. The aim was that the rental payments under the lease would more than cover the cost of repaying the loan and other expenses, generating an attractive annual return for the equity investor. At the end of the lease (or possibly sooner) the aircraft would be sold, potentially enabling the equity investor to recoup the sum invested and make a profit.

8. Mr Sandy confirmed that Alubaf was interested in receiving more information about these investment opportunities.

The Garuda transaction

9. On 28 March 2013 Mr Kuzbari provided Mr Sandy and Mr Abdullah with a financial model and diagram of the transaction structure for the potential investment in the aircraft to be delivered to Garuda. The amount of equity required for this investment was US$47-48m and the estimated average annual yield was around 10%. In an email sent on 29 March 2013, Mr Sandy indicated that Alubaf was keen to look at all such opportunities and asked for similar information on the MAS transaction, which Mr Kuzbari sent. In the same email Mr Sandy confirmed that, if "fully satisfied with the deal, financials, structure, risk and the counter parties", Alubaf could action the Garuda transaction within the required period of one month. Similar statements were made by Mr Sandy in a telephone conversation with Mr Kuzbari on 1 April 2013, which Mr Kuzbari reported in an internal email sent to others at Novus.

10. On 2 April 2013 Mr Kuzbari outlined in an email to Mr Sandy a proposed timetable for the Garuda transaction, starting with a meeting in Bahrain on 7 April 2013 and leading to funding and closing of the transaction and delivery of the aircraft in the week commencing 22 April 2013. One of the "required steps" in the process was receipt of a commitment letter from Alubaf, which was scheduled for 14 April 2013. Mr Kuzbari said that he could send the standard draft commitment letter used by Novus which had been approved by previous investors. He also mentioned the need for signature of a management agreement between Novus and Alubaf and again said that he could send the standard draft which had been approved by previous investors.

11. On 7 April 2013 Mr Kuzbari travelled to Bahrain and met Mr Sandy and Mr Abdullah. As Mr Kuzbari recorded in an internal email sent immediately afterwards, the meeting went very well and Mr Sandy and Mr Abdullah said that Alubaf (including the Chairman, CEO and Head of Investment) were all very keen to do the Garuda deal. Mr Sandy and Mr Abdullah said that they needed formal approval before issuing a firm commitment letter. Mr Kuzbari asked for an initial comfort letter by close of business on that day. Such a letter, dated 7 April 2013 and signed by Mr Abdullah, was duly provided. The letter confirmed Alubaf's "indicative commitment" to invest approximately US$45m in conjunction with Novus to acquire

a new A330-200 aircraft from Airbus to be delivered on or about 22 April 2013 and to be leased for a term of 12 years to Garuda. The letter further stated that "[t]his commitment is subject to completion of our due diligence procedures and obtaining all necessary internal approvals."

12. It soon transpired, however, that there was insufficient time to arrange the Garuda transaction. Mr Kuzbari notified Mr Sandy of this in an email sent on 10 April 2013, in which he explained that the timing would not work as Garuda and Airbus were looking for commitments that week. In these circumstances, attention now turned to the MAS transaction.

The MAS transaction

13. MAS had ordered from Airbus two A330-300 passenger aircraft, with scheduled delivery dates in July 2013 and January 2014. On 5 December 2012 Novus agreed a letter of intent with MAS outlining the terms on which Novus provisionally offered to finance the purchase of these aircraft at a price not exceeding US$107m per aircraft. The basic structure of the proposed transaction was that, for each aircraft purchase, a special purpose company (SPC) would be incorporated in a tax efficient jurisdiction which would take an assignment from MAS of the right to acquire ownership of the aircraft in return for paying the purchase price to Airbus. Upon acquisition, the aircraft would be leased to MAS for a term of 12 years. For tax and other legal reasons, the leasing arrangements would involve a chain of leases with the purchasing SPC as head lessor, two intermediate SPCs, and MAS as the ultimate sub-lessee.

14. By 12 April 2013, Mr Sandy had begun work on preparing an investment application to seek internal approval from Alubaf's investment committee to participate with Novus in the acquisition and lease to MAS of the aircraft due to be delivered in July 2013. Over the following days Mr Kuzbari provided further information and responded to queries from Mr Sandy about the proposed transaction. At the request of Novus, a non-disclosure agreement dated 15 April 2013 was signed under which Alubaf undertook to keep information confidential. Arrangements were also made for Mr Kuzbari to visit Bahrain to make a presentation to Alubaf's investment committee. The aim of the presentation was to pave the way for the investment application by introducing Novus and its business and providing general background about the aircraft leasing industry. The presentation took place on 17 April 2013 and touched briefly on the MAS deal.

15. The investment application (which was largely prepared by Mr Sandy) was a detailed document which sought approval to participate with Novus in the MAS transaction by investing 99% of the required equity in an amount of just under US$40m (with the other 1% of the equity to be contributed by Novus). The application recorded that the rest of the acquisition cost of the aircraft was to be funded by non-recourse debt financing of US$70m arranged by Novus. The investment term was stated to be 12 years (the period of the lease to MAS), though it was said that a lesser term could be arranged through a sale of the aircraft. The estimated net average annual yield was stated to be 9.83%.

16. On 23 April 2013, Mr Abdullah circulated the investment application to the members of Alubaf's investment committee. In his covering email he mentioned that discussions were taking place with Libyan Foreign Bank ("LFB"), the parent

company of Alubaf, with a view to "selling down" part of the investment to LFB. Those discussions resulted in LFB expressing its willingness to participate in the MAS leasing transaction, with an initial mandate of US$10m. This was confirmed in an email sent to Mr Abdullah on 5 May 2013, which he received shortly after the investment committee had met on that day.

17. Along with other information provided to Alubaf in the run up to the investment committee meeting, Mr Kuzbari sent to Mr Sandy on 2 May 2013 a draft management agreement. In the email attaching the document Mr Kuzbari said that, aside from the management agreement and "once you obtain your approvals", Novus would "require a commitment letter (subject to documentation) to officially remove the deal from the market". Mr Sandy forwarded the email to Mr Abdullah, highlighting in bold the part relating to the commitment letter to flag this as "an important issue outlined by Hani [Kuzbari] for us to keep in mind as we go forward."

18. At the meeting of Alubaf's investment committee on 5 May 2013 Mr Sandy and Mr Abdullah presented details of the MAS transaction to the committee and answered questions. According to the minutes of the meeting prepared by Mr Abdullah, which I regard as the best evidence of what was decided, the transaction was deemed appropriate and a discussion took place of how much of the proposed investment should be retained by Alubaf and how much should be sold on to other institutions. After discussion, the committee unanimously approved a net participation by Alubaf of US$15m with the remaining US$25m to be sold to "external parties/sister banks post funding". Mr Abdullah was authorised to pursue "necessary action" which, as requested in the investment application, was for the Treasury and Investment Department to "proceed with executing the necessary documentation to fund and close the Transaction."

19. Immediately after the meeting Mr Sandy telephoned Mr Kuzbari to tell him that Alubaf had "formally fully approved" the MAS deal. Mr Kuzbari circulated this good news at once in an internal email within Novus saying that he would send Alubaf a draft commitment letter that day along with a checklist.

20. Later on 5 May 2013 Mr Kuzbari sent a draft commitment letter by email to Mr Sandy. In the email he said about this letter:

> "I am attaching a standard draft letter. Please feel free to amend as you see fit and kindly forward a countersigned letter on Alubaf letterhead so that we can officially allocate the June/July aircraft to Alubaf (in partnership with Novus)."

In the same email Mr Kuzbari went on to outline the next steps that needed to be taken. He said that the aircraft could be delivered at any time between late June and late July and that exact timing would only be known two to three weeks before the delivery. With that in mind, Mr Kuzbari set out an initial timetable, of which the first two steps were "[r]eceiving countersigned commitment letter by May 7th" and "[e]xecution of management agreement by May 9th."

21. In an internal email sent to Alubaf's Head of Risk Management, Mr Qader, on 6 May 2013 and copied to Mr Abdullah, Mr Sandy confirmed that following the investment committee meeting he had verbally advised Mr Kuzbari that Alubaf had approved its

equity investment in the MAS transaction "subject to satisfactory review and completion of the necessary documentation".

22. There was some email correspondence between Mr Sandy and Mr Kuzbari about the terms of the draft commitment letter and draft management agreement in which Mr Sandy proposed some minor amendments to those documents. On 9 May 2013 Mr Sandy sent to Mr Kuzbari by email a scanned copy of the executed commitment letter which had been signed by Mr Abdullah on behalf of Alubaf. Mr Abdullah subsequently signed the management agreement on behalf of Alubaf and Mr Sandy sent a scanned copy of this document to Mr Kuzbari by email on 19 May 2013.

23. The commitment letter and management agreement are at the heart of this case and I will return shortly to these documents and the issues about whether they were contractually binding on Alubaf.

Subsequent steps

24. Throughout May 2013, work was done to progress the transaction. The SPCs were incorporated, directors for these companies were nominated and bank accounts for them were set up. On 12 May 2013 Mr Sandy sent to Mr Kuzbari the first batch of documents which were needed from Alubaf to comply with know your client (KYC) obligations of the banks which would be providing the loan for the transaction and of other third parties. The KYC documents sent on 12 May 2013 included a list of authorised signatories of Alubaf; and another copy of the same list was attached to an email sent by Mr Sandy to Mr Kuzbari on 15 May 2013. I will return to this document when I consider an argument now made by Alubaf that Mr Abdullah did not have authority to bind Alubaf by his sole signature of the commitment letter and management agreement.

25. On 19 May 2013 Mr Sandy agreed that the law firm Stephenson Harwood should be appointed to act for Alubaf and Novus jointly. A letter of engagement dated 28 May 2013 was subsequently signed by Novus' in-house counsel and by Mr Abdullah on behalf of Alubaf.

26. On 20 May 2013 Mr Sandy informed Mr Kuzbari that Alubaf was in the process of seeking approval from the Central Bank of Bahrain to set up the SPCs required for the transaction. Mr Sandy also mentioned that, as part of this process, Alubaf was required to provide an opinion from its auditors, Ernst & Young, on whether the assets and liabilities of the SPCs needed to be consolidated into Alubaf's balance sheet, which Mr Sandy thought likely to be the case. Such an opinion was provided by Ernst & Young on 30 May 2013. The opinion confirmed that under International Financial Reporting Standards such consolidation was required. Alubaf enclosed a copy of this opinion with its letter to the Central Bank dated 3 June 2013.

