Neutral Citation Number: [2018] EWHC 3315 (Comm)

Case No: CL-2016-000039

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEENS BENCH DIVISION
COMMERCIAL COURT

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

Date: 30/11/2018

Before :

MR JUSTICE PHILLIPS

- -

Between :

AIRCRAFT PURCHASE FLEET LIMITED

Claimant

- and -

COMPAGNIA AEREA ITALIANA SPA

Defendant

- -
- -

Paul Stanley QC and Phillipa Hopkins QC (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Gavin Kealey QC, Andrew Wales QC, Anna Gotts and Harry Wright (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 8, 9, 14-17, 20-22 November 2017, 11, 12, 17-18 January 2018

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Approved Judgment

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MR JUSTICE PHILLIPS

Mr Justice Phillips :

1. The claimant ("APFL") claims US$260 million in damages from the defendant ("CAI") in respect of CAI's alleged renunciation of a "Framework Agreement" pursuant to which CAI was obliged to lease new Airbus 320 aircraft from APFL (or from one of its subsidiaries). CAI's obligation in relation to each aircraft was to enter a lease simultaneously with the delivery of the new aircraft by Airbus SAS ("Airbus") pursuant to an A320 Family Purchase Agreement ("the APA") between Airbus as the Seller and APFL as the Buyer. APFL had replaced the original Buyer under the APA pursuant to a novation agreement entered shortly after APFL had executed the Framework Agreement with CAI.

2. APFL contends that CAI renounced its obligations on 15 March 2012 by insisting that it would lease only A319 aircraft (a shorter version of A320, but part of the A320 "family"), a stance which was continuing when APFL purported to accept the renunciation on 2 April 2013.

3. In the meantime, however, and apparently unknown to CAI, on 5 April 2012 Airbus had served notice of termination of its obligation to sell aircraft to APFL in the years 2013 and 2014 due to APFL's unremedied breaches of the APA. Further, on 19 September 2012 Airbus and AFPL agreed an amendment to the APA, confirming the cancellation of 2013 and 2014 deliveries as from 5 April 2012 and further cancelling deliveries scheduled for 2015 and 2016.

4. APFL accepts that, by agreeing that cancellation, APFL rendered itself incapable of performing its corresponding obligations to CAI under the Framework Agreement. APFL nevertheless maintains its claim for damages on the basis that it was CAI's wrongful refusal to accept A320s that caused or materially contributed to Airbus' termination in April 2012 or, alternatively, caused or materially contributed to Airbus' refusal to re-instate deliveries thereafter (or at least lost APFL the chance of such reinstatement). APFL accepts that, if it cannot establish that causal connection, it cannot show any loss and its claim must fail.

5. CAI denies that it renounced the Framework Agreement, contending that its insistence on the delivery of A319 aircraft was equivocal, limited to deliveries scheduled for 2013 and in any event was in reliance on the terms of the Framework Agreement, even if mistaken, rather than a refusal to be bound by its terms. CAI further contends that, if it did renounce the Framework Agreement, APFL subsequently affirmed it.

6. Further, CAI disputes that its renunciation had any effect on APFL's problems with Airbus: those problems arose, CAI contends, from a long history of defaults, culminating with a refusal to take delivery of a completed aircraft on spurious grounds, when the real reason was that APFL did not have the finance to pay for it.

7. CAI also brings a counterclaim, seeking a determination that APFL is liable, under the terms of the Framework Agreement, to pay CAI certain sums due from APFL's parent company, Toto Holdings SpA ("Toto"), a company 98% owned by Carlo Toto, in the event that Toto fails to pay.

The factual background

8. CAI did not call any witnesses of fact, whereas APFL called Riccardo Toto, a director of APFL from its formation in December 2008 until February 2013 (and the son of Carlo Toto), and Soeren Ferré, who acted as the *de facto* chief executive of APFL from about October 2010 until December 2013.

9. However, the facts relevant to the dispute are best found in and to be inferred from the contemporaneous documents, for the reasons explained by Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisee (UK) Limited* [2013] EWHC 3560 (Comm) at §16-§22. That is particularly so in the present case where (i) the key events occurred in the period 2011-2013, more than four years before the witness statements were signed, (ii) the factual witnesses revealed a highly partisan approach and a casual regard for the truth.

10. The summary of the factual background set out below is, accordingly, drawn primarily from the contemporaneous documents, supplemented by reference to the evidence of Mr Riccardo Toto and Mr Ferré and my findings in relation to that evidence where required.

The APA

11. On 31 October 2005 an Italian company named Air One SpA ("Air One"), a member of the Toto group of companies and the operator of Italy's first private airline, entered the APA with Airbus as "the Buyer", agreeing to buy and take delivery of thirty A320 family aircraft between 2006 and 2009.

12. The APA provided that the Final Price for each aircraft would be the aggregate of the Airframe Basic Price (approximately US$45.5m as at January 2004) and the Propulsions Systems Basic Price (approximately US$11.3m as at the same date), in each case revised up to the Delivery Date of the aircraft in accordance with a Price Revision Formula. The Buyer was required to make Predelivery Payments ("PDPs") totalling 20% of the reference price for each aircraft, 2% on signature of the APA and the remaining 18% over the 24 months prior to the Scheduled Delivery Month.

13. The APA contained, among others, the following provisions:

> "*8.3 Upon successful completion of the Technical Acceptance Process, the Buyer shall on or before the Delivery Date, sign and deliver to the Seller a certificate of acceptance in respect of the Aircraft in the form of Exhibit D (the "**Certificate of Acceptance**") which shall not relieve the Seller of any of its obligations under this Agreement.*
>
> ….
> "*9.2.1 The Buyer shall send its representative to the delivery Location to take Delivery of, and collect, the Aircraft within seven (7) days after the date on which the Aircraft is Ready for*

> *Delivery and shall pay the Balance of the Final Price on or before the Delivery Date.*
>
> *….*
>
> "*9.2.3 Should the Buyer fail to*
>
> *(i) deliver the signed Certificate of Acceptance to the Seller within the delivery period as defined in clause 9.2.1; or*
>
> *(ii) pay the balance of the Final Price for the Aircraft to the Seller within the above defined period*
>
> *then the Buyer shall be deemed to have rejected delivery of the Aircraft without warrant when duly tendered to it hereunder…*
>
> *….*
>
> *20.3 If the Buyer fails to comply with its obligations as set forth under Clause 8 and/or Clause 9, or fails to pay the Final Price of the Aircraft, the Seller shall have the right to put the Buyer on notice to do so within a period of fifteen (15) business days after the date of such notification.*
>
> *If the Buyer has not cured such defect within such period, the Seller may, by written notice, terminate all or part of this Agreement with respect to undelivered Aircraft.*"

14. By Letter Agreement No. 8, annexed to the APA and forming an integral part of it, Airbus:

    i) recognised the importance for the Buyer of securing the most competitive financing;

    ii) agreed to assist the Buyer in obtaining financing support from the Export Credit Agencies of France, Germany and the United Kingdom;

    iii) agreed that, in the event that the Buyer could not obtain European Export Credit financing or commercial financing after reasonable efforts or it could only be obtained on terms less favourable than those specified, or were otherwise unacceptable to the Buyer, Airbus would provide or cause to be provided a first secured standby credit facility for 10 firmly ordered Aircraft, and no more than 4 in any one year ("Backstop Financing");

    iv) required, as a condition precedent of providing Backstop Financing, the pro-rata participation of the Propulsion System manufacturer on a pari-passu basis with Airbus.

15. The APA was amended on numerous occasions. By December 2008 it was agreed that Air One would buy a total of 67 A320 family aircraft[1].

The December 2008 transactions

16. In 2008 CAI, a company incorporated in Italy, having taken over the business of the troubled Italian airline, Alitalia[2], also acquired the entire shareholding in Air One from the Toto group pursuant to an *Accordo Quadro* or Master Agreement dated 11 December 2008 ("the MA"). As part of the transaction, Toto acquired a minority shareholding in CAI. The MA was governed by Italian law.

17. Although it was selling Air One to CAI, the Toto group did not wish to lose the benefit of the APA, which was seen as favourable to the Buyer. It was therefore agreed that Air One's interest under the APA be transferred to another company in the Toto group, on the basis that that company would lease the aircraft purchased from Airbus to CAI under a new agreement. APFL was duly incorporated in Ireland for that purpose.

18. The Framework Agreement was also entered on 11 December 2008 between CAI and APFL, reciting that APFL was in the process of agreeing with Airbus the novation of purchase agreements for up to 67 A320 family aircraft.

19. On 23 December 2008 Airbus, Air One and APFL duly concluded a Partial Novation and Amendment Agreement, the effect of which was that APFL replaced Air One as the Buyer under the APA. By clause 7.4, APFL undertook to Airbus to maintain a minimum Unrestricted Cash position of US$50 million.

The Framework Agreement

20. The Framework Agreement (in which APFL was defined as "the Company") was governed by English law and included the following provisions:

> "*3.1 CAI undertakes to the Company that it shall take on lease from the Company and/or one or more Lessors not less than sixty four (64) A320 Aircraft…in each case on the terms and subject to the conditions of this Agreement and the Pro Forma Operating Lease.*
>
> ….
>
> *3.4 The Company undertakes to CAI that it shall procure that each of the Aircraft are leased to CAI as contemplated by this Agreement and CAI undertakes to the Company that it shall take on lease each Aircraft subject, in each case, to the terms and conditions of this Agreement and the relevant Lease, for a term of twelve (12) years…*
>
> ….

[1] There were other agreements, including for the purchase of A330 aircraft.
[2] CAI is frequently referred to as "Alitalia" in the subsequent contemporaneous documents. It operated the Alitalia airline until 1 January 2015.