27. By this time Novus had begun sending draft transaction documents to Alubaf. On 24 May 2013 Mr Kuzbari sent Mr Sandy a term sheet summarising the terms on which the proposed bank lenders indicated that they were willing to provide debt finance for the transaction. This was followed the next day by "a very initial set of draft documents" received from the lawyers acting for MAS. On 29 May 2013 Mr Kuzbari sent to Mr Sandy a full list prepared by the lenders' lawyers of the documents for the

transaction. The list comprised 152 documents in total, of which 24 were highlighted in bold as being the most significant.

Alubaf withdraws

28. In early June concerns emerged within Alubaf about having to consolidate the SPCs in Alubaf's financial statements with the consequence that the aircraft would be included as an asset and the bank loan of US$70m as a liability of Alubaf. On 4 June 2013 Mr Sandy sent an email to Ernst & Young in which he said that Alubaf was very uncomfortable in having to consolidate all of the SPCs in accordance with Ernst & Young's opinion. Mr Sandy asked for urgent confirmation that, if Alubaf were to "down sell" its equity in the transaction to 49% of the total equity amount, the need to consolidate the US$70m of external financing would be avoided and whether this would be achieved if LFB (although related to Alubaf) agreed to increase its share of the equity to US$20m (over 50%). Ernst & Young immediately gave this confirmation. However, on 6 June 2013 LFB informed Mr Abdullah that it was not prepared to increase the size of its investment above US$10m.

29. On that day Mr Abdullah and Mr Sandy spoke on the telephone to Mr Kuzbari about Alubaf's situation. From emails sent by Mr Kuzbari following this call, it is apparent that Mr Abdullah and Mr Sandy told him that Alubaf was not willing to consolidate the investment and asked Novus to help in finding a solution. Mr Kuzbari responded that, given the commitment letter and its agreement with Alubaf, Novus had removed the deal from the market and turned down other investors who had expressed interest in the MAS transaction. He said that it should not be a problem finding other investors to replace Alubaf partially or entirely given enough time, but there were only about three weeks left before delivery of the aircraft. Any new investor would need a few weeks to get approvals, and trying to push them to move faster would send the wrong signals and be likely to scare them off.

30. On 10 June 2013 Mr Kuzbari and his father, Mr Safwan Kuzbari, travelled to Bahrain and met the CEO and other members of Alubaf's investment committee. The message they conveyed was that it was too late to reduce Alubaf's share of the equity before the transaction closed, but that Novus was willing to provide some form of comfort letter to confirm that it would help Alubaf to find a third party who would purchase at least US$10m of the equity after closing had taken place.

31. Novus subsequently provided such a letter dated 13 June 2013. In addition, Stephenson Harwood issued a letter of advice dated 12 June 2013 which addressed one of Alubaf's concerns by specifically confirming that Alubaf would not become liable to the lenders for repayment of the loan in the event of a default even if the SPC established as the borrower was consolidated into Alubaf's balance sheet for accounting purposes.

32. On 17 June 2013 the transaction was considered at a meeting of Alubaf's board of directors. Mr Abdullah made a presentation in which he explained the background and sought the consent of the board to "[c]ontinue with the approved investment in view of the consolidation issue" and the mitigating steps proposed. The board, however, resolved to reject the proposal. The next day (18 June 2013) Novus was told that Alubaf's board of directors had declined the deal.

33. Over the next two or three days various discussions took place in which Novus attempted to hold Alubaf to its commitment. Mr Kuzbari was told that Alubaf's board was going to reconsider its decision at the request of its management but, when Mr Kuzbari followed this up with Mr Abdullah by telephone on 24 June 2013, he was told that no further decision had yet been made. On 25 June 2013 English solicitors instructed by Novus wrote to Alubaf requesting an undertaking that Alubaf would abide by the terms of the commitment letter and management agreement, failing which Novus would sue for breach of contract. Solicitors instructed by Alubaf replied on 28 June 2013 stating that there was no binding agreement between Alubaf and Novus and that Alubaf did not intend to proceed with the proposed transaction.

34. In these circumstances the transaction was aborted. MAS purchased the aircraft itself with the assistance of debt finance only and no equity investment. It appears that the aircraft was delivered to MAS in July 2013, though there is no evidence showing the exact date. Novus did subsequently arrange finance (including equity investment provided by another Bahraini bank) for the second aircraft which MAS had ordered from Airbus. That aircraft was delivered in December 2013.

The claim

35. Novus claims in this action that the commitment letter and management agreement constituted binding contracts which were repudiated by Alubaf and that, as a result, Novus lost the opportunity to earn fees which it would have earned under the management agreement if the transaction had gone ahead. The damages claimed in the particulars of claim amount to over US$8m.

36. Alubaf denies on a variety of grounds that any binding contract was made. Its principal contentions are:

    i) The commitment letter was not intended to be legally binding and/or is void for uncertainty;

    ii) Although Mr Abdullah signed the commitment letter and management agreement, he did not have authority to bind Alubaf to provide funding for the transaction; and

    iii) There was in any event no binding contract made because neither of those documents was counter-signed by Novus and returned to Alubaf before Alubaf withdrew from the transaction.

37. Alubaf's secondary case is that the commitment letter and management agreement, even if contractually binding, did not on their terms oblige Alubaf to proceed with the transaction. Alubaf has also raised points regarding the causation and quantum of the losses claimed by Novus.

The commitment letter

38. Because of its central importance in this case, I have quoted the commitment letter in full in an appendix to this judgment. When sent to Novus on 9 May 2013, the letter was printed on Alubaf's headed notepaper. It was addressed to Novus. Its subject was described as the "purchase of one new Airbus A330-300HGW aircraft … to be

delivered in June/July 2013, with onward lease to Malaysia Airlines ("MAS"), hereinafter referred to as the "Transaction"." The letter said that Novus had proposed the "Transaction" to Alubaf and gave further details of the Transaction including the amounts of equity and debt by which the purchase price of the aircraft was to be funded. The "Equity amount" (inclusive of transaction expenses) was specified as US$39,787,500.

39. The three provisions in the commitment letter on which Novus founds its claim state as follows:

> "**Equity:**
>
> Alubaf's commitment to the Transaction (including the funding of 99% of the Equity amount) shall be conditional upon satisfactory review and completion of documentation for the purchase, lease and financing and subject to the Transaction realising a minimum net expected average cash on cash return of around 9.5% per annum.
>
> ...
>
> **Time of the Essence:**
>
> Alubaf and Novus shall ensure or procure timely execution of all Transaction documentation based on the timetable, which shall be communicated by Novus. Alubaf acknowledges that all Transaction documentation relating to the purchase and acquisition of the Aircraft shall be completed at least four weeks prior to the Aircraft expected delivery date (the "Target Completion Date").
>
> **Transaction expenses:**
>
> Alubaf covenants to pay all Transaction costs and related expenses, in line with economics presented by Novus to Alubaf. It is understood that expected transaction costs and related expenses are already form part of the Equity amount referenced above."

40. Other provisions dealt with confidentiality, arrangements for incorporating the purchaser / borrower SPC, and the mechanics for payment of the equity amount at closing. The letter also provided for English governing law and non-exclusive jurisdiction. At the end of the commitment letter, there were places for the letter to be signed on behalf of each party.

The management agreement

41. The management agreement has all the trappings of a formal, professionally drafted contract. After the details of the parties, it begins (beneath the word "whereas") with six recitals which include the following:

> "(E) The Bank has agreed to appoint [Novus] as its exclusive manager to assist in the acquisition of the Aircraft, the lease and finance of the Aircraft, using the Documentation (defined below).
>
> (F) The Bank has agreed to appoint [Novus] as its exclusive manager subsequently to assist after acquisition of the Aircraft, with the management of the Aircraft on the Bank's behalf upon and subject to the terms herein contained."

42. Clause 1 of the agreement is a definition clause which includes the following (amongst many other) definitions:

> "'Aircraft' means one new Airbus A330-300(HGW) aircraft ...
>
> 'Aircraft Transaction' means the acquisition, finance, lease and or sub-lease and ultimate disposal of the Aircraft which was sourced by [Novus] and accepted by the Bank pursuant to the terms of this Agreement.
>
> 'Documentation' means the set of documents previously agreed between [Novus] and MAS, which shall be replicated in form and substance, for the Aircraft, subject to any necessary amendments, if any, to reflect the terms herein contained and the Bank's participation in the aircraft Transaction.
>
> 'Effective Date' means the date on which the Aircraft is purchased and leased to MAS which is expected on or around 30 June 2013 but not later than 31 August 2013;
>
> 'Lease SPC' means an entity incorporated in a tax efficient jurisdiction owned by the Bank or one of its affiliates.
>
> 'Term' means the term of this Agreement which shall commence on the Effective Date and shall continue until the earlier to occur of: (a) disposal of the Aircraft, or (b) termination of this Agreement in accordance with clause 12.2."

43. Clause 2 is headed "Appointment" and includes the following sub-clauses which are particularly relevant:

> "2.1 The Bank hereby appoints with effect from the Effective Date, [Novus], as its exclusive managers to assist … in the acquisition, lease, subject to the Documentation, and the management, of the Aircraft during the Term hereof, all subject to the provisions set out herein.
>
> …

> 2.4 The obligations of the parties under this Agreement shall take effect upon acceptance and execution of this Agreement by both parties hereto.
>
> 2.5 The parties hereto agree that, they will use their best endeavours to have the Documentation finalized executed by the Bank and/or the Lease SPC and placed in escrow, at least one month prior to the Effective Date, subject to release by the parties on or prior to the Effective Date."

44. Clause 3 of the management agreement sets out representations and warranties given by each party to the other. Clause 4 specifies in some detail the services which Novus as the management company was to provide. Clause 8.1 states that Novus will be entitled to the management fee set out in schedule 1. As set out in schedule 1, the management fee had four elements:

    i) A one-off flat fee calculated as 1.25% of the Aircraft Acquisition Cost payable upon closing of the Aircraft Transaction;

    ii) A fee of 0.6% per annum of the annual Appraised Base Value of the Aircraft, payable in advance, on a quarterly basis;

    iii) A one-off fee of 1.5% of the sale price of the Aircraft payable on disposal of the Aircraft; and

    iv) In the event of a re-leasing, 1% of the applicable Average Appraised Base Value of the Aircraft at the time of re-lease.