> *4.2 The Purchase Agreements contain certain options in relation to the type (i.e., in relation to the A320 Aircraft, certain rights to choose A319 and/ or A321 aircraft…) of the Aircraft to be delivered under the Purchase Agreements. Schedule 1 sets out, in relation to each Aircraft, the dates by which any option relating to that Aircraft must be exercised. CAI will, not less than thirty (30) days before the date on which any such rights must be exercised in relation to any Aircraft notify the Company whether such rights should be exercised. The Company undertakes that it shall procure that such rights are exercised in accordance with CAI's instructions unless the Company evidences, to the reasonable satisfaction of CAI on or prior to the date failing ten (10) days prior to the date any such rights must be exercised, that CAI's instructions would have a material and adverse effect on the present or future value of the relevant Aircraft (taking into account any adjustments of purchase price payable under the relevant Purchase Agreement) or the ability of the Company to finance the purchase price of the relevant Aircraft.*
>
> *Schedule 1*
>
> *A320 family type flexibility*
> *There is an option to change the type of A320 family aircraft from A320 to A319 or A321, which is available for every second A320 Aircraft. The decision to exercise an option to convert the type of an aircraft must be made by written notice delivered to Airbus at the latest eighteen (18) months prior to the first day of the quarter in which the aircraft which is being converted is scheduled for delivery, in respect of the firm Aircraft, and at the time of exercise of the relevant purchase option, in relation to the option aircraft. The type flexibility right is always subject to Airbus industrial and planning constraints.*"

21. The Framework Agreement also contained the following provision, pursuant to which CAI brings its counterclaim:

> "8.7 *Toto set-off rights*
>
> *The Company and (by its execution of a Delivery Notice) each Lessor acknowledges that certain amounts are payable to CAI by Toto pursuant to a share purchase agreement entered into or to be entered into between CAI and Toto in relation to the purchase by CAI of the entire issued share capital in Air One. In consideration of CAI agreeing to enter into this Agreement as part of a wider transaction of which such share purchase agreement forms and integral part,*

> *8.7.1 the company agrees that, if Toto fails to pay any amount to CAI pursuant to such agreement which falls due on or prior to the fifth anniversary of such agreement, the Company shall, on or prior to the date falling five (5) Business Dates after CAI notifies the Company of such failure, pay to CAI any amount then due and owing but unpaid to Toto under such agreement.*"

APFL's difficulties in relation to 2009 aircraft

22. The APA, as amended, provided for APFL to take delivery of 14 A320 aircraft in 2009. The first five of those aircraft were acquired with the benefit of Backstop Finance from Airbus (one more than Airbus was obliged to provide under the APA), indicating that APFL had not been able to obtain commercial or EEA funding on acceptable terms.

23. APFL succeeded in obtaining finance for the next four A320s, guaranteed by SACE (the Italian export credit agency). However, APFL failed to make PDPs due to Airbus in respect of future aircraft, causing Airbus to write to APFL on 7 September 2009, notifying its intention to reschedule the delivery dates for those aircraft. That letter has not been disclosed by APFL, but APFL's response, signed by Rocco Radica, was in evidence. The letter sought to blame Airbus for APFL's inability to pay the PDPs and the consequences, asserting:

    i) that Airbus had failed to assist with Export Credit financing or Backstop financing in relation to one aircraft, as a result of which APFL had paid the cash purchase price (presumably prior to obtaining finance);

    ii) that delays in obtaining SACE support were due to Airbus, which had not complied with its financial assistance duties. Mr Radica asserted that Airbus had given wide assurances in that regard which had not been reflected in the APA;

    iii) that the "arbitrary rescheduling" of deliveries would expose APFL to the risk of breach of obligations to CAI, for which Airbus would be held liable.

24. Mr Radica's letter appears to have been as misconceived as it was aggressive. Airbus had already provided more Backstop Financing than was required and had no contractual obligation to obtain export credit financing for APFL.

25. In late November 2009 APFL, though Mr Riccardo Toto, informed Airbus that it was unable to purchase the last five A320s due for delivery in 2009, apparently because it was unable to fund the US$40m equity portion of the purchase price (even if export credit support was available), notwithstanding that Airbus was willing to free-up US$25m in PDPs. APFL proposed that Airbus release APFL from the obligation to buy those five aircraft and itself lease them directly to CAI instead. A letter from Mr Riccardo Toto to Airbus of 30 November 2009 setting out the above has not been disclosed by APFL.

26. On 1 December 2009 Tom Enders, the President and Chief Executive of Airbus, wrote to Mr Carlo Toto, in his capacity as President of APFL, in the following terms:

"*Given that AP Fleet has continuously breached its cash covenants and is also $14m in default on A330 PDPs, we have a choice to make. We obviously have to protect our own business and industrial risk as well as the interests of our customers. Either we take a radical step and now cancel the contract between us and AP Fleet in its entirety, or, in the spirit of our partnership, we find a way forward.*

Airbus wants AP Fleet to survive, and in the long term we want to continue working with you to strengthen your business with Alitalia. Based on everything your team has told us, and knowing that you hope to attract new investors next year, our final position is a fairly simple one:

We accept your proposal, and Airbus will indeed take on the major responsibility for delivering (to Alitalia) the five immediate A320s that are built and ready for delivery, even if the ECAs were ready to participate for all five aircraft. This is very disappointing, but it seems that we do not have much option to do otherwise…

Other than the next two A320s in early 2010, for which you have a sale and leaseback agreement with AerCap, Airbus will also work directly with Alitalia and leasing companies to deliver A320s in 2010, as well as the two A330s in June and July next year. In other words, if we succeed, AP Fleet will only take delivery of two aircraft from Airbus in 2010 (the two AerCap A320s early next year).

From an AP Fleet standpoint, the five A320s that are due for immediate delivery, your seven A320s in late 2010, and the two A330s in 2010 would be deferred to a date in 2013 or beyond, to be mutually agreed.

We are not cancelling any A330 or A320 positions with AP Fleet

AP Fleet will release Alitalia immediately from its obligation to lease aircraft exclusively from AP Fleet from now until the end of 2010, in order that Alitalia can lease A330s and A320s from Airbus or other third parties…

Carlo, much of the above represents huge risk and cost for Airbus. I believe our actions show how much we are prepared to do in order to keep AP Fleet's business alive both now and during the course of 2010. By suspending all but two deliveries to AP Fleet until the end of 2010, we are giving you the necessary breathing space to find new investors and restructure your company. You can then ensure you are ready for a "business as normal" scenario with Airbus, and Alitalia, from January 2011 onwards.

> *This letter addresses the critical short-term delivery issues. For our business together from January 2011, including the A320s, A330s and A350s, our teams should meet early next year to review delivery schedules and PDPs. In any event, we need to count on the overdue PDPs being paid to Airbus no later than January 31st next year.*
>
> *Please think carefully about the massive steps we are taking to preserve your long-term business. I urge you very strongly to accept our proposal as above. We are mindful that we must protect our own interest here, and we do not want to be forced to take the other option.*"

27. It was common ground that Airbus' proposal was exceptional in nature: Airbus was not in the business of leasing aircraft to airlines and was forgoing some US$170m in purchase monies. Airbus later pointed out that it had never before provided direct leases, even in crisis situations. It now was offering to take that course reluctantly and was considering, as an alternative, terminating the APA only one year after the novation in favour of APFL.

28. It appears that, in its response of 9 December 2009, APFL did not accept Airbus' offer, at least in full. The letter has not been disclosed, but Airbus' response of 15 December 2009 from its Executive Vice President, Christopher Buckley, stated:

> "*We are very disappointed that AP Fleet does not seem to understand the very clear message in our letter of December 1st. Airbus has a choice: given that AP Fleet is in breach of contract, we either terminate our contracts with AP Fleet in their entirety, or we try and help you through this difficult period as you wait new investors.*
>
> *Given our relationship with AP Fleet, we decided on the latter course of action. Our decision to take responsibility for the five end-2009 deliveries to Alitalia was not taken lightly, and is a remarkable gesture to AP Fleet.*
>
> *Riccardo, on December 2nd I advised you clearly on the phone, in good faith, to agree as closely as possible to the proposal in Mr Enders' letter. Instead, you casually ignore most of the contents!*
>
> *In our conversation you will remember that I suggested a possible small compromise on the late 2010 deliveries, but nothing else. We will therefore make one, and only one, change to the proposal in Mr Enders' letter. Rather than releasing AP Fleet from the responsibility for taking the seven A320s at the end of 2010 (deferring these deliveries to AP Fleet until 2013), we will reduce this number to five. In other words, AP Fleet will take two A320s early in 2010 (the AerCap aircraft), and now two A320s at the end of the year, but nothing else from Airbus in 2010.*

> *We will only maintain these two A320's at the end of 2010 for AP Fleet if we are satisfied that a new, credible investor is in place, and that all PDPs are fully up to date, by March 31st, 2010. We urgently need your agreement to the proposal in Mr Enders' letter, with one change as detailed above, no later than 1800 this Thursday, December 17th. Beyond this date we reserve all our rights as per the contract.*
>
> *Riccardo and Lino, I think you underestimate 1) what we have proposed to help with AP Fleet's survival, but 2) how close we are to taking an alternative decision. Please do not draft up new lengthy letters about ECAs or other issues. We just need you to sign this agreement, and then we can all move forward and you can concentrate on reorganizing your company next year.*"

29. APFL replied on 18 December 2009. Although still demanding that Airbus release it from purchasing the last five A320s due in 2009, APFL again declined to accept the whole of Airbus' offer, seeking to retain the right to purchase A320s in 2010. APFL stated that it was "*currently undertaking a major intervention on the equity capital of the company and establishing a credit facility which will allow APFL to comply with its obligations*", although it is clear that neither in the event happened.

30. On 31 December 2009 Mr Buckley indicated that Airbus' patience had run out, stating in an email to Mr Riccardo Toto that, if APFL did not unconditionally accept Airbus's offer, Airbus would send "*the letter on breach of covenant*". That was not an idle threat. On 15 January 2010 Airbus served a formal notice that, according to APFL's third quarter 2009 results, the Financial Covenant of maintaining US$50 million of Unrestricted Cash relied upon by Airbus in entering the Partial Novation and Amendment Agreement with APFL had been breached.