45. Of the remaining clauses of the agreement, clause 12 provided that the management agreement would terminate forthwith upon disposal of the aircraft (or sooner in the event of certain categories of breach). Clause 14 provided that the agreement could be executed in counterparts, each of which "when duly exchanged or delivered shall be deemed to be an original but, taken together, they shall constitute one instrument". Clause 16 provided for the agreement to be governed by English law and for the parties to submit to the non-exclusive jurisdiction of the English courts. There was also a signing page which provided for the document to be signed "[f]or and on behalf of" each party, with the signatures witnessed.

Intention to create legal relations

46. Alubaf accepts that the management agreement was intended, when executed, to be legally binding. However, Alubaf has argued that the commitment letter was not intended to be a legally binding document or at all events was not intended to bind Alubaf to proceed with the transaction.

47. As the Court of Appeal noted in Barbudev v Eurocom Cable Management Bulgaria EOOD and others [2012] EWCA Civ 548 at para 30, the leading case on the test of whether parties intended to create legal relations is now RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14, [2010] 1 WLR 753. The

judgment of the Supreme Court in that case was given by Lord Clarke, who stated the applicable principles (at para 45) as follows:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

48. Applying this test, I think it plain from the terms of the commitment letter that it was intended to create legally binding relations. Any possible doubt about that conclusion is dispelled by the provision headed "Governing Law", which states:

> "This Commitment Letter Agreement (including the agreement constituted by your acceptance of its terms) and any non-contractual obligations arising out of or in connection with it (including any non-contractual obligations arising out of the negotiation of the Transaction) shall be governed by, and construed in accordance with, English law. The courts of England have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this Commitment Letter Agreement."

49. Faced with the clear implication of the governing law provision, counsel for Alubaf fell back on an argument that some parts of the commitment letter – in particular the provision dealing with confidentiality – were intended to create legally binding obligations but that other parts – and in particular the provisions headed "Equity" and "Time of the Essence" on which Novus specifically relies – were not.

50. It is certainly possible in principle to create a document of which only part is intended to be legally binding. For example, it is common place for contractual documents to include recitals which are not themselves intended to form legal obligations. The first two paragraphs of the commitment letter under the heading "Background" seem to me to fall into this category. Equally, it is apparent that the final sentence of the letter, which looks forward to "timely closing of the Transactions, and to having a long term business relationship with your organization" is not intended to create a binding obligation. Apart from these introductory and concluding passages, however, I do not think it realistic to discriminate among the substantive terms of the commitment letter and to construe only some but not others as intended to be legally binding. If that had been the intention, one would expect to see the distinction between the two qualitatively different types of provision clearly signalled. In fact, the language of obligation is used throughout the body of the letter. Like other provisions, those headed "Equity" and "Time of the Essence" on which Novus particularly relies both use the mandatory word "shall". Moreover, the heading "Time of the Essence" itself signifies that failure to procure timely execution of the transaction documentation in accordance with the provision will constitute a breach of contract. Novus also relies on the provision headed "Transaction Expenses", which begins with the words

"Alubaf covenants to pay all Transaction costs and related expenses". The word "covenants" is quintessentially the language of legal obligation.

51. Alubaf invoked an alleged practice of the aviation finance industry that participants in a proposed transaction are not bound to participate until what might be described as definitive documentation is executed at the closing of the transaction. Such a practice, if it existed, could not control the meaning of the commitment letter. Its relevance would be as forming part of the factual background against which the document should be read: see Crema v Cenkos Securities plc [2010] EWCA Civ 1444, [2011] 1 WLR 2066, para 43; Proton Energy Group SA v PCO Lietuva [2013] EWHC 334 (Comm), para 29. Expectations generated by a usual industry practice of the kind alleged might lead equivocal language reasonably to be understood as a non-binding statement of intent only. In this case, however, there is no ambiguity. It is plain from the terms of the commitment letter that, whether it be usual or not, the parties have not merely made a statement of intention but intended to undertake legal obligations by entering into the commitment letter.

52. In any case, the expert evidence failed to establish the existence of the alleged industry practice. At most the evidence showed that an equity investor would be unlikely to commit itself unconditionally to the provision of funds until the transaction documentation has been finalised. But the commitment letter did not purport to do that. Furthermore, Mr Fitzgerald, the industry expert called by Alubaf, gave evidence that when an entity such as Novus arranges a transaction by finding a third party investor to fund the purchase of an aircraft rather than making the equity investment itself, there is typically some sort of arrangement made to secure the commitment of the investor to the deal. As Mr Fitzgerald explained:

> "If the arranger fails to raise the capital, they rapidly lose their market reputation, so they are highly motivated to find and lock in Equity investors as early as they can."

53. One way of "locking in" an equity investor is to procure the payment of a deposit which is agreed not to be refundable if the investor withdraws. Another method, which Mr Fitzgerald has himself used, is to put the equity investor into a direct contractual relationship with the airline and to have a side agreement with the airline under which the arranger receives its fees. It seems to me entirely consistent with the same commercial logic for the arranger, as an alternative approach, to obtain a contractual undertaking from an equity investor to provide funding if relevant conditions are fulfilled. I think it clear that on an objective analysis this was the intended effect of the commitment letter.

Subjective intention

54. Counsel for Alubaf submitted that, as a limited exception to the objective approach, a party's subjective intention not to be legally bound by a document is relevant if that intention is or ought reasonably to be known to the other party. In support of that submission, Mr Ayres QC cited a passage from the judgment of Andrew Smith J in Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475. In that case the parties signed a term sheet setting out the terms of a financial transaction. The judge found that the defendants, when they signed the term sheet, did not consider that they were entering into a legally binding

commitment but that on an objective assessment the parties evinced an intention to do so. He then said (para 228):

> "However, there are circumstances in which the parties to what would objectively be held to be contractual are not legally bound by it under English law. If the other parties actually and reasonably believed that the Defendants intended to make a contract, there would be a concluded contract, but not if the other parties knew or would reasonably have believed that that was not the Defendants' intention and not, in my judgment, if the other parties had simply formed no view one way or the other as to whether the Defendants so intended. That is the opinion expressed by Professor Sir Gunter Treitel in *Chitty on Contracts* (2008) 30th Edn, vol 1, para 2–004, and I agree with it."[1]

Andrew Smith J found that, on the facts of the case, this exception did not apply, as the claimants had reasonably believed that the defendants intended to be bound by the term sheet when they signed it.

55. There was an unsuccessful appeal by the defendants in which this point was not directly in issue: see Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWCA Civ 1334. Nevertheless, Longmore LJ, with whom the other members of the Court of Appeal agreed, observed (at para 17):

> "I would not myself accept that the [defendants'] subjective intentions have any relevance to the questions whether and when there came to be a binding contract. It is trite law that, although no contract can be made without an intention to be legally bound, that intention has to be ascertained objectively, not by looking into the parties' minds."

56. It is indeed a well established principle of English law that the meaning of contractual and other documents is to be determined by objective analysis of what the words used would reasonably be understood to mean, and that evidence of what a party subjectively intended the document to mean is irrelevant to the exercise. There are, however, authorities which suggest that the question whether a document is intended to be contractually binding may depend, if not on whether this was the subjective intention of either party, then at least on whether one party understood this to be the other party's intention: see e.g. The Hannah Blumenthal [1983] 1 AC 854. The extent of any such qualification to the objective test, and whether it exists at all, is far from clear. Moreover, whether it is theoretically justifiable to apply a different test in deciding whether parties intended to undertake contractual obligations from the test applied in determining the scope of those obligations is open to doubt. One difficulty is that the distinction is not a sharp one. Suppose the question is not whether a party intends to be bound by all the terms of a document, but whether a particular term in

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[1] See now *Chitty on Contracts* (32nd Edn, 2015) vol 1, para 2–004; but compare the apparently inconsistent statement of the law at para 2-170.

the document is intended to create a legal obligation: on which side of the line does this question fall?

57. It is not necessary, however, to explore these difficult issues further in the present case. That is because I am not persuaded that either party's subjective intention or belief about the other party's subjective intention as to the effect of the commitment letter differed from the objective effect of the document. Although Mr Abdullah gave evidence that he considered the commitment letter to be merely a letter of intent which was not legally binding, I cannot accept that this was his understanding when he signed it. I do not suppose that Mr Abdullah intended to commit Alubaf unconditionally to fund the purchase of the aircraft. He would have understood that funding was conditional upon satisfactory review and completion of documentation for the transaction, as the commitment letter said. But that does not mean that he regarded the commitment letter as merely a statement of intention which would not be legally binding. He must, for example, have seen the governing law provision and understood that, by agreeing to the terms of the letter, Alubaf was assuming legal obligations the effect of which could end up being decided by an English court (as has in fact occurred). For reasons given at paragraphs 75-83 below, I also find that when he signed the commitment letter Mr Abdullah believed (correctly) that he had the authority to bind Alubaf.

58. In any case I have no doubt that Mr Kuzbari believed the commitment letter to be a legally binding document, which was why he was so concerned to get it signed as soon as possible and before legal fees and other expenses were incurred in implementing the transaction. Nor did Mr Kuzbari have any reason to believe that the people that he was dealing with at Alubaf (principally Mr Abdullah and Mr Sandy) did not share his understanding of the commitment letter. For reasons given at paragraphs 85-88 below, I also have no doubt that Mr Kuzbari reasonably believed that the copy of the commitment letter signed by Mr Abdullah which he received had been duly executed on behalf of Alubaf.

59. I therefore find that the commitment letter was both objectively intended and, insofar as it is relevant, subjectively understood by the parties to be a legally binding document.

Certainty

60. Even when a document (or relevant part of a document) is intended by the parties to be legally binding, there are circumstances in which it may be regarded as too uncertain to be enforceable by a court. Such a conclusion should, however, be one of last resort. English law aims to uphold and give effect to the intentions of the parties, not to defeat them. As Lord Tomlin observed in Hillas & Co Ltd v Arcos Ltd (1932) 43 Ll L Rep 359, 364, the aim of the court "must always be so to balance matters that, without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains." Accordingly, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words used in a way which gives them a practical meaning: see e.g. Brown v Gould [1972] Ch 53, 56-58; BJ Aviation Ltd v Pool Aviation Ltd [2002] EWCA Civ 163, [2002] 2 P & CR 25, para 23; Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475, para 235;

Barbudev v Eurocom Cable Management Bulgaria EOOD and others [2012] EWCA Civ 548, para 32.

Alubaf's funding obligation

61. Pursuant to the "Equity" clause in the commitment letter, Alubaf's obligation to fund the "Equity amount" was stated to be "conditional upon satisfactory review and completion of documentation for the purchase, lease, and financing". Counsel for Alubaf submitted that those words should be construed disjunctively as specifying two separate conditions: (i) a satisfactory review; and (ii) completion of documentation for the purchase, lease and financing. That is not, in my opinion, a reasonable interpretation. It would not be businesslike to agree that the provision of funding should be conditional upon a satisfactory review in the abstract without specifying the subject-matter of the review. In any case the commitment letter does not refer to "a" satisfactory review but simply to "satisfactory review" (with no indefinite article) "and completion of documentation". Thus, for reasons both of syntax and semantics, I think it clear that the review was intended to be a review of the documentation for the purchase, lease and financing of the aircraft.

62. For Alubaf, Mr Ayres QC further submitted that, even if this is right, there is no conceptual difference between a review of the documentation for the transaction and a review of the transaction embodied in the documentation: in either case, what is envisaged is a review of the suitability of the transaction as a whole. He argued that there are no objective criteria by which to judge whether the transaction or the documentation which defines it is "satisfactory" and that a commitment which is conditional upon a satisfactory review of those matters is too uncertain to be enforced.

63. I agree that whether or not the documentation was "satisfactory" would potentially depend upon the attitudes and aims of the particular investor. Terms of some of the key transaction documents, such as the aircraft leases, which one investor might consider essential or objectionable might be differently perceived by another. There is no general or universal standard by which documentation could be declared "satisfactory" in some absolute sense. The implication of this, however, is not that the language cannot be given a definite or practical meaning. It is that the word "satisfactory" would reasonably be understood to mean "considered satisfactory by Alubaf". There is no conceptual difficulty or uncertainty in applying that test. Whether Alubaf considered the documentation to be satisfactory is a question of fact.

64. At the same time, I do not think that the ability of Alubaf to reject documentation as unsatisfactory should be seen as completely unqualified. It is in the nature of a contractual discretion. It is now well established that, in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally): see Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The "Product Star") (No 2) [1993] 1 Lloyd's Rep 397, 404; Paragon Finance Plc v Nash [2002] 1 WLR 685, paras 39-41; Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd [2008] 1 Lloyd's Rep 558, 575–577; British Telecommunications Plc v Telefónica O2 UK Ltd [2014] UKSC 42, para 37; Braganza v BP Shipping Ltd [2015] 1 WLR 1661.

65. For reasons that I gave in Brogden v Investec Bank Plc [2014] EWHC 2785 (Comm) at paras 95-100, I understand this principle to apply not only when a contract confers a duty or power on one party to take a decision which affects the interests of both parties, but whenever the contract gives responsibility to one party to make an assessment or exercise a judgment on a matter which materially affects the other party's interests and about which there is room for reasonable differences of view. That is the position here, where the commitment letter, as I construe it, makes the funding of the equity amount conditional upon a judgment to be made by Alubaf that it considers the documentation for the transaction to be satisfactory. That judgment is accordingly subject to the implied constraints that it must be exercised in good faith, for proper purposes and not in an arbitrary, capricious or irrational manner.

66. Although as with all questions of interpretation the meaning of the term must depend on the context, there are other cases in which a requirement for a "satisfactory" document has been similarly construed. Thus, in Astra Trust Ltd v Adams and Williams [1969] 1 Lloyd's Rep 81, 87, a requirement for a "satisfactory survey" was held to be a matter for the judgment of the party for whose benefit the survey was sought. Megaw J did not think it appropriate to seek to apply an objective test to the concept of what was satisfactory, but observed:

> "It would probably be right as a matter of law to assume that the plaintiffs' satisfaction has to be confined and limited in this way and in this sense, that it must be a *bona fide* dissatisfaction before they can reject the survey as being unsatisfactory."

A similar approach was adopted in Albion Sugar Co Ltd v William Tankers Ltd and Davies, The John S Darbyshire [1977] 2 Lloyd's Rep 457, 466.

67. The provision headed "Time of the Essence", on which Novus also relies, imposes an obligation on both parties to "ensure or procure timely execution of all Transaction documentation based on the timetable". That requirement cannot reasonably be interpreted as removing or detracting from the right of Alubaf, reflected in the Equity provision, to review the documentation and decide whether it is satisfactory. The two provisions need to be read together. Their combined effect is to require Alubaf, when provided with draft documentation, to review it, identify any respect in which it considers the documentation unsatisfactory and, if considered satisfactory, to execute the documentation – all in a timely manner.

Clause 2.5 of the management agreement

68. In the management agreement, Novus relies on clause 2.5, which I have quoted at paragraph 43 above. Counsel for Alubaf argued that the definition of the term "Documentation" used in this clause (quoted at paragraph 42 above) is hopelessly unclear. I agree that it is unclear, first of all, whether the definition was intended to refer to a set of documents agreed between Novus and MAS for the present aircraft transaction before Alubaf became involved or to documents agreed for the purpose of a previous transaction relating to a different aircraft. Moreover, whichever meaning was intended, there is no evidence that such a set of documents existed and was replicated in form and substance for the transaction. In these circumstances the term "Documentation", as defined, lacks any coherent meaning or content.

69. Even if the definition of the term is ignored and the "Documentation" referred to in clause 2.5 of the management agreement can be understood to denote whatever documentation was in fact prepared to implement the transaction, clause 2.5 cannot reasonably be construed as obliging Alubaf to execute documents in any particular form or with any particular content. Like the "Time of the Essence" provision in the commitment letter, clause 2.5 is concerned solely with timing. However, the timing which it contemplates is different from that provided for in the commitment letter. The commitment letter contains an acknowledgment by Alubaf that all transaction documentation "shall be completed at least four weeks prior to the Aircraft expected delivery date", which is designated as the "Target Completion Date". By contrast, clause 2.5 of the management agreement requires the use of best endeavours to have the "Documentation" finalised, executed and placed in escrow "at least one month prior to the Effective Date". Although it would be theoretically possible for both timing requirements to operate in tandem, I can see no sensible commercial purpose for such a confusing arrangement.

70. Insofar as there is inconsistency between the commitment letter and the management agreement as regards the arrangements prior to the acquisition of the aircraft, reasonable parties would in my view have regarded the commitment letter as taking priority. That was the document which was specifically concerned, and concerned only, with the period leading up to the closing of the transaction, whereas the principal focus of the management agreement was the management of the aircraft following its acquisition.

71. The court will generally try hard to avoid the conclusion that a clause in a contract is meaningless, and will strive to give it a reasonable meaning – if need be by amending or supplying words: see e.g. The Tropwind [1982] 1 Lloyd's Rep 232, 237. The compunction to do this is significantly reduced, however, where, as in this case, the clause is redundant in any event. In my view, a reasonable person would have understood the operative provisions concerning the completion of documentation to be those contained in the commitment letter, and have disregarded clause 2.5 of the management agreement as having no legal effect.

Authority to bind Alubaf

72. The commitment letter and management agreement were each signed on behalf of Alubaf by Mr Abdullah, its Head of Treasury and Investments. Alubaf contends, however, that Mr Abdullah did not have authority to bind the bank to proceed with the transaction. This is said to be because:

    i) The size of the investment was such that it required the approval of Alubaf's board of directors, which was never given; and

    ii) In any case Mr Abdullah did not have authority to bind Alubaf by his sole signature.

73. I do not accept either of these contentions.

Actual authority

74. The parties are agreed that, although the law applicable to the question is the law of Bahrain, the scope of Mr Abdullah's actual authority is to be determined on the basis that there is no material difference between the relevant Bahraini law and English law.

75. According to an internal Alubaf document setting out parameters for investments made by the bank, individual investments above US$10m and below US$30m required the approval of the investment committee, while individual investments above US$30m required the approval of both the investment committee and the board of directors. The amount of equity funding required to finance the acquisition of the aircraft was just under US$40m, and Alubaf has argued that approval from the board of directors was therefore needed for the investment. However, the understanding on which Alubaf's investment committee approved the making of the investment was that Alubaf would "sell down" US$25m of the equity amount; and before Mr Abdullah signed the commitment letter, Alubaf had obtained a similarly worded commitment letter from LFB confirming its commitment to participate in the transaction by funding at least 25% of the equity amount. Mr Abdullah confirmed in evidence that his understanding at the time was that in these circumstances, because the net amount of Alubaf's proposed investment was under the US$30m limit, the approval of the board of directors was not required.

76. I infer that Mr Abdullah's understanding was shared by Alubaf's CEO and the other members of its investment committee. If the committee had thought that the approval of the board of directors was needed in order for Alubaf to make the investment, I am sure that they would not have authorised Mr Abdullah at the meeting on 5 May 2013 to proceed with executing the necessary documentation to fund and close the transaction (as I have found that they did). Instead they would have restricted their decision to approving Alubaf's participation in the transaction, subject to the further approval of the board of directors. Steps would also then have been taken to seek the approval of Alubaf's board. As it was, the matter was not referred to the board until Alubaf's CEO became concerned by the accounting requirement to consolidate the SPCs and hence include the entire cost of the aircraft (including the US$70m of bank debt) in the bank's financial statements.

77. Although the document specifying the parameters for investments does not spell out how the relevant limits apply in a situation where part of the total sum invested by Alubaf is funded by another institution, I should be slow to find that Alubaf's investment committee had a mistaken understanding of its own authority. Furthermore, it seems to me that it made commercial sense for the committee to regard Alubaf's net participation in the transaction as the relevant amount, given that this was the sum of money which Alubaf would have to find from its own funds and which would be exposed to the equity risks identified in the investment application. I therefore decline to hold that the investment committee acted in excess of its authority when it authorised the bank's Treasury and Investment Department to fund and close the transaction without requiring further approval from Alubaf's board.