31. APFL accepted Airbus' position on 21 January 2010 and the revised agreement was formalised by Amendment No. 9 to the APA dated 12 March 2010, subject to agreement being reached with CAI by the end of May 2010 that CAI would lease aircraft directly from Airbus. The effect of the amendment, subject to such agreement with CAI, was that APFL was to purchase only three A320s in 2010 and no A330s. APFL's Financial Covenant was also reduced to maintaining US$25m of Unrestricted Cash, but only until 1 June 2010 (corresponding with the deadline for agreement with CAI), when it would return to US$50m.

APFL's difficulties in relation to 2010 aircraft

32. Although APFL was only required to purchase three A320s in 2010, it struggled to finalise finance with AerCap for two of those aircraft. By May 2010 those two aircraft were ready for delivery, as were two A330s, in respect of which CAI had not yet agreed to take a direct lease from Airbus.

33. On 27 May 2010 Iain Grant of Airbus emailed Mr Bergonzi, a director of APFL, in the following terms:

> "*Lino, with approximately $260m of A320s and A330s sat in Toulouse painted in Alitalia livery, no clear agreement between Alitalia and AP Fleet on the way forward on the 2011/2012 Alitalia fleet requirement (an essential requirement for Phase 2) Airbus' management's preoccupation is managing the AP Fleet/Airbus 2011 order book, and consequentially we will not extend the end of May 2010 contractual deadline set out in Amendment 9.*
>
> *….*
>
> *Time is running out and if you [have] not been able to reach agreement with Alitalia on the leases and the waiver from the framework in the next few days we may be forced, subject to board approval, to implement a backup solution.*"

34. It appears that the two A320 aircraft in question were, in the event, sold to AerCap rather than financed and, having been released from the Framework Agreement in June 2010, were leased directly by AerCap to CAI. They were delivered in July 2010.

Restructuring in respect of aircraft deliveries from 2011 onwards

35. In 2010 CAI made it known to APFL that it had a strong preference for the smaller A319 aircraft, as that version had materially lower fuel and other running costs than the A320 aircraft. The Framework Agreement gave the option to CAI to change every second aircraft to be delivered to an A319, but CAI expressed a preference that all aircraft delivered in 2011 and 2012 should be the smaller version.

36. APFL was reluctant to agree the change. Although overall costs of running A319 aircraft were lower, that reduction did not compensate for the reduction in seating capacity and therefore potential revenue. The result was that the market for A319 aircraft was relatively small, with the consequence that those aircraft were less easy to sell and therefore less attractive as security for financing. It was therefore harder for a purchaser such as APFL to obtain finance for the purchase of A319s and such finance as could be obtained would be on less favourable terms.

37. In an email dated 17 August 2010, Mr Bergonzi asked Mr Grant for Airbus' support in discouraging CAI from converting A320s into A319s. In his reply the next day, Mr Grant stated:

> "*Whilst A320s may be preferential to both Airbus and AP Fleet, the A319 remains a great product that already works well in the Alitalia (and Air France) network and complements the A320s. Convincing Alitalia's network capacity planners may be an uphill battle.*
>
> *We are interested to understand the progress you are making with your research into A330 financing solutions when we next meet. This and moving the A350s will clearly be the major focus of the meeting.*"

38. Mr Grant was referring to continuing discussions between Airbus and APFL as to the future of the APA and, in particular, APFL's difficulties in raising finance for eight A330s scheduled for 2011.

39. By 1 October 2010 APFL had asked Airbus to release it from the obligation to purchase the eight A330s and that Airbus lease them directly to CAI. On that date Mr Buckley wrote to Mr Riccardo Toto and Mr Bergonzi in the following terms:

> "*This proposal was scrutinised in detail, and was the subject of extensive debate in which certain Board members expressed extreme reluctance to step in once again and 'fulfil AP Fleet's commitment' to lease aircraft to Alitalia. At our Board level there is intense frustration that the relationship with AP Fleet is one of constant crisis management. They have made a very firm decision that we just cannot continue in this way. Therefore, the following global solution has to be definitive.*
>
> *The package of amendments summarised in the attached Appendix finally approved by our Board, this approval being subject to the relevant documentation reflecting the amendments being signed by AP Fleet, Airbus and Alitalia by October 8th, a week from now.*
>
> *….*
>
> *Ricardo and Lino, I want to stress that you should not underestimate the depth of feelings at both the Airbus and EADS Board level on this issue, with many believing that Airbus has already done enough and is now taking on an unacceptable level of additional exposure. This is made at the more difficult for us to accept the time when the demand for new A330s is strengthening.*
>
> *We really are at the end of the road, especially in terms of the industrial and financial exposure Airbus is willing to take, and I strongly urge you to make the most of this final opportunity.*"

40. The Appendix provided for the rescheduling of all 44 remaining A320s (permitting APFL to lease 15% to parties other than CAI and to re-use Backstop Financing if it had redeemed such finance on sale of an aircraft), cancellation of the A330 purchase agreement and the rescheduling of A350s to 2020 and beyond, subject to numerous terms and conditions.

41. It appears that Airbus subsequently agreed to extend its deadline to 31 October 2010. On 14 October 2010 Mr Ferré, who had recently joined APFL on a consultancy basis as, in effect, its CEO, wrote to Nigel Taylor of Airbus following a meeting with him. Mr Ferré attempted to allay some of Airbus's concerns about APFL, including indicating that the company was actively investigating strategic opportunities such as joint ventures (although no such opportunities bore fruit). He went on to state:

> "*The purpose of the 'Phase 2' discussions is to ensure that the delivery stream is restructured in such manner that a 'Phase 3' is not required going forward, as I do not think that the continuous stress between our two organisations is the right way to manage a relationship between APFL and its main supplier. I am also concerned that the current stage of discussions with Airbus, as an attempt to solve the A330 situation, will not solve the cash requirements related to other contracts with Airbus… You have now presented us with a revised concept that makes even less sense than the previous one if we could end up paying even more for the A330s and even not free any cash to enable us to deal successfully with the A320 order…*
>
> *On the issue of Alitalia requesting A319s, whilst I think all people involved would agree that the residual value of the market appeal of the A319 is pale compared with the A320s, this is what the airline wants. It also means that, from an APFL stand-point, it will be much harder for us to sell down A319 exposure compared with what we achieved on the A320s. My opinion of the A319s is reinforced by the numerous discussions I have had already with many lessors interested in Alitalia exposure as none show any interest for A319s. APFL will nevertheless deal with it as we are committed to deliver these leases to Alitalia.*
>
> *….*
>
> *Finally, whilst we are doing our maximum to resolve the current situation, I am afraid that the October 31st deadline will be hard to reach…*"

42. Notwithstanding Mr Ferré's reservations, and without concluding any agreement with Airbus, on 10 November 2010 APFL and CAI entered Amendment Agreement No 1 to the Framework Agreement ("AA1"). Clause 2.1 provided for the effective cancellation of 18 of the remaining 44 A320 family aircraft. Clause 2.2 provided:

> "*The deliveries of the remaining 26 (twenty six) A320 family Aircraft still to be delivered are agreed between the Parties as follows:*
>
> *2.2.1 Three (3) A320 Aircraft in year 2010*
>
> *2.2.2 Five (5) A319 Aircraft in year 2011*
>
> *2.2.3 Five (5) A319 Aircraft in year 2012*
>
> *2.2.4 Five (5) A320 Family Aircraft in year 2013*
>
> *2.2.5 Five (5) A320 Family Aircraft in year 2014*

2.2.6 Three (3) A320 Family Aircraft in year 2015

2.2.7 The months and dates of Delivery will be fixed pursuant to the terms of A 320 Purchase Agreement as amended in connection with this AA1."

43. It was accordingly agreed between APFL and CAI that CAI would receive only A319 aircraft in 2011 and 2012. The position in relation to 2013 (and possibly 2014 and 2015) became a matter of dispute between the parties, as set out below, CAI maintaining that it was entitled to elect for delivery of any aircraft in the A320 family, and could therefore choose to have only A319s. CAI, however, did not maintain that argument at trial, not contesting APFL's obviously correct contention that determination of which type of A320 family aircraft would be delivered remained subject to the provisions in that regard in the Framework Agreement, namely, the option granted to CAI to convert every other A320 to an A319, but even then subject to the "material adverse effect" exception in clause 4.2.

44. On 16 November 2010 Stefania Raimondi, APFL's Head of Legal, wrote to Airbus asserting that Airbus was subject to a contractual obligation of good faith and owed a general duty of good faith under French law, but had failed to comply with such duties in negotiating amendments to the APA. The letter finished with a reservation of all contractual and legal rights in the statement that APFL would "*not hesitate in taking all necessary enforcement measures should Airbus continue to deal in bad faith*".

45. On 7 December 2010 Airbus and APFL agreed Amendment No. 10 to the APA, re-scheduling the 44 A320s and providing that the five aircraft scheduled for 2011 would be immediately converted into A319 aircraft and that the five scheduled for 2012 might be converted into A319 aircraft by written notice from APFL to Airbus no later than February 2011.

46. Amendment No. 10 also permitted APFL to lease 18 of the A320s to parties other than CAI. APFL in due course agreed to sell four A320s to China Aircraft Leasing Company ("CALC"), for leasing to a Chinese airline, that agreement being formalised in a Master Sale and Purchase Agreement executed on 11 January 2012.

APFL's breach of the Financial Covenants

47. Clause 8.2 of Amendment No. 10 provided that, for the purposes of APFL's financial covenant, the Unrestricted Cash position was again reduced, this time on a permanent basis, from US$50m to US$25m. Further, APFL was to provide, not later than 31 January 2011, an officer's certificate evidencing the Unrestricted Cash position as required by that clause.