78. The argument that Mr Abdullah did not have authority to bind Alubaf by his sole signature to the commitment letter and management agreement is based on Alubaf's "authorised signatures list". This document, which is addressed to "All Our Correspondents", contains specimen copies of the signatures of all officials of Alubaf

authorised to sign "engagements, undertakings or instructions" on behalf of the bank. The document also sets out signing powers. It states that two signatures are required for, among other purposes, signing "ordinary correspondence engaging or offering to engage the Bank in any transaction" (para 2(i)) or in order to "make, sign draw, issue drafts, cheques, payment instructions and financial commitments" (para 3). By contrast, only a single signature is required to sign "ordinary correspondence not involving the payment or transfer of money and not engaging, nor offering to engage, the Bank in any transaction" (para 5).

79. Counsel for Alubaf submitted that if – as I have held – the commitment letter was intended to bind Alubaf contractually, albeit subject to conditions, to provide funding for the MAS transaction, then the commitment letter fell into one or both of the two categories mentioned above which required two signatures; and the same would apply to the management agreement. I do not think it reasonable, however, to describe the management agreement as "ordinary correspondence". Nor, given its status as a contract which was intended to be executed by both parties, does the commitment letter seem to me to fall within that description. Therefore, neither para 2(i) nor para 5 of the authorised signatures list is apposite. Para 3 seems to me to be equally inapposite, being concerned with the making of payments and not the execution of contracts.

80. Mr Sinclair submitted that the documents in issue in this case fell within para 6, which states that "[a]ny payments or commitment emanating from our Bank through any medium other than in writing with signatures as above, will have to be suitably authenticated". I think it plain, however, that this paragraph is dealing with electronic and other communications not made in writing, which therefore could not be authenticated by one or more written signatures.

81. Whatever his perception of the commitment letter, Mr Abdullah must have understood the management agreement to be a contract which would, when executed, oblige Alubaf to pay fees to Novus if the aircraft was acquired. I am sure that if Mr Abdullah had believed that the document was one which required the joint signature of another Alubaf official, he would have arranged that. Again, it seems to me that I should be slow to find that Alubaf's own Head of Treasury had a mistaken understanding of his own authority to sign documents on behalf of the bank.

82. Alubaf's authorised signatures list seems to me to be concerned with authority to commit the bank in correspondence and other documents issued in the ordinary course of banking business. I do not see it as being applicable to the execution of contractual documents implementing a transaction for which formal approval had been given within the bank. In circumstances where the investment committee (acting, as I have found it was, within the limits of its authority) had specifically authorised Mr Abdullah as Head of the Treasury and Investment Department "to proceed with executing the necessary documentation to fund and close the [MAS] transaction", I do not accept that Mr Abdullah exceeded his authority in signing the commitment letter and management agreement on behalf of Alubaf without the joint signature of another Alubaf official.

83. I would add that a further point taken by Alubaf that the documents were not stamped with Alubaf's official stamp was entirely without merit, as there was no evidence that

there was any internal requirement (or external legal requirement) for contracts (or any other documents) executed by Alubaf to be stamped.

Apparent authority

84. Whether I am right in my interpretation of Alubaf's internal limits of authority is, however, academic. That is because, whether or not Mr Abdullah had actual authority to bind Alubaf by signing the commitment letter and management agreement, I think it plain that he had apparent authority to do so, which was sufficient in law to bind Alubaf. Under the doctrine of apparent authority, where one party (the principal) represents to a third party that an agent is authorised to act on its behalf, and the third party relies on the representation, then the principal is bound by the agent's act whether or not the agent was actually authorised to do the act. The commonest form of representation creating such apparent authority is the representation made by permitting an agent to act in the management or conduct of the principal's business: see Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, 505 (Diplock LJ).

85. In this case Mr Abdullah had been given the role by Alubaf of Head of Treasury and Investments. Furthermore, Alubaf's participation in the MAS transaction had been approved by the bank's investment committee. A party in the position of Novus aware of those matters, as Novus was, which sought a contractual commitment that Alubaf would proceed with the transaction and was sent a document signed by Mr Abdullah giving such a commitment would reasonably assume, unless specifically informed otherwise, that Mr Abdullah was duly authorised by Alubaf to sign the document (as sole signatory) on behalf of the bank.

86. It is apparent from internal Novus emails dated 7 and 17 April 2013 that Mr Kuzbari was told at the meetings which he attended with Alubaf on those days that the bank's investment committee could approve investments up to US$30m itself, that board approval was needed for greater amounts and that board approval would be obtained by circulating the board without the need for a board meeting. Mr Kuzbari was entitled to believe that these requirements had been satisfied when he was informed on 5 May 2013 that Alubaf had "formally fully approved" the deal. There was no reason for him to believe, and I find that Mr Kuzbari did not believe, at that time or later that any further internal approval was needed.

87. Nor was Mr Kuzbari told or given reason to believe that Mr Abdullah's sole signature was insufficient to bind Alubaf to the commitment letter and management agreement. The authorised signatures list on which Alubaf's argument is based was only sent to Novus on 12 May 2013 (i.e. after the executed commitment letter had already been sent), and only as part of the KYC documentation required to be provided to the lenders and other third parties. No suggestion was made when the authorised signatures list was sent that it had any relevance to the signature of the commitment letter or the management agreement or that it called into question Mr Abdullah's authority to bind Alubaf by his sole signature of those documents. In these circumstances it was entirely reasonable for Mr Kuzbari to believe, as he plainly did throughout, that the commitment letter and all the copies of the management agreement that Novus received, signed as they were by Mr Abdullah alone, had been duly executed by Alubaf.

88. It is clear that Novus relied on the representation that Mr Abdullah had authority to bind Alubaf and that, if Mr Kuzbari had thought at any stage that Mr Abdullah lacked such authority, he would not have accepted the commitment letter and management agreement sent to Novus as satisfying the requirement for Alubaf to execute those documents.

89. Accordingly, irrespective of his actual authority, I conclude that Mr Abdullah had apparent authority to bind Alubaf by his sole signature of the commitment letter and management agreement.

Execution by Novus

90. The third ground on which Alubaf contends that it was not bound by the commitment letter and management agreement is that Novus allegedly failed to sign and return those documents. This contention raises two questions. The first is a question of fact. The second is whether as a matter of law Alubaf could and did become bound by the documents even if Novus did not return signed copies of them.

When were the documents signed?

91. As mentioned earlier, a scanned copy of the commitment letter signed by Mr Abdullah was sent by email to Mr Hani Kuzbari on 9 May 2013. On receipt Mr Kuzbari forwarded the email with its attachment to a number of other people within Novus, including his father, Mr Safwan Kuzbari. Mr Safwan Kuzbari in turn forwarded the email attaching the scanned letter to his personal assistant, Ms Nancy Helou, with the instruction "pp" – which I understand to mean "please print".

92. Mr Hani Kuzbari gave evidence that, as soon as he received the executed commitment letter from Alubaf by email, he arranged for his father to sign two copies of it and then put one of these copies with his papers to pass to Alubaf in due course. Novus did not adduce any evidence from Mr Safwan Kuzbari, however, and there is no other evidence to support this testimony.

93. A scanned copy of the management agreement signed by Mr Abdullah was emailed to Mr Hani Kuzbari on 19 May 2013. As with the commitment letter, Mr Kuzbari forwarded the email with its attachment to a number of other people within Novus, including his father. He copied the email to Ms Nancy Helou with the words "Nancy, please print so that I can countersign".

94. According to Mr Hani Kuzbari, as with the commitment letter, as soon as he received this document, he asked Mr Safwan Kuzbari to sign two copies of it. It was his evidence that his father did so promptly and returned the signed document to him, and that he placed it with documents to be handed to Alubaf at the next opportunity. Again, however, there is no other evidence which supports this claim. Nor does Mr Hani Kuzbari's evidence fit with the instruction to Ms Helou in his email indicating that he intended to sign the document himself.

95. Mr Hani Kuzbari sent an email to Mr Sandy on 19 May 2013 thanking him for forwarding Alubaf's executed copy of the management agreement and stating that he would return a counter-signed copy shortly. However, no email was ever sent to Alubaf which attached a counter-signed copy of the management agreement.

Furthermore, despite the evidence of Mr Hani Kuzbari that his father signed two copies, one to pass to Alubaf and one for Novus to keep, Novus has not disclosed any copy of the management agreement which contains the scanned signature of Mr Abdullah and the actual signature of Mr Safwan Kuzbari.

96. On 23 May 2013 Mr Hani Kuzbari travelled to Bahrain and met Mr Abdullah and Mr Sandy. At this meeting, Mr Sandy handed over to Mr Kuzbari two large lever arch files of KYC documents. Mr Kuzbari gave evidence that to the best of his recollection he passed the signed commitment letter and management agreement to Mr Sandy on this occasion. Mr Abdullah gave evidence that, to the best of his knowledge, the documents were not handed over by Mr Kuzbari on this occasion or at any other time. Mr Sandy in his statement adduced as hearsay evidence denied that a copy of either document signed on behalf of Novus was ever provided to him or to his knowledge to anyone at Alubaf.

97. I had the impression from Mr Kuzbari's testimony that it rested on a conviction that he must have returned counter-signed copies of the commitment letter and management agreement to Alubaf at some point, and that he had identified his trip to Bahrain on 23 May 2013 as the only occasion when this could have happened. I find, however, for the following reasons that Mr Kuzbari did not deliver signed copies of the commitment letter and management agreement to Alubaf on 23 May 2013 (or on any other occasion):

i) There is no reference in any email (or other contemporaneous document) to any intention that Mr Kuzbari would bring counter-signed copies of the documents with him to the meeting in Bahrain on 23 May 2013 nor in any later document to his having done so.

ii) The documents disclosed by Alubaf in these proceedings do not include any copy of the commitment letter or management agreement signed on behalf of Novus.

iii) Mr Kuzbari's evidence on this issue is disputed by Alubaf's witnesses.

iv) There is no evidence, apart from Mr Hani Kuzbari's testimony, that by 23 May 2013 his father had signed either the commitment letter or the management agreement.

v) The fact mentioned earlier that Novus has not disclosed a copy of the management agreement which bears Mr Abdullah's scanned signature and Mr Safwan Kuzbari's actual signature indicates that Mr Safwan Kuzbari never signed the version which Novus received from Alubaf by email on 19 May 2013 and such a document therefore could not have been handed over to Alubaf on 23 May 2013.