48. However, accounts for the period ending 31 December 2010 reveal that as at that date APFL had Unrestricted Cash of only US$ 8.7m, less than the reduced amount required by the covenant revised only days before.

49. On 16 February 2011 Airbus wrote to APFL, giving notice that APFL had not performed various of its obligations under Amendment No.10, including providing a certificate of compliance with the Financial Covenant (referring, in fact to a parallel

obligation under the parallel Amendment to the purchase agreement for A330 aircraft).

50. The issue was discussed at a meeting of the Board of Directors of APFL on 24 February 2011, including Mr Bergonzi, and attended by Mr Radica (then the company secretary), Mr Ferré and Ms Raimondi. The minutes record the following:

> "*A question was raised as to whether, once the shareholder loan is repaid, the Company will be able to comply with the financial covenants under the Airbus purchase agreements and under the framework agreement. A discussion took place and the meeting was reminded of the way the breach of the financial covenants are covered under the above mentioned agreements. It was also explained that once the profits from the sales are credited to the Company's bank account, a letter will be sent to Airbus, evidencing and confirming the cash standing on our accounts, which is in compliance with the purchase agreement. It was noted that Alitalia has not requested evidence of the minimum cash standing to the Company's bank account. It was also explained that should Airbus, further to the repayment of the shareholder loan, send a notice to the Company asking for the evidence of the minimum cash, then the Company shall have 45 days to comply with such a request.*"

51. As CAI submits, that discussion reveals that APFL took a remarkably cynical approach to APFL's financial covenants both to Airbus and to CAI (the latter requiring cash of US$40m). APFL plainly had no concern that it should comply with its obligations, but only with avoiding detection of its plainly regular and persistent breaches. It is also clear that APFL had no intention of complying with its obligation under the Framework Agreement to report any breach of Financial Covenant to CAI.

52. On 10 March 2011 Mr Radica signed a certificate, addressed to Airbus, confirming that, as of that date, the Unrestricted Cash position of APFL was greater than US$25m. Although Mr Radica described himself as an officer of APFL, it appears that he had ceased to be company secretary on 24 February 2011, having been replaced in that role by Ms Raimondi.

53. At the end of 2011 APFL was, according to its accounts, again in breach of its financial covenants to both Airbus and CAI, having only US$10.642m in Unrestricted Cash.

54. Whilst the above conduct calls into question APFL's integrity and reliability, as well as its financial standing, and CAI understandably focused upon it, there is no evidence that Airbus was aware of the extent of APFL's breach of the financial covenant or its willingness to disguise that breach.

APFL's difficulties in relation to 2011 aircraft

55. APFL again experienced great difficulties in obtaining finance to purchase the five A319s scheduled for delivery in 2011. No finance had been obtained for the two aircraft due to be delivered in June as late as 26 May 2011. Commercial Finance was

eventually obtained for one of those aircraft so that it was delivered on time. The second was left "on the tarmac", which Mr Ferre recognised, in giving evidence, was for Airbus "*the worst thing you can do*".

56. In the event Airbus agreed to provide Backstop Finance for the second June aircraft and it was delivered in August 2011.

57. Two further A319s due for delivery in September 2011 were ultimately on-sold to CDB Leasing Co. Ltd, which then leased them to CAI (through special purpose companies) in November 2011.

58. The final 2011 A319, due for delivery in October, also required Backstop Financing from Airbus and was delivered in November 2011.

59. On 9 November 2011 Mr Sabelli, the Chief Executive Officer of CAI, met Mr Buckley of Airbus, apparently investigating the possibility of acquiring A319s directly from Airbus. Mr Buckley also met with Mr Ferré before emailing Mr Sabelli on the 21 November 2011 in the following terms:

> "*... It is true that we have seen a huge shift in the marketplace from the A319 to the A320 and A321. Quite simply, we are not selling as many A319s right now. In Europe everyone seems to want the better economics per seat of larger aircraft. The A319 is a great aircraft, but the 120-140 seat segment is very weak ... So, we understand APFL's reluctance to lease A319s, unless there can be some changes to your framework agreement.*
>
> - *ideally we need to convince Alitalia to take A320s instead!*
>
> - *however, as I mentioned in our meeting, we will be pleased to make Alitalia a sales proposal for A319s if that is what works best for you.*
>
> *We do believe that AP Fleet can make the A319s work if 1) you can be flexible with the framework agreement, to reflect changes in the marketplace; and 2) we support this initiative by finding a way to help AP Fleet (and therefore Alitalia) improve the economics of the transaction…*"

60. Mr Sabelli replied on 22 November 2011, stating that he regarded Mr Buckley's email as a "non-answer" and confirming that CAI was not interested in A320s. Mr Buckley responded by emphasising that the problem with Airbus selling directly to CAI was the need to find a financier or lessor, and that CAI would be very fortunate to find similar terms to those CAI already had with APFL.

MSN 5018 – events in early 2012 leading to Airbus' termination notice

61. On 13 January 2012, APFL gave notice to CAI that the expected delivery date for the first of the A319s scheduled for 2012, MSN 5018, was 31 January 2012, stating that the lessor/lender would be Airbus and indicating that the aircraft would be purchased

with Backstop Finance. APFL had requested, on 4 January 2012, that Airbus provide such finance.

62. It appears, however, that the engine manufacturer, CFM, refused to participate in such finance and Airbus declined (as it was entitled to do) to proceed without CFM's participation. APFL was, once again, left without finance for the purchase of an aircraft which was imminently due for delivery.

63. On 31 January 2012 Airbus gave APFL an Aircraft Ready for Delivery Notice in relation to MSN 5018, stating that the Technical Acceptance Process had been successfully completed that day and that the aircraft was Ready for Delivery. Airbus required APFL to comply with clause 9.2 of the APA by signing the Certificate of Acceptance, paying the balance of the Final Price and taking Delivery within 7 days.

64. On the same date, Airbus Aircraft Quality Conformance Management issued a memorandum noting a deviation on the inboard flap of the right-hand wing of MSN 5018 with a depth of less than 0.1mm and a diameter of 15mm. The deviation was not classified as a "*dent nonconformity*" and the conclusion was that it was technically fully acceptable and "*can stay as is without further action*".

65. On 21 February 2012 Airbus notified APFL that it was proceeding with the issue of the Statement of Conformity for MSN 5018 and again demanded that APFL meet its obligations. Airbus further formally confirmed that it would not provide Backstop Finance as the condition precedent of CFM's participation had not been satisfied.

66. On 23 February 2012 Ms Raimondi wrote to Airbus in relation to MSN 5018. Ms Raimondi first asserted that, because of the "dent" in the flap, MSN 5018 had not in fact completed the Technical Acceptance Process, requesting that the "part" be replaced and a further Technical Acceptance Process take place, following the successful completion of which APFL would sign the Certificate of Acceptance, pay and take delivery.

67. Secondly, Ms Raimondi accused Airbus of failing to meet obligations to assist APFL in obtaining finance. As to Airbus' reliance on the condition precedent to its obligation to provide Backstop finance, she stated:

> "*Leaving to one side, for present purposes, whether or not you have taken all appropriate steps to secure that participation, we simply do not agree with your interpretation of the contractual position. You have agreed on previous occasions to enter into backstop financing arrangements with us, without any further participation from CFM. At the time of entering those arrangements, the conditions set out in clause 33 of Letter Agreement No.8 were either satisfied or waived by you, and there is not reason why these matters need to be re-visited in circumstances where the parties are simply seeking to roll-over existing arrangements.*"

68. It is entirely clear, and I find, that APFL's reference to the deviation in the flap of MSN 5018 was an opportunistic and wholly unjustified attempt to delay its obligations in relation to the aircraft and to create some form of negotiating position.

APFL's own internal records make no reference to any defect in the aircraft and there is no suggestion that anything was done about the deviation before APFL eventually sold MSN 5018 to Orix in June 2012. Indeed, on 8 May 2012 Ms Raimondi herself, in an email to Orix's lawyers, expressly stated that MSN 5018

> "…*was accepted under the Airbus purchase agreement on January 31, 2012 and Statement of Conformity was issued on February [28]th, 2012. The aircraft was then put in storage. Therefore APFL has accepted the aircraft …*"

69. Although it appears that Ms Raimondi was being less than frank with Orix, it is clear that she had no genuine belief that the aircraft had not successfully completed its Technical Acceptance Process on 31 January 2018.

70. The real reason why APFL was refusing to take delivery of MSN 5018 was its inability to fund the purchase price given that Airbus was refusing to finance it. I do not need to decide whether Ms Raimondi genuinely believed that Airbus was in breach of its obligations in that regard, or whether it was a further negotiating tactic.

71. On 27 February 2012 Airbus refuted both of Ms Raimondi's contentions and, on 28 February, Airbus issued the Statement of Conformity.

72. On 1 March 2018 Ms Raimondi wrote again to Airbus, urgently demanding that it provide Backstop Finance and asserting that Airbus' refusal amounted to a renunciation of Airbus' commitments to APFL.

73. On 7 March 2012 Airbus gave APFL Notice of Failure to take Delivery in respect of MSN 5018, stating:

> "*AP Fleet has failed to sign the Certificate of Acceptance in accordance with clause 8.3 of the Purchase Agreement and failed to pay the Balance of the Final Price, take Delivery of and collect the Aircraft within seven (7) days after the date the Aircraft was Ready for Delivery in accordance with clause 9.2 of the Purchase Agreement. Consequently, and in accordance with clause 9.2.3 of the Purchase Agreement, AP Fleet is deemed to have rejected delivery of the Aircraft without warrant when duly tendered to it under the Purchase Agreement.*
>
> *….*
>
> *As a result of AP Fleet's failure to comply with its obligations under clause 8 and clause 9 of the Purchase Agreement and its failure to pay the Final Price of the Aircraft in accordance with clause 20.3 of the Purchase Agreement, we hereby put AP Fleet on notice to comply with its obligations under Clause 8 and Clause 9 of the Purchase Agreement and to pay the Final Price of the Aircraft within fifteen (15) business days after the date hereof, that is by 28 March 2012. If AP Fleet has not cured such default by 28 March 2012, Airbus may exercise the*

> *termination rights set out under Clause 20.3 of the Purchase Agreement.*"

74. Ms Raimondi replied on 8 March 2012, not only re-asserting that the aircraft was defective, but adding a new argument as to its alleged technical deficiency:

> "*We hereby reject the content of your letter of 7 March 2012. In particular, we do not agree with your conclusion that APFL is deemed to have rejected Aircraft 5018 without warrant. As we explained in our letter of 23 February 2012, a technical fault with one of the aircraft's flaps was identified during the Technical Acceptance Process and we requested that the flap be replaced. We note in this regard that Airbus' technical team considers this fault to be "technically fully acceptable" and that they have requested to close the relevant QLB. However, we have clarified with Airbus that the damaged flap actually reduces the relevant tolerance and therefore a new flap is compulsory.*
>
> *Furthermore, we understand that the damaged area is on the upper side of the flap which exposes it to higher risks from adverse weather conditions such as hail. Indeed, the very location of the damaged area significantly increases the chances that further damage will occur in the same area, resulting in a flap replacement being inevitable. In those circumstances, Aircraft 5018 would need to be grounded and the leasing of another flap for the time required to replace the damaged one would be necessary.*
>
> *In light if the above, it is incorrect to say that APFL has failed to sign the Certificate of Acceptance in accordance with clause 8.3 of the Purchase Agreement. APFL is not obliged to sign that certificate until such time as Aircraft 5018 successfully completes the Technical Acceptance Process. Since Airbus has failed to replace the damaged flap, Aircraft 5018 has not yet successfully completed the Technical Acceptance Process. For the avoidance of doubt, APFL will not sign the Certificate of Acceptance, pay the Balance of the Final Price or take Delivery of Aircraft 5018 until that flap is replaced and the aircraft passes a further Technical Acceptance Process.*
>
> *….*
>
> *We have also been informed that a new regulation applies to operators of aircraft registered in a European Member State or registered in a third country and operated by a European Union operator and to non-European operators of aircraft flying in the European airspace. Consequently, from 1 March 2012, all newly produced aircraft above 5,700 kg maximum take-off mass or with passenger seating capacity above 19, will have to be equipped with ACAS II change 7.1. We understand*

> *that Aircraft 5018 is equipped with the TCAS 7.0 instead of ACAS II Change 7.1 and considering that the deadline of 1 March 2012 has passed, an exception from the aviation authority is now required.*
>
> *To avoid such request to the aviation authority, we would therefore be obliged to have the modification performed by Airbus before delivery of Aircraft 5018.*
>
> *In relation to the financing of Aircraft 5018, you seem to have deliberately ignored the efforts that APFL is making (and has been making) in obtaining financing from commercial banks in order to take delivery of Aircraft 5018….*"

75. On 16 March 2012 Airbus again refuted APFL's contentions, including pointing out that the Change 7.1 mandate was an operator and not a manufacturer responsibility, and that Airbus had provided APFL with details of how to apply for an exemption in respect of MSN 5018.

76. On 4 April 2012 Mr Ferré and Mr Riccardo Toto met Patrick de Castelbajac, Airbus' Vice President Contracts, and other Airbus representatives, in Toulouse. Mr de Castelbajac informed them that Airbus was going to exercise its right to terminate the APA. In his first witness statement Mr Riccardo Toto stated:

> "*Coming out of the meeting, Airbus appeared to be happy with the solution for MSN 5018 but Mr de Castelbajac said that Airbus would send the termination notice anyway. I made it very clear that if a termination notice was issued. APFL would be forced to litigate. In response to this, Patrick de Castlebajac stated that he would send the termination notice but that he would state in the covering letter that Airbus hoped to be able to find a solution to the problem. I recall that he said to me words to the effect of, "*Riccardo, you don't have a client because your client wants A319 aircraft and you want to sell them A320s. You are technically in default of the Purchase Agreement and Airbus has an opportunity to sell the aircraft [those that would have otherwise been delivered to CAI in accordance with the Framework Agreement] to CALC at a higher price*." In response, I explained that I agreed with his summary of the situation but that if the termination notice was issued, we would litigate and MSN 5018 would then be sitting on the tarmac for a long time.*"

77. When cross-examined, Mr Toto claimed that, at the meeting:

> *"what [Airbus] said clearly to us is that if Alitalia is able to take delivery of the A320 we are going to [reinstate] the contract."*

78. That assertion had not been pleaded, was not in Mr Toto's witness statement, was not corroborated by Mr Ferré and was not relied upon by APFL in support of its case in

written or oral closing argument. Mr Kealey QC, for CAI, put to Mr Toto that the assertion was a complete lie, a categorisation with which I agree. It was plain to me that Mr Toto embellished his account on the spur of the moment in the witness box, in an attempt to bolster APFL's case. Indeed, Mr Toto's ability and willingness to fabricate self-serving evidence in that way casts considerable doubt on his account, in his first witness statement, of the alleged post-meeting comment by Mr de Castlebajac that APFL did not have a client because CAI wanted A319s. It was put to him that that statement was also false and I find that to be the case.

79. On 5 April 2012 Airbus served a Termination Notice on APFL, terminating the APA in respect of the 14 aircraft which were due to be delivered in 2013 and 2014 (five each year due to be leased to CAI and two each year due to be sold to CALC). The notice stated as follows:

> "*We… refer to Airbus' letters dated 21st February 2012, 27th February 2012 the Aircraft Ready for Delivery notice dated 28th February 2012 Airbus' letter dated 5th March 2012 and the default notice of AP Fleet's failure to take delivery of the Aircraft dated 7th March 2012 ("**Delivery Failure Default Notice**"), your letter dated 8th March 2012 received by Airbus on 12th March 2012 and Airbus' letter dated 16th March 2012, each of which concerned one (1) Airbus A319–111 aircraft bearing manufacturers serial number 5018 ("**MSN 5018**")*
>
> *As a result of AP Fleet's failure to comply with its obligations under clauses 8 and 9 of the Purchase Agreement and its failure to pay the Final Price of MSN 5018, in accordance of [sic] clause 20.3 of the Purchase Agreement, pursuant to the Delivery Failure Default Notice we called upon AP Fleet to comply with its obligations under clauses 8 and 9 of the Purchase Agreement and to pay the Final Price of MSN 5018 by no later than Wednesday, 28th March 2012.*
>
> *AP Fleet has failed to remedy its defaults by that date and, accordingly, Airbus hereby exercises its right pursuant to clause 20.3 of the Purchase Agreement to terminate the Purchase Agreement with respect to the Aircraft set out in Appendix 1 hereto…*"

80. Airbus' covering letter made the following offer:

> "*To demonstrate our willingness to maintain a constructive relationship despite the ongoing default, and further to AP Fleet confirming that it will take delivery of all 2012 aircraft, Airbus would be willing to consider revoking its termination of the four aircraft which you have commitments with CALC subject to the demonstration, to Airbus' satisfaction, that the resulting transaction represents a firm and robust commitment, which will not require Airbus' financing and is based on acceptable terms and conditions.*

> *Given our industrial constraints, the window to rescind the termination of these four aircraft is limited and we would appreciate receiving the corresponding information as soon as possible and in any case before the end of the month.*"

81. It was therefore apparent that Airbus was willing to consider reinstating the four aircraft to be sold to CALC on the basis that it was a firm commitment, but was not contemplating the possibility of reinstating aircraft to be leased to CAI and which would require financing.

Discussions leading up to Amendment No.11 to the APA

82. The next day Mr Carlo Toto wrote personally to Mr Enders in the following terms:

> "*[Y]esterday evening, at 8pm, I learned with great regret that due to the failure to collect an A319, Airbus had sent to AP Fleet a termination notice in respect of the A320 aircraft to be delivered in 2013 and 2014.*
>
> *I asked the CEO of the company, Soeren Ferre, to immediately inform me about the reasons for the non-collection by AP Fleet of aircraft MSN 5018. I have received comprehensive explanations for the reasons by both AP Fleet and Airbus and I realized that this situation was the outcome of a lack of clarity and cooperation, from both sides, in the months of February and March.*
>
> *Considering that, regardless of which party is right, the situation had to be immediately resolved, just to avoid that this stalemate could worsen and the position of both parties could deteriorate even more, last night I gave directions for the aircraft to be immediately sold, even incurring a loss. This morning, Soeren Ferre gave me confirmation of having reached an agreement with a leading lessor for the sale of aircraft MSN 5018, that within the next week a LoI shall be signed that the sale transaction and consequent delivery of the aircraft to Alitalia shall be finalised considering the minimum lead time required.*
>
> *I also want to reassure you on future deliveries, the remaining aircraft to be delivered in 2012 are covered with a loan guaranteed by SACE and by a leading lessor, the 7 aircraft for delivery in 2013 and the first two to be delivered in 2014 are already covered, and the remaining 5 of 2014 we are providing to mobilise funding. The above-mentioned strategy has been already anticipated to your management and confirmed in a letter sent today.*
>
> *Based on the above, I ask you to intervene with your people so that the termination notice is put aside and a peaceful cooperative atmosphere restored….*"

83. On the same date Ms Raimondi of APFL wrote a far more aggressive letter to Airbus, rejecting Airbus's entitlement to terminate part of the APA and reiterating APFL's claims about a damaged flap on MSN 5018 and Airbus' failure to provide Backstop Finance for that aircraft. Nevertheless, she proceeded to state that APFL would approach SACE for finance for the remaining 2012 aircraft and had signed a letter of intent with CALC for the sale of the remaining five A320s scheduled for delivery in 2013 (in addition to the existing sale of two aircraft in each of 2013 and 2014).

84. Airbus responded on 12 April 2012, noting that, as regards commercial arrangements which APFL was contemplating in relation to 2013 and 2014 aircraft, the APA had been terminated in relation to those aircraft.