98. My conclusion is further supported by an email sent by Mr Hani Kuzbari to Mr Sandy on 29 May 2013 on the subject of the "management agreement (hard copies)". In this email Mr Kuzbari wrote:

> "You have already sent a soft copy of the management agreement, however I have not received hard copies so that I

> can countersign and return a copy for your records. Kindly courier two sets to our Dubai or Geneva office, and I will return one executed set."

The impression given by this email is that Mr Kuzbari had not yet returned to Alubaf a counter-signed copy of the management agreement and was waiting to receive hard copies of the agreement (bearing Mr Abdullah's original signature) before doing so.

99. It appears that Mr Sandy did send hard copies of the management agreement to Novus by courier because Novus has disclosed a copy which bears the actual signatures of both Mr Abdullah and Mr Safwan Kuzbari. I infer that Mr Hani Kuzbari received the hard copies some time before 10 June 2013, as he mentioned in an internal email sent to others at Novus on that date that he had in his possession "two original management agreements".

100. During the trial Novus made further searches and disclosed (although only after Mr Hani Kuzbari had given evidence) the following documents:

i) A screen shot of the document properties showing that a scanned copy of the management agreement signed by Mr Safwan Kuzbari as well as Mr Abdullah was created on 12 June 2013;

ii) A screen shot of the document properties showing that a scanned copy of the commitment letter signed by Mr Safwan Kuzbari as well as Mr Abdullah was created on 20 June 2013;

iii) An email from Mr Hani Kuzbari to Ms Nancy Helou sent at 10:42 on 20 June 2014 attaching a scanned copy of the commitment letter signed by Mr Abdullah only;

iv) An email from Ms Helou to Mr Hani Kuzbari sent at 11.14 on 20 June 13 attaching a scanned copy of the commitment letter signed by Mr Safwan Kuzbari as well as by Mr Abdullah; and

v) An email from Ms Helou to Mr Hani Kuzbari sent at 11:15 on 20 June 2013 attaching a scanned copy of the management agreement signed by Mr Safwan Kuzbari as well as by Mr Abdullah.

101. From these documents and the other evidence to which I have referred, I draw the following conclusions:

i) The scanned copy of the management agreement signed by Mr Abdullah and sent to Novus by email on 19 May 2013 was never counter-signed on behalf of Novus.

ii) At some time between 29 May and 10 June 2013 Novus received two hard copies of the management agreement signed by Mr Abdullah which were then counter-signed by Mr Safwan Kuzbari, probably on 12 June 2013. On that date a scanned copy of the agreement bearing both signatures was made, probably by Ms Helou, but nothing was done with the scanned document until 20 June 2013, when she sent it by email to Mr Hani Kuzbari.

iii) The commitment letter was not signed on behalf of Novus until 20 June 2013, when Mr Hani Kuzbari re-sent to Ms Helou the scanned copy which had been received by email from Alubaf on 9 May 2013. This document was printed and counter-signed by Mr Safwan Kuzbari. The counter-signed document was then scanned and sent back to Mr Hani Kuzbari by Ms Helou on the same day.

iv) Mr Hani Kuzbari first received copies of the commitment letter and management agreement signed by his father by email from Ms Helou on 20 June 2013. However, the counter-signed documents were not sent to Alubaf – which had by this time informed Novus of its decision not to proceed with the transaction.

v) Copies of the commitment letter and management agreement signed on behalf of Novus were not provided to Alubaf until disclosure took place in these proceedings in March 2015.

Was signature on behalf of Novus necessary?

102. Counsel for Novus submitted that there was no need for Novus to sign the commitment letter because a contract was concluded when, after agreeing the form of the commitment letter, Alubaf signed and sent the letter to Novus on 9 May 2013. I do not accept that submission as both the draft form of commitment letter provided by Novus on 5 May and the version signed by Mr Abdullah and sent to Novus on 9 May 2013 provided for a signature on behalf of Novus to indicate that the terms were "accepted" on its behalf. There is also reference in the governing law provision to "the agreement constituted by [Novus'] acceptance of" the terms of the commitment letter. The intention manifested was therefore that, after the commitment letter had been signed on behalf of Alubaf, Novus should signal its acceptance before the letter became contractually binding.

103. There was no term of the commitment letter, however, which stipulated that the only way in which Novus could signal its acceptance was by counter-signing the letter. It is well established that, in the absence of such a stipulation (and, even then, if the requirement for a signature is waived) acceptance of an offer can be communicated by conduct which as a matter of objective analysis shows an intention to accept the offer: Brogden v Metropolitan Railway Co (1877) 2 App Cas 666; Reveille Independent LLC v Anotech International (UK) Ltd [2016] EWCA Civ 443, para 40.

104. In this case Mr Hani Kuzbari had made it clear in correspondence – and, in particular, in emails sent on 5 and 8 May 2013 – that receipt of the commitment letter executed by Alubaf was an essential step in the transaction timetable. Upon receipt of the executed letter, Novus proceeded with the next steps required to progress the transaction, including instructing a law firm to prepare documentation and establishing special purpose companies. No suggestion was made by Novus that it was not satisfied with the commitment letter executed by Alubaf or did not consent to its terms. Equally, nothing was said on the part of Alubaf to suggest that it was waiting for Novus to return a counter-signed copy of the commitment letter or did not regard the terms of the commitment letter as binding until that was done. In the circumstances, the clear implication from the conduct of the parties in proceeding with the transaction without further reference to the commitment letter was that the commitment letter was understood to be agreed and in place.

105. Had there otherwise been any doubt about the matter, Novus' acceptance of the commitment letter was in any case communicated unequivocally to Alubaf when Mr Hani Kuzbari stated an email sent to Mr Abdullah and Mr Sandy on 6 June 2013 (mentioned at paragraph 29 above) that Novus had "removed the aircraft from the market for the benefit of Alubaf several weeks ago given the commitment letter and the agreement we had."

106. The position is different in the case of the management agreement. The natural meaning of clause 2.4 (quoted at paragraph 43 above) is that the obligations of the parties under the agreement are to take effect when the agreement has been executed by both parties, and not until then. In the case of the management agreement, therefore, signature was the prescribed mode of acceptance. Furthermore, in accordance with the general rule that acceptance of an offer is not effective until communicated to the offeror, and also with clause 14 of the management agreement itself, I think it clear that each party had to receive a copy of the agreement signed by the other party in order for the stipulation to be satisfied.

107. As a matter of law, even when a signature is required in order for a document to become binding, it is possible to waive the requirement by clear words or conduct. If the requirement is intended solely for the benefit of one party, it may be waived by that party. But if the requirement for a signature is for the benefit of both parties to a contractual document, it must be clear that both parties have waived it: see Reveille Independent LLC v Anotech International (UK) Ltd [2016] EWCA Civ 443, para 41.

108. It cannot be said that the requirement for the management agreement to be executed by both parties was intended for the benefit of one party only. It was clearly intended for the benefit of both parties – its evident purpose being that each party should know with certainty at what point the obligations created by the agreement had taken effect.

109. Mr Sinclair argued that if – as I have held – Novus was required by the terms of the management agreement to sign it before the agreement took effect, that requirement was nevertheless waived by the conduct of the parties in proceeding with the transaction. I do not accept, however, that such an inference can be drawn. It is one thing to infer acceptance of an offer from conduct in the absence of any stipulation that the document will only become binding upon signature, but it is another and harder thing to infer from conduct that such a stipulation has been waived. Furthermore:

    i) The steps required to progress the transaction in terms of incorporating companies, preparing documentation and so forth were provided for in the commitment letter.

    ii) There is no evidence that, after receiving the signed commitment letter, Novus continued to press Alubaf to execute the management agreement or suggested that receipt of that document was necessary in order for the transaction to proceed.

    iii) The only obligations set out in the management agreement which were intended to take effect before the "Effective Date" (when the aircraft was acquired) were the obligations of the parties under clause 2.5 to "use their best endeavours to have the Documentation finalized executed … and placed in

escrow, at least one month prior to the Effective Date". I have concluded that this term was without legal effect. But even if I am wrong about that, there was no conduct or communication between the parties which indicated that they were in fact expecting or endeavouring to ensure that the documentation required to implement the transaction would be executed and placed in escrow at least one month prior to the Effective Date, nor that they regarded themselves as under such an obligation. As noted earlier, the timing for the execution of the transaction documentation was already provided for – in inconsistent terms – by the commitment letter.

iv) When the management agreement signed by Alubaf was sent to Novus on 19 May 2013, it was described as "partially executed" and Mr Sandy expressly requested a counter-signed copy.

v) Mr Kuzbari's email of 29 May 2013 to Mr Sandy, mentioned earlier, continued to discuss the execution of the management agreement with the implication that signature by both parties was still regarded as necessary.

110. The conclusion which I draw from the communications between the parties is not that they were treating the management agreement as binding before it had been signed by both parties. Rather, it is that execution of the management agreement was not regarded as essential in order for the parties to proceed towards closing the transaction. It was sufficient, and I infer was seen as sufficient, that the management agreement should be in place by the time the aircraft was purchased, with the position up to that time being covered by the commitment letter.

111. Accordingly, as a copy of the management agreement signed on behalf of Novus was not delivered to Alubaf at any relevant time, I find that Alubaf never became contractually bound by that agreement.

112. I would add that I have no doubt that a copy of the management agreement duly signed on behalf of Novus would have been returned to Alubaf at some stage if the transaction had proceeded and the aircraft had been acquired.

Alubaf's repudiatory breach of contract

113. I have held that the commitment letter bound Alubaf contractually to provide equity funding for the purchase of the aircraft in the agreed amount provided that (i) Alubaf acting in good faith considered the documentation prepared for the transaction to be satisfactory and (ii) the projected return from the investment was not less than 9.5% per annum.

114. When Alubaf's board of directors decided on 17 June 2013 that the bank would not proceed with the transaction, the board's decision was not based on any dissatisfaction with the transaction documentation which had by then been provided. Nor has Alubaf subsequently suggested that any of that documentation was unsatisfactory, let alone that Alubaf could in good faith have declined to proceed with the transaction on that basis. The other matter on which Alubaf's commitment was conditional was the transaction realising a minimum net expected return of around 9.5% per annum. There was also no suggestion that this condition might not be satisfied. The sole reason for the decision was that Alubaf's board took the view that

proceeding with the transaction was not in Alubaf's commercial interests, principally because of the need to consolidate the SPCs in the bank's financial statements. That was not a ground on which Alubaf had reserved the right to decline to fund its share of the equity amount.