85. On 17 April 2012 Ms Raimondi wrote to Airbus, enclosing a letter from CALC confirming that (i) it had entered a fully binding and deposited agreement with APFL for the acquisition of four A320s to be delivered in 2013 and 2014; and (ii) it had signed a letter of intent with APFL in relation to five further A320s for delivery in 2013. Ms Raimondi concluded by asserting that it was clearly unreasonable to terminate the APA in respect of 14 aircraft because APFL had not yet taken delivery of one aircraft.

86. On 19 April 2012 Mr Bergonzi sent an email to various other board members and Mr Ferré, setting out his thoughts on the company's problems:

> "*My comments are that the problems of the company don't lie either in the organisation or in the management of technical and administrative activities.*
>
> *….*
>
> *The real problems of the company are the relationships with Airbus and Alitalia, which have been deeply discussed during the board, and the drop of the lease rates, which don't allow to do the leasing operations with profit.*
>
> *Therefore the strategy to sell the aircraft with some margin is correct because [this] avoids also the problems of the Banks financing which are difficult or almost impossible, to obtain and are conditioned by a huge amount of equity and to the increase of interest rates.*
>
> *In consideration of what was said above Soeren, with the support of the board, has to work with Airbus in order to convince them to withdraw their cancellation letter.*
>
> *Moreover, it will be necessary to renegotiate with Alitalia the problem of the A319/A320 deliveries of next year, and in parallel to try to convince Ascend to increase the lease rate in order to render the operations profitable.*
>
> *Should we not be able to succeed in the above target, it is better not to enter into leasing operations with losses, and to study the*

> *possibility to walk away from Airbus contract, with the exception of the aircraft that can be sold, under the condition that we are able to recover the PDPs in their hands. I know that it is difficult but we can try, and from my side I will take care of the problem of the lease rates with Ascend*"

87. Mr Ferré responded that he agreed with Mr Bergonzi's analysis, but added, with regard to lease rates, that APFL would be lucky if the downward trend stopped. When cross-examined, Mr Ferré accepted that the suggestion that Ascend might be persuaded to change its approach to lease rates was naïve. In due course APFL recorded that Ascend was indeed unwilling to modify its quarterly commentary just to serve APFL's interests.

88. On 19 June 2012 Mr Ferré sent an email to the APFL Board, recording that Airbus regarded the 2013 and 2014 aircraft as "gone". To reinstate the slots Airbus wanted:

i) the two A319s that were ready to be delivered, and this had been done;

ii) the remaining three A319s for 2012 to be financed;

iii) the four CALC aircraft to be placed, and this had been done;

iv) the five remaining 2013 aircraft to be placed to CALC – "*this is pending as they walked away from the LOI for a number of reasons*";

v) APFL to commit to lease the five 2014 aircraft to Alitalia. "*this we cannot accept. If Alitalia wants A319, I know already that I cannot trade or finance these planes – even if Alitalia wants A320, this won't be an easy ride either. I told Airbus that if they insist on this, they have to provide backstops as us committing to this, could lead us to the same issues (probably worse) than what we are facing now*."

89. It is apparent from the above that Mr Ferré was telling Airbus that they would have to agree to provide Backstop Finance if APFL was to lease 2014 aircraft to CAI, regardless of whether those aircraft were A320s or A319s.

90. Having received no response to her letter of 17 April 2012, Ms Raimondi wrote to Airbus again on 20 June 2012, referring to the fact that MSN 5018 had now been delivered to Orix, the sale to CALC and the LOI with CALC and suggesting that APFL had "*lived up to its commitment to Airbus*". Ms Raimondi did not disclose that CALC had in fact walked away from the LOI. Whilst not withdrawing broader allegations against Airbus, Ms Raimondi invited Airbus to withdraw the notice of termination and to reinstate the terminated aircraft.

91. On 22 June 2012 Airbus responded, reiterating that 2013 and 2014 aircraft had been terminated. Airbus did acknowledge that it had engaged in without prejudice communications about the possible sale of certain additional aircraft to APFL under strict new conditions, but stating that:

> "*…it will be of paramount importance that we establish credible and solid documentation with AP Fleet and CALC, so*

> *that Airbus can indeed rely on CALC's firm commitment to ultimately purchase and fund these aircraft.*"

92. At about this point, however, Airbus decided, perhaps unsurprisingly, that it was simpler and more profitable to sell directly to CALC, cutting out APFL and its profit margin. Much to Mr Ferré's annoyance, Airbus agreed to sell to CALC directly the five A320s it required in 2013.

93. With no realistic prospect of persuading Airbus to rescind its termination notice, APFL engaged in negotiations with Airbus for the termination of the relationship. It seems that, just before an agreement was reached, Airbus also cut APFL out of the sale of the two A320s APFL had agreed to on-sell to CALC in 2014.

94. By Amendment No. 11 to the APA executed on 19 September 2012, Airbus and APFL agreed:

    i) to a revised Delivery Schedule as at 5 April 2012 (the date of Airbus' Termination Notice), confirming that no aircraft were to be delivered in 2013 or 2014. APFL thereby agreed and accepted that the APA had been validly and effectively terminated to that extent;

    ii) that, in consideration of APFL paying a cancellation fee of US$2,000,000, the 17 A320 aircraft scheduled for delivery in 2015 and 2016 would be automatically and irrevocably cancelled on 15 January 2013;

    iii) that Airbus would sell two additional A320 aircraft to APFL in 2013, subject to CALC agreeing to purchase those aircraft if APFL failed to do so;

    iv) that Airbus would provide Backstop Finance in relation to the remaining three A319s due for delivery in 2012.

95. It will be apparent that, on execution of Amendment No 11, there was no longer any possibility that APFL could fulfil its obligations under the Framework Agreement: it had accepted that Airbus would deliver no more A320 family aircraft (save for two which were committed to CALC) and, indeed, a number of the aircraft were now being sold by Airbus directly to CALC.

The dispute as to CAI's entitlement to A319 aircraft

96. During 2012, whilst APFL was dealing with Airbus in relation to MSN 5018, the Termination Notice and Amendment No.11 to the APA, it was at the same time dealing, almost entirely separately, with CAI in relation to CAI's insistence on receiving A319 aircraft.

97. CAI's Strategic Plan dated 1 July 2011 (which was provided to APFL) was based on leasing 18 A319 aircraft (and no A320s) between 2012 and 2015. CAI was, of course, entitled to receive five A319s in 2012.

98. Thereafter CAI consistently asserted that the delivery of A319s was crucial to CAI's fleet plan and, moreover, that CAI had a right to opt for that version of the aircraft under the Framework Agreement and AA1, regardless of any difficulties APFL might

have in financing such aircraft. By way of example, on 7 October 2011 Mr Paolo Amato, Chief Financial Officer of CAI, wrote to Mr Ferré in the following terms:

> "*The options to choose A319s has been granted by AP Fleet in clause 4.2 of the FAA and the AA1, has not amended such rights, but indeed has confirmed them. Please note that the provisions you cited in your letter, I mean clause 2.2, confirm such option, because it is literally written that starting from 2013 and until 2015 a certain number of "A320 Family Aircraft" has to be delivered. Please note that Schedule 1 of the FA clearly states that "There is an option to change the type of A320 family aircraft from A320 to A319 or A321". There isn't any kind of waiver from Alitalia of such rights in the AA1 and so I am sorry to consider that, contractually, your position is not acceptable. Furthermore please, let me remind you that, as previously stated in our 5th of July 2011 letter, A319 aircraft are crucial for Alitalia fleet development plan; the reasons behind your difficulties to provide Alitalia all the A319s have been already stated in your letter dated 5th July 2011, but they do not change your obligation to deliver these aircraft. However, with respect to one of the reasons you mentioned, I have to remind you that Alitalia financial performances have been consistently improving since its start-up and that the company has already executed a number of significant refinancing transactions based on owned fleet.*"

99. On 13 January 2012 APFL, in the person of Ms Raimondi, notified CAI that it was proposing to deliver five A320s in 2013.

100. On 2 February 2012 Mr Ferré met Mr Amato and explained APFL's difficulties in obtaining finance for A319s, particularly when the lessee was a loss-making airline such as Alitalia. APFL's original case was that CAI, through Mr Amato, renounced the Framework Agreement at this meeting by insisting on delivery of only A319s in 2013. However, that contention was not pursued at trial, no doubt because Mr Ferré's evidence in his witness statement was that he left the meeting feeling confident that CAI's management might become more aligned to his position.

101. The next day Ms Raimondi wrote to CAI, referring to the meeting and stating:

> "*As noted in that meeting, and for the avoidance of doubt, we hereby confirm that from January 2013 onwards we will only deliver A320 aircraft to Alitalia.*
>
> *As previously communicated to you on several occasions, the current financing market is highly volatile with many prominent commercial financing institutions withdrawing completely from the aircraft financing business. In this turbulent environment, as we have noted, those commercial banks which APFL has approached for financing our upcoming deliveries have either refused outright to finance A319 aircraft or have indicated that they will only do so at conditions which*

> *are exorbitant and detrimental to our company. In such circumstances, it is evident that APFL is unable to provide A319 aircraft.*
>
> *In the meantime, I request that you confirm (by return) receipt of this letter and notification that only A320s will be delivered from January 2013 onwards.*"

102. On 9 February 2012 Mr Amato emailed Mr Ferré, objecting to the fact that their meeting of 2 February had been referred to in correspondence from APFL's Head of Legal, and further asserting that APFL was under a contractual obligation as to future A319 deliveries and that A319 aircraft were crucial for CAI's fleet development plan.

103. On 24 February 2012, Milbank Tweed, APFL's solicitors, wrote to CAI, demanding confirmation that A320s would be accepted, stating:

> "*Your failure to acknowledge our client's notifications that it is not only obliged to deliver, and indeed able to deliver, A320s from January 2013 onwards has given rise to a genuine and legitimate concern on our client's part regarding Alitalia's intention to honour its contractual obligations under the framework Agreement. In particular, it is concerned that you will refuse to accept delivery of A320 aircraft when the time for delivery arises.*
>
> *This position is entirely unacceptable. As you will appreciate, our client requires certainty in circumstances where significant costs are being incurred, and will be incurred, in relation to the delivery of A320 aircraft to your specification. Our client would need to take immediate steps in order to seek to mitigate its losses, including, in particular, engaging with Airbus, if your position (in breach of the Framework Agreement) is that you will not accept delivery.*
>
> *In those circumstances, our client hereby requests your written confirmation, within 7 days of the date of this letter, that you will accept delivery of A320 aircraft, in accordance with the Framework Agreement from January 2013 onwards. In the absence of this confirmation, our client will have no option but to:*
>
> *Assume that Alitalia no longer intends to honour its contractual obligations under the Framework Agreement:*
>
> *Take immediate steps in order to minimise its losses occasioned by your breach of contract; and*
>
> *Hold you entirely responsible for all and any losses it sustains, and seek to recover those losses from you by legal proceedings, if necessary.*"

104. On 15 March 2012 CAI wrote to Mr Ferré, responding to Ms Raimondi's letter of 3 February. CAI asserted a contractual right to be provided with A319 aircraft for 2013. The letter, which was copied to Mr Buckley at Airbus, stated as follows:

> "*We take due note of your statements about APFL difficulties in approaching the aircraft financing market and in providing Alitalia with A319 Aircraft for the 2013 year, nevertheless we are forced to remind [sic] your contractual obligation, arising out of the Framework Agreement, to provide us with A320 family aircraft, which includes A319 aircraft. Such obligation has been further confirmed with the Amendment Agreement N.1 dated 1 November 2010 which, in clause 2.2, provides for an aircraft delivery obligation, on a yearly basis.*
>
> *Therefore, since Alitalia has requested such type of Aircraft for 2013, we confirm Alitalia position and reject in its entirety the content of your letter.*"

105. On the same date CAI also replied to Milbank Tweed's letter of 24 February, rejecting APFL's argument and also raising the fact that APFL was in default by failing to deliver MSN 5018, stating as follows:

> "*We are really surprised in reading your attempt to build a "failure" of Alitalia for not acknowledging your Clients request, Indeed Alitalia has simply and clearly requested APFL to fulfil its obligation under the Framework Agreement for deliveries forecasted in 2013. Our surprise grows much more, considering that APFL is presently and clearly in default of its obligation with respect to deliveries for 2012. Notwithstanding Alitalia received a Delivery Notice from APFL for an A319 to be delivered on January 2012, Alitalia is still waiting for the actual delivery.*
>
> *To read that Alitalia's behaviours might give rise to "… a genuine and legitimate concern […] regarding Alitalia' intention to honour its contractual obligations under the Framework Agreement" is pretty original: your Client has a concern, but Alitalia is facing right now with an undisputable default from your Client.*
>
> *In the merit of your letter, please consider that Alitalia has confirmed to your Client its position on A319 aircraft several times and now, the same position is simply confirmed herein once again. The Framework Agreement grants Alitalia an option among A320 family, which includes A319 aircraft, and such flexibility rights remain subject only to Airbus industrial and planning constraints, not to the difficulties your Client is facing on the aircraft financial market. Your Client is obliged to delivery [sic] the A319 and such obligation has been further confirmed in clause 2.2 of the Amendment Agreement N.1 dated 1 November 2010.*

> ….
>
> *We do believe that your Client is not honouring its contractual obligations, and we are not arguing about a potential default, but a true and actual default for A319 deliveries of 2012.*
>
> *We therefore reserve the right to claim for relevant damages and to enforce the remedies provided by the Framework Agreement and all relevant documentation, as well as by applicable law.*"

106. APFL now relies upon CAI's two letters of 15 March 2012 as the point at which CAI renounced the Framework Agreement. It contends that that renunciation was continuing thereafter, CAI repeating its stance on numerous occasions, including in a letter from Mr Ragnetti (the new CEO of CAI) to APFL dated 29 May 2012, in which he reiterated that APFL had an unconditional obligation to deliver A319s in 2013 and that APFL's statement that it would not do so was itself a default.

107. On 2 April 2013 APFL applied to be joined as a party to an arbitration between Toto and CAI under the terms of the MA, APFL seeking to advance a counterclaim. The submissions made by APFL made it plain that APFL was purporting to terminate the Framework Agreement by reason of CAI's serious breach. APFL contends that it thereby accepted CAI's renunciation of the Framework Agreement. CAI does not dispute that, if there was an extant renunciation by CAI as at 2 April 2013, APFL's submissions of that date amounted to an acceptance of it.

The key issues of fact

108. It was common ground that, if CAI had renounced the Framework Agreement, it would nonetheless have a defence to APFL's claim for damages if APFL had, independently, rendered itself incapable of performing its obligations under the contract.

109. CAI argued that this arose by the application of the doctrine of frustration: it had become impossible for either party to perform the Framework Agreement once Airbus had terminated the 2013 and 2014 aircraft deliveries and certainly once Amendment No. 1 had been executed. CAI submitted that, whilst APFL would not be entitled to rely on the doctrine as the frustration was "self-induced" from its perspective, CAI (as the innocent party in this context) was so entitled: *FC Shepherd & Co Ltd. v Jerrom* [1987] 1 QB 301 per Mustill LJ at 325H.

110. However, I accept Mr Stanley QC's argument, for AFPL, that the doctrine of frustration is not applicable on the facts of this case. Frustration of a contract can only arise where responsibility for the matters which give rise to the impossibility of performance is not allocated in the contract, either expressly or implicitly: *National Carriers Ltd. v Panalpina (Northern) Ltd* [1981] AC 675. In the present case, APFL's obligations under the Framework Agreement (including undertaking to exercise options under the APA as directed by CAI) were wholly dependent on the APA remaining in force, a contract to which it (and not CAI) was to become a party. It was plainly necessary, in order to give business efficacy to the Framework

Agreement, to imply a term that APFL would not act so as to permit Airbus to terminate the APA or any relevant part of it.

111. APFL accepted, however (and CAI naturally did not demur), that it was a potential defence to a claim for damages for renunciation if the innocent party was not itself ready or willing to perform the contract, referring to *Acre 1127 Ltd (in liq) v De Montfort Fine Art Ltd* [2011] EWCA Civ 87 per Tomlinson LJ at §51:

> "*It is equally clear in my judgment that Castle can recover no damages from De Montfort consequent upon De Montfort's repudiatory breach of the agreement. Whilst Castle did not immediately terminate the contract on account of De Montfort's repudiatory breach, Castle was neither ready nor willing to perform the contract itself and it did not seek further performance from De Montfort. In such circumstances Castle can in my judgment maintain no claim against De Montfort. The situation is analogous to that discussed in cases such as Braithwaite v Foreign Hardwood Company (1905) 2KB 543, British and Benington's Ltd v North Western Cachar Tea Co (O1923) AC 48 and Cooper, Ewing & Co Ltd v Hamel & Horley Ltd (1923) 13 LI L Rep 590. Cases such as these establish the principle that a repudiating party has a defence to a claim in respect of that breach by the innocent party, if he can establish that, at the time of the repudiation, the innocent party was already irremediably disabled from performance, provided that that inability to perform on the part of the innocent party is not itself attributable to the repudiatory breach.*"

112. Mr Stanley emphasised the qualification that the defence did not arise if the inability to perform was itself attributable to the renunciation.

113. In that context, Mr Stanley further accepted that, although the onus was on CAI to establish impossibility, that onus was met: Airbus' termination of the 2013 and 2014 aircraft deliveries, its refusal to reinstate those deliveries, and the entry of Amendment No. 11 did indeed result in APFL being unable to perform the Framework Agreement at any time after 19 September 2012.

114. However, Mr Stanley submitted that such impossibility or inability was attributable to CAI's renunciation, and so did not provide CAI with a defence. He recognised that the burden was on APFL to establish that causative link, but contended that such a link was made out by the evidence.

115. I accept Mr Stanley's analysis of the law and his identification of the issues to which it gives rise in this case. But whatever the right analysis, it was common ground that the key factual issues for determination are whether CAI's alleged renunciation caused or materially contributed to (i) Airbus serving its termination notice; (ii) Airbus' failure to reinstate the 2013 and 2014 aircraft and/or (iii) the entry of Amendment No. 11 to the APA.

Did CAI's stance materially contribute to Airbus serving the termination notice?

116. APFL recognised in its written closing submissions that the non-delivery of MSN 5018 was "*the occasion for and, no doubt, one of the reasons for, Airbus' termination*". However, it further contended that such action:

> "*...is likely to have been influenced by CAI's known refusal to take delivery in 2013. That changed the commercial calculus for Airbus; it provided positive reasons to want to terminate 'slots' which APFL might otherwise (contrary to Airbus' commercial interests) try to trade to airlines other than CAI; and it removed any positive benefit to Airbus of maintaining those slots for the benefit of its Italian market share.*"

117. However, there is no direct evidence to the effect that Airbus' action was in any way influenced by CAI's alleged renunciation in relation to A319s. No witness was called and no statement adduced from anyone with knowledge of Airbus' decision-making process. Mr Riccardo Toto gave oral evidence of an alleged comment by Mr de Castelbajac on 4 April 2012 suggesting that CAI's stance was a relevant factor in Airbus' decision, but that evidence is not relied upon by APFL and I discount it entirely for the reasons given above.

118. Neither do the contemporaneous documents provide any evidence whatsoever of CAI's stance being a factor in Airbus' decision to serve a notice of termination. In the chain of correspondence leading up to the termination, Airbus simply complains about APFL's failure to take delivery of MSN 5018 and responds to APFL's spurious justifications and counter-allegations in relation to that aircraft. The correspondence shows a straightforward process of escalation by Airbus, entirely focused on a clear and serious default by APFL, leading to formal notification on 7 March 2012 that APFL had 15 business days in which to cure that default. The sole reason Airbus gave for issuing the notice of termination was that APFL failed to accept, pay for and take delivery of MSN 5018 after being given formal notice under the contract that it must do so.