115. Accordingly, by informing Novus that it had decided not to make the investment, Alubaf renounced its obligations under the commitment letter and committed a clear anticipatory repudiatory breach of contract. Although Novus attempted to persuade Alubaf's decision-makers to reconsider their position, they remained intransigent. In those circumstances, Novus had no choice other than to accept Alubaf's repudiatory breach as putting an end to the contract between the parties. That acceptance was formally communicated in a solicitors' letter dated 30 July 2013, although it must have been clear well before then that the contract was at an end since it could not be performed without the cooperation of Alubaf.

Mitigation of loss

116. Alubaf has asserted that Novus did not take reasonable steps to mitigate its loss by looking for another equity investor to replace Alubaf as soon as Alubaf indicated that it was not going to proceed with the transaction. There is no evidence to support this assertion. In particular, Alubaf (on whom the burden lies on this issue) has adduced no evidence that there was another potential investor who would have been ready and willing to step into its place at such short notice.

117. When Alubaf asked for help from Novus in selling part of its equity stake so as to reduce its net investment below US$20m, Novus identified two institutions who expressed interest in investing after the transaction had closed, one of which provided Mr Kuzbari with a letter dated 18 June 2013 confirming its interest. Novus took the view, however, and advised Alubaf, that there was no practical possibility of selling all or part of Alubaf's equity stake or replacing Alubaf with another investor before the transaction closed. There is no reason to doubt the accuracy of that assessment or to suppose that Novus would not have made every effort to bring in another investor before closing, if that had been a realistic option. Not only did Novus have immense experience of arranging aviation finance but it also had a strong reputational as well as financial interest in completing the MAS transaction, if it possibly could. There is no basis for suggesting that Novus failed to act reasonably in this regard.

The opportunity lost by Novus

118. As a result of Alubaf's repudiatory breach of contract, Novus lost the opportunity to earn the fees which it would have earned under the management agreement if the purchase and lease of the aircraft had been completed. It is common ground between the parties that the correct approach in law is to assess this loss by applying the principles which govern the loss of a chance.

119. The rival positions as to what would have happened if Alubaf had proceeded with the transaction are diametrically opposed. The position of Novus is that the chance that the purchase and lease of the aircraft would have been completed is 100%. This was supported by Mr Kuzbari's evidence that all transactions which Novus has undertaken where commitments were made or given have successfully completed, save only for the transaction which is the subject of the present claim. The position of Alubaf is

that there is no real or substantial chance that the transaction would have been completed. However, none of the factors relied on by Alubaf provides a credible basis for its position.

120. The main factor identified by Alubaf is an issue which arose (after Alubaf had made its decision not to proceed) regarding the terms of the debt finance. On 23 May 2013 the three prospective lenders had signed a term sheet containing summary terms and conditions for the loan required to finance the purchase of the aircraft. The term sheet was expressly stated to be an indicative letter of intent only, which was not legally binding. The terms did not provide for the lenders to have any recourse against the equity investor in the event of a default in repayment of the loan. When the draft loan agreement was prepared, however, the lawyers acting for the lenders requested a guarantee from Alubaf or Novus of the obligations of the borrower SPC. In an internal email sent on 18 June 2013, one of the Novus personnel to whom this request was reported described it as a "deal breaker". Mr Hani Kuzbari responded by email to that comment saying that he was sure that the lenders would drop the issue but that the matter needed to be approached very carefully. The issue was not taken further, as very shortly afterwards the deal was aborted because of Alubaf's withdrawal from the transaction.

121. Mr Kuzbari said in evidence that the request made by the lenders for recourse against the equity investor was an attempt to improve their position of a kind which is normal in such negotiations and that, if the issue had been discussed further, the lenders would have backed down. He pointed out that the structure used by Novus was well established and well known to the lenders and that it was a basic feature of the arrangements, reflected in the term sheet, that the debt finance would be on a non-recourse basis. Mr Kuzbari also said that it was unheard of for lenders to resile from the terms contained in the term sheet and that the same lenders who had signed the term sheet later provided the debt finance for the second MAS aircraft, which they did on a non-recourse basis. In the light of Mr Kuzbari's uncontradicted evidence, I accept that the likelihood that this issue would in fact have proved to be a deal breaker is extremely low.

122. Another risk suggested by Alubaf is that MAS might have decided to purchase the aircraft itself without equity investment, even if Alubaf had not pulled out of the transaction. There is nothing to suggest, however, that there was any prospect of this happening, and it was in my view rightly characterised by Novus as pure speculation. Other possible causes of failure suggested by Alubaf's expert, such as total loss or major damage to the aircraft before delivery or a sudden major adverse change in the financial condition of MAS, are not merely fanciful but are matters which should in principle be disregarded, as they are known not to have occurred: see Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The "Golden Victory") [2007] 2 AC 353.

123. On the evidence I think it overwhelmingly likely that, if Alubaf had honoured the contractual undertakings given in the commitment letter, the purchase and lease of the aircraft would have been completed. The transaction was, however, a complex one and, when Alubaf pulled out, a lot of work remained to be done in a period of around three weeks before the aircraft was due to be delivered. In particular, drafts of many of the transaction documents had yet to be produced and all the key documents had still to be finalised. Although I accept that much of the documentation was of a largely standard kind, I cannot discount as unreal or insubstantial the possibility that

an issue would have arisen, such as the issue of recourse against the equity investor raised by the lenders, which might have led Alubaf in good faith to have rejected some aspect of the documentation as unsatisfactory and which might for that reason (or for some other reason) have prevented the deal from completing. Based on what can only be a matter of impression rather than any mathematical calculation, I assess the chance of such an occurrence at 15%.

Quantification of damages

124. There are four heads of loss claimed by Novus, the first three of which relate to elements of the management fee provided for in schedule 1 to the management agreement (which I have set out at paragraph 44 above).

125. The first head of loss is the one-off fee which would have become payable upon closing of the transaction, calculated as 1.25% of the "Aircraft Acquisition Cost". The "Aircraft Acquisition Cost" was defined in the management agreement to mean "approximately" US$107m. The reason why this sum was approximate was that the precise purchase price payable to Airbus would only have been known shortly before completion. US$107m was the maximum figure, and to reflect the possibility that the actual amount might have been less, I will assume an acquisition cost of US$105m. On this basis the fee payable to Novus would have been US$1,312,500. Allowing for the 15% chance that the transaction would not have been completed, the sum recoverable under this head is US$1,115,625.

126. The next head of loss is the management fee of 0.6% per annum of the annual "Appraised Base Value" of the aircraft payable during the term of the management agreement. The agreement defined "Appraised Value" to mean "the value of the Aircraft, calculated as the average of three base value valuations undertaken by three Approved Appraisers". The term "Approved Appraiser" was in turn defined to mean "an aircraft appraiser of international repute, who has been approved in writing by the Bank, Novus and Lease SPC".

127. The calculation of loss put forward by Novus is based on the valuations of the aircraft obtained by Novus in March 2013 which were used in preparing the financial model provided to Alubaf showing the expected return from its equity investment. The valuations were obtained from three independent appraisers (Avitas, ASG and Ascend) and comprised estimates of the future base value of an aircraft of the relevant type for each of the years 2013 to 2025. Taking 0.6% of the average of the valuations for each of the 12 years for which the aircraft was to be leased by MAS, Novus has claimed lost fees totalling US$5,831,880.

128. Alubaf argued that the valuation evidence relied on by Novus is inadequate because it is out of date; that the calculation put forward by Novus fails to allow for the possibility that the lease would not have run its full course; that a deduction should in principle be made for costs which Novus would have incurred in managing the aircraft; and that Novus' calculation ignores the time value of money. Counsel for Alubaf submitted that the court simply has insufficient information on which to assess damages under this head.

Estimating the value of the aircraft

129. On behalf of Novus, Mr Sinclair sought to justify the use of estimates of value made in 2013 on the basis that damages are generally to be assessed as at the date of the defendant's breach of contract. That is indeed often said to be the general rule. The reason, however, why the date of breach is in many cases an appropriate date to take for the purpose of valuing the claimant's loss is that the mitigation principle requires damages to be assessed on the assumption that the claimant acted reasonably to mitigate its loss on becoming aware of the defendant's breach of contract.[2] In particular, where there is an available market, it is assumed that the claimant will mitigate its loss by going into the market to obtain a substitute performance. Thus, where, for example, a seller fails to deliver goods in breach of a contract of sale, the buyer's damages are generally calculated by reference to the price at which the buyer could have purchased replacement goods as soon as it learnt of the seller's default.

130. In this case I have rejected the argument that Novus failed to take reasonable steps to mitigate its loss, and it is not suggested that there was an available market for its management services which could be used to measure damages. In my view, the correct approach is to assess damages on the basis of the best information – including information about the value of the aircraft – available at the present time: see Radford v de Froberville [1977] 1 WLR 1262, 1286 (Oliver J); Kramer, "The Law of Contract Damages" (2014) ch 17.

131. At the start of the trial, Alubaf applied for permission to rely on a supplemental report from its expert, Mr Fitzgerald, which had been served two weeks earlier. This report included up to date valuations for an aircraft of the relevant type obtained from one independent appraiser, Ascend. Novus objected to this and other parts of the report being admitted in evidence on the ground that it was too late. I refused permission to admit Mr Fitzgerald's supplemental report insofar as the application was contested, with the exception of the valuations on which he sought to rely.

132. After the completion of the evidence and before the start of closing submissions, the solicitors for Novus sent a letter to Alubaf's solicitors which enclosed up to date valuations from all three appraisers previously used (Avitas, ASG and Ascend). All these valuations were significantly lower than those given in 2013, but those obtained from Avitas and ASG were somewhat higher than those from Ascend which Alubaf had put in evidence. Alubaf objected to the introduction of this further material. No doubt recognising the difficulty which an application to adduce further evidence made at that stage of the trial would face, counsel for Novus did not formally apply for the new material to be admitted in evidence and maintained the position that damages should be assessed on the basis of the valuations made in 2013.

133. Estimating the value of an aircraft, and especially its future value, is inherently uncertain. As discussed, I consider that the proper approach is to use the best information available at the time when the assessment is made. In principle, it would be preferable to have current estimates of value from three appraisers rather than just one, particularly as the management agreement required the "Appraised Value" of the

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[2] See the valuable discussion in A Dyson and A Kramer "There is No 'Breach Date Rule': Mitigation, Difference in Value and Date of Assessment" (2014) 130 LQR 259.

aircraft to be calculated as the average of three valuations. However, it would be procedurally unfair as well as inconsistent with the need for litigation to be conducted efficiently and in an orderly way to allow Novus to rely on estimates of value which were not put in evidence and which Alubaf's expert was never given an opportunity to consider. In the circumstances I think it right that I should base the assessment of damages on the figures in Mr Fitzgerald's supplemental report which he derived from the valuations given by Ascend. There was no challenge made to that evidence when Mr Fitzgerald was cross-examined.

Expected term of the management agreement

134. In an email sent to Mr Sandy on 12 April 2013, in answer to a question about Novus' experience with MAS, Mr Kuzbari said:

> "Our relationship with MAS goes back about 20 years. We have leased various aircraft to them over the years and never, ever, had any delayed payments or default. They have honoured all their obligations on time, without any exception."

135. Since 2013, MAS has been experiencing financial difficulties and is currently in administration. According to Mr Fitzgerald, the airline is currently in the process of seeking to renegotiate its aircraft leases to reduce the rental payments to what it considers to be current market rates. It was, however, Mr Kuzbari's evidence that all rental payments due from MAS under leases of A330-300 aircraft managed by Novus have continued to be paid in full and on time. If the transaction which is the subject of this case had been successfully completed, I think it overwhelmingly likely that the management agreement would still be in effect and that Novus would be continuing to receive annual management fees. It cannot be assumed, however, that the lease would run its full 12 year term. It is possible that there would at some point be a re-leasing of the aircraft – in which case Novus would be entitled to an additional one-off fee as well as continuing to receive the annual management fee until the disposal of the aircraft.

136. There must also be a real possibility that the aircraft would be sold sooner than 2025 – in which event the management agreement would terminate and payment of annual management fees would cease. It seems reasonable to suppose – as Alubaf's internal investment application indicated, although there was no direct evidence on this point – that Alubaf as the beneficial owner of 99% of the equity would have the power to cause the SPC referred to in the management agreement as the "Lease SPC" to dispose of the aircraft at any time, thus triggering an obligation to pay the disposal fee to Novus but bringing to an end the liability to pay the annual management fee.

137. I am sure that anyone who purchased from Novus the right to receive future income under the management agreement would expect a significant discount to reflect this possibility. Again, there is no scientific way of estimating the probable duration of the management agreement. To give what I consider to be a fair weight to the chance that the aircraft would have been sold before the lease ended, I will assume a disposal date for the aircraft of 2022. This means that in estimating the future management fees lost by Novus the last three years of the lease should be left out of account.

Other elements of loss

138. The third head of loss claimed by Novus is the one-off fee payable on disposal of the aircraft of 1.5% of the sale price. On the assumption I have made that the aircraft would have been sold in 2022, the expected sale price based on the estimates of value obtained from Ascend is US$49m. This would result in a fee payable to Novus at that time of US$735,000.

139. I accept the evidence of Mr Kuzbari that no deduction is necessary for costs that would have been incurred by Novus, as the staff and other costs involved in performing the management services are fixed costs that Novus would have incurred in any event. In quantifying the second and third heads of loss, however, a 15% discount again needs to be made to reflect the chance that the transaction would not have been completed. Alubaf has also rightly pointed out that, insofar as the losses claimed under these heads lie in the future, the figures need to be discounted to net present values. I invite the parties to seek to agree an appropriate discount rate as well as the rate of interest applicable to past losses.

140. The final head of loss consists of legal expenses of £47,622 paid to Stephenson Harwood and expenses of US$56,736 incurred in incorporating the SPCs to be used for the transaction. These sums fall within the covenant given by Alubaf in the commitment letter to pay all costs of the transaction and related expenses. Although a query was raised by Alubaf in closing submissions about whether the bill from Stephenson Harwood included some work not related to the transaction, this point was not raised with Mr Kuzbari or otherwise investigated in the evidence, and I consider that Novus is entitled to recover the sums claimed.

Conclusions

141. I can summarise my main conclusions as follows:

i) The commitment letter was a legally binding document, which was duly executed by Mr Abdullah on behalf of Alubaf. Although Novus never returned a counter-signed copy, it communicated its acceptance of the letter by its conduct. The effect of the commitment letter was to bind Alubaf to provide equity funding for the purchase of the aircraft in the agreed amount unless Alubaf decided in good faith that the documentation prepared for the transaction was not satisfactory or the projected return from the investment fell below 9.5% per annum.

ii) The management agreement did not become binding because Novus did not return a counter-signed copy of it to Alubaf (although Novus would have done so if the transaction had proceeded). In any case the management agreement had no legal effect in relation to the period before the aircraft was delivered.

iii) The decision of Alubaf's board of directors not to proceed with the transaction, when communicated to Novus on 18 June 2013, amounted to an anticipatory repudiatory breach of the contract contained in the commitment letter which Novus accepted as putting an end to the contract.

iv) As a result of Alubaf's repudiatory breach of contract, Novus lost the opportunity to earn fees which would have been payable under the management agreement if the transaction had been completed. The value of this loss should be calculated on the basis that there was an 85% chance that the transaction would have been completed, that the best evidence of the past and future value of the aircraft is provided by the estimates from Ascend included in the supplemental report of Alubaf's expert, and that an appropriate date to assume as the date for the disposal of the aircraft is 2022.

142. I invite the parties to calculate and agree the amount for which, in the light of these findings, judgment must be entered in favour of Novus.

APPENDIX

6 May, 2013

Novus Aviation Ltd.
c/o 29, Route de Pré-Bois
WTC II – P.O. Box 568
1215 Geneva – Switzerland

Dear Sirs,

Subject: Purchase of one new Airbus A330-300HGW aircraft, MSN (to be advised) to be delivered in June/July 2013, with onward lease to Malaysia Airlines ("MAS"), hereinafter referred to as the "Transaction".

Novus Aviation Ltd have proposed to us the abovementioned Transaction:

Background:
MAS have entered into a purchase agreement for the purchase of the Aircraft from the manufacturer.

MAS wishes to assign their purchase agreement to Novus Aviation Ltd. and Novus Aviation Ltd. wishes to invite Alubaf Arab International Bank BSC (c) ("**Alubaf**") to participate in the Transaction.

A special purpose company (the "**Purchaser/Borrower SPC**") shall be established for the Transaction. Transaction related costs shall be funded with a combination of equity and debt.

Purchase Price of the Aircraft:
US$107,000,000 (the "**MAS Purchase Price**") plus transaction costs and related expenses. The Purchase Price of the Aircraft shall be funded with (i) Equity and (ii) Loan as follows:

- **Equity amount**: (inclusive of transaction expenses): US$ 39,787,500
- **Loan amount**: US$ 70,000,000
- **Total**: US$ 109,787,500

Purchase and Operating Lease:
Upon delivery of the Aircraft from the Manufacturer, the Purchaser/Borrower SPC will concomitantly lease the Aircraft to MAS for a 12 years firm lease term (the "**Operating Lease**").

Purchaser/Borrower SPC:
Purchaser/Borrower will be an SPC, owned as to 99% by Alubaf and as to 1% by a Novus Group company ("**Novus**").

Equity:
Alubaf's commitment to the Transaction (including the funding of 99% of the Equity amount) shall be conditional upon satisfactory review and completion of documentation for the purchase, lease and financing and subject to the Transaction realising a minimum net expected average cash on cash return of around 9.5% per annum.

Alubaf shall fund its contribution of 99% of the Equity amount in cash and Novus shall fund its contribution of 1% of the Equity amount either in cash or by deducting the 1% from its sourcing fees.

KYC:
Alubaf shall timely provide Novus with full and complete KYC (Know Your Customer) information, as necessary, for the financial institutions who will be providing the Loan for the Transaction.

Time of the Essence:
Alubaf and Novus shall ensure or procure timely execution of all Transaction documentation based on the timetable, which shall be communicated by Novus. Alubaf acknowledges that all Transaction documentation relating to the purchase and acquisition of the Aircraft shall be completed at least four weeks prior to the Aircraft expected delivery date (the "**Target Completion Date**").

Confidentiality:
Alubaf and Novus shall keep the terms of the Transaction confidential and shall not disclose the terms or conditions of any of the Transaction documentation to any other person except if required by law or by any applicable governmental or other regulatory authority; and to its employees or professional advisers for the purposes of the Transaction, who have been made aware of and agree to be bound by the obligations under this paragraph or are in any event subject to confidentiality obligations as a matter of law or professional practice.

Incorporation of Purchaser/Borrower SPC:
Novus and Alubaf will incorporate the Purchaser/Borrower SPC within 7 days of signature by the parties of this Commitment Letter. The Purchaser/Borrower SPC will be managed by two Directors from Alubaf and one Director from Novus. A minimum of two signatures shall be required on all documents and to pass all corporate resolutions.

Transaction expenses:
Alubaf covenants to pay all Transaction costs and related expenses, in line with economics presented by Novus to Alubaf. It is understood that expected transaction costs and related expenses are already form part of the Equity amount referenced above.

Bank Accounts:
As soon as practical after execution of this Commitment Letter, the parties will open an operating bank account in the name of the Purchaser/Borrower SPC, with joint signature authority of Alubaf and Novus. Approximately two weeks before closing, as advised by Novus, the account will be credited with Alubaf Equity participation amount, so that funds are timely positioned to financial closing, to ensure efficiency and closing process to be conducted in an orderly manner.

Press releases:
Press releases and PR related activities relating to the Transaction shall be coordinated through Novus, who will endeavor to maximize desired exposure of each party.

Governing Law:
This commitment Letter Agreement (including the agreement constituted by your acceptance of its terms) and any non-contractual obligations arising out of or in connection with it

(including any non-contractual obligations arising out of the negotiation of the Transaction) shall be governed by, and construed in accordance with, English law. The courts of England have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this Commitment Letter Agreement.

We look forward to timely closing of the Transactions, and to having a long term business relationship with your organization.

Signed on behalf of
ALUBAF ARAB INTERNATIONAL BANK BSC (c)

Signature: _____
Name: _____
Title: _____

Accepted on behalf of
NOVUS AVIATION LTD.
Signature: _____
Name: _____