119. The position is confirmed by Mr Carlo Toto's letter of 6 April 2012, in which he states that he has received "*comprehensive explanations from both AP Fleet and Airbus*": those explanations related to a lack of clarity and cooperation between APFL and Airbus, no mention being made of CAI.

120. APFL's contention was therefore based solely on an inference it seeks to draw as to Airbus' unexpressed motivations in effecting the termination. The argument was as follows:

i) Despite issues with MSN 5018, Airbus had no wish to cease trading with APFL, as evidenced by the fact that it did not terminate the whole of the APA;

ii) Airbus had known for some time (stretching back to at least 2011) of CAI's strong preference for A319s;

iii) Airbus then saw CAI's letter of 15 March 2012, asserting a contractual right to A319s;

iv) Airbus would therefore have realised that APFL would not be able to lease aircraft to CAI in 2013 and 2014, removing much if not all of the commercial attractiveness of selling to APFL in those years;

v) The proper inference, at least on the balance of probabilities, is that Airbus' decision to terminate aircraft for 2013 and 2014 was materially influenced by such commercial considerations, informed by CAI's stance in relation to A319s.

121. The immediate problem with that argument is that Airbus had already served notice giving APFL 15 days to remedy its default on 7 March 2012, some days before it saw CAI's letter of 15 March 2012, relied upon by APFL as the (first) renunciation of the Framework Agreement. APFL therefore cannot argue that the giving of such notice (a serious and formal step in itself) was influenced by CAI's alleged renunciation, so must invite an inference that Airbus would not (or might not) have followed through with its threat to terminate were it not for sight of CAI's letter of 15 March 2012.

122. I can see no possible basis for such a finding. It was common ground that leaving an aircraft on the tarmac was a matter of grave concern to Airbus. APFL was refusing to take delivery of MSN 5018, mounting spurious arguments to justify that stance, refusing to back down and threatening litigation. Once Airbus had taken the step of giving formal notice of default, it was highly unlikely to be withdrawn without APFL performing or, at the very least, accepting its obligation and making acceptable concrete proposals acceptable.

123. In any event, as APFL itself points out, Airbus was already fully aware of CAI's strong preference for A319s and had consistently taken the view (not surprisingly) that the A319 was a good aircraft and that, although financing was an issue, if CAI really wanted them, there would be a way of making that work. It is unclear why CAI's letter of 15 March 2012 would have changed Airbus' view in any material way. CAI was asserting that it had a contractual right to A319s: that was either correct, in which case there was no change, or it was incorrect, in which case CAI would be obliged to take A320s if it could not agree a resolution in the meantime,

124. I accept CAI's submission that the proper inference, to the extent that one can be drawn without engaging in pure speculation, is that Airbus had finally lost patience with APFL's failure to perform its obligations under the APA, continually requiring Airbus to bail it out by providing financing, leasing directly to CAI and cancelling or rescheduling deliveries. Airbus had been "*close...to taking an alternative decision*" (that is, to terminate the APA) in December 2009 and was "*really...at the end of road*" in October 2010, its Board feeling "*intense frustration that the relationship with AP Fleet is one of constant crisis management.*"

125. In those circumstances it is not in the least surprising that a further default in early 2012, indicative of APFL's inability to finance any of the aircraft due for delivery that year, would trigger a termination process. It was made all the more inevitable, in my judgment, by the aggressive and dishonest denials and allegations put forward by APFL (Mr Ferré accepting in cross-examination that lying was a "style" he adopted in negotiating). I conclude that it was inevitable that Airbus would terminate the APA in the circumstances of APFL's further blatant default, regardless of any stance CAI was adopting in relation to A319s.

Did CAI's stance materially contribute to Airbus refusing to reinstate deliveries?

126. There is again no direct evidence that Airbus had any regard to CAI's position in relation to A319s in considering (to the extent that it did), whether to reinstate the cancelled 2013 and 2014 aircraft. The absence of any reference in the documents is telling. If Airbus had been genuinely concerned by CAI's stance (which was inconsistent with the APA), it would surely have asked APFL (or CAI) what the basis was for CAI's assertion that it had a contractual right to receive only A319s, but it never did so.

127. Neither did APFL ever suggest to CAI that its stance was inhibiting negotiations with Airbus: indeed, APFL at no point even told CAI that Airbus had terminated deliveries, strongly suggesting that APFL did not consider that CAI was responsible for such termination or its non-reversal. As CAI points out, APFL was quick to make allegations that CAI's conduct was causing it to lose contracts with lessors and equally quick to threaten litigation. On 5 February 2013, when Mr Riccardo Toto thought APFL might lose a finance deal with ICBC because of a delay due to CAI needing board approval, he emailed CAI stating: "*This is not acceptable, We are loosing the deal."* and later the same day emphasised "*We are loosing the deal for your responsibility*". The contrasting silence from APFL on the issue of Airbus' termination, throughout the process, demonstrates that CAI was not seen by APFL as an impediment in that regard.

128. In the absence of any direct evidence to support its contention, APFL nevertheless again invites an inference that, in the period after the termination notice, Airbus might have reinstated the 2013 and 2014 aircraft but for CAI's insistence on taking only A320s. APFL relies upon the fact that Airbus did not terminate the whole of the APA on 5 April 2012, but wished to have a constructive ongoing relationship with APFL (including selling further aircraft from 2015), and that it did indeed engage in negotiations for the re-instatement of both 2013 and 2014 aircraft. APFL argues that there must have been at least a chance that the outcome of those negotiations would have been different, and those aircraft reinstated, if CAI had been willing to take the more easily financed A320 aircraft.

129. In my judgment that contention is without merit for the following reasons:

    i) Airbus' decision in April 2012 to leave the APA in place in relation to deliveries after 2014 is plainly explicable on the basis that there was no need, at that point, to release APFL from obligations in relation to 2015 and onward, for which aircraft production would not yet have commenced. As APFL was in continuing default in relation to MSN 5018 and was unlikely to meet obligations in relation to other aircraft, Airbus retained the option of terminating those future years at any time. What Airbus made entirely clear to APFL, in every communication, was that 2013 and 2014 deliveries were firmly cancelled and no longer part of the APA;

    ii) It is plain from the correspondence, and from Mr Ferré's record of his discussions with Airbus, that Airbus was unwilling to accept any exposure whatsoever in relation to the 2013 aircraft, and so, in order to reinstate them, required a firm commitment from CALC to purchase two (plus two more in 2014) and to lease a further five. These aircraft were not to be leased to CAI

and so CAI's stance on type of aircraft was irrelevant to whether or not they would be reinstated;

iii) In any event, the obvious answer for Airbus (and CALC) was that it was preferable and more profitable to sell directly to CALC, and this is precisely what happened in relation to seven of the aircraft. It is apparent that this had already been put in train by the time of the discussions recorded by Mr Ferré, as CALC had, by then, "*walked away*" from the Letter of Intent it had signed with APFL. It is not arguable that CAI's stance in any way affected Airbus's decision to sell to CALC rather than to APFL;

iv) According to Mr Ferré, Airbus did stipulate that 2014 aircraft, if reinstated, would have to be leased to CAI, but Mr Ferré recorded on 19 June 2012 that he told Airbus that APFL could not commit to that (whether the aircraft were A320s or A319s) without Airbus agreeing to provide Backstop Finance for all of them, because it would be difficult to obtain other financing for any aircraft. Mr Ferré suggested in cross-examination that what he actually said to Airbus was that APFL could not commit unless it was determined that the aircraft would be A320s, but this is not what he recorded at the time and I reject his attempt to revise his account five years after it was written;

v) It was, accordingly, irrelevant to Airbus whether CAI was insisting on A319s in 2014 because it would have to provide Backstop Financing for A320s in any event, which is something it was plainly not prepared to do;

vi) More generally, I consider it was unlikely in the extreme that Airbus, having taken the decision to terminate, would have been willing to re-instate aircraft without some serious improvement in APFL's ability to perform its obligations. It is inconceivable that Airbus would have agreed simply to revert to the arrangements in place until 5 April 2012, which had resulted in constant crisis management. A change in CAI's stance would not have been such a serious improvement.

130. I conclude that CAI's stance as to A319s played no part whatsoever in Airbus' refusal to reinstate the 2013 and 2014 deliveries.

Did CAI's stance materially contribute to APFL entering Amendment No. 11?

131. Whilst there is technically a separate issue as to whether, but for CAI's renunciation, APFL would have entered Amendment No 11 to the APA, that agreement was the inevitable result of Airbus' refusal to reinstate the 2013 and 2014 aircraft, depriving APFL of its future income and of any assets to trade. As is apparent from Mr Bergonzi's and Mr Ferré's emails in April 2012, APFL recognised that, absent such reinstatement, its only option was to seek cancellation of all commitment and seek the return of PDPs. CAI's stance was therefore no more a cause of APFL entering Amendment No 11 than it was a cause of Airbus refusing to reinstate deliveries in 2013 and 2014.

Conclusion on impossibility of performance

132. I therefore conclude that, on the evidence, APFL was entirely responsible for rendering itself unable to perform its obligations under the Framework Agreement and that CAI's alleged renunciation was not a factor in such impossibility arising. APFL has not come close to discharging the burden of establishing that Airbus's actions were in any way influenced by CAI's stance in relation to its entitlement to A319s.

Conclusion on APFL's claim

133. It follows that, on the basis of the legal propositions advanced by APFL and the above findings of fact, CAI has a complete defence to APFL's claim as APFL would not have been able to perform its obligations under the Framework Agreement in any event, independently of CAI's alleged renunciation.

134. As APFL's claim fails on the facts, I do not propose to decide the numerous issues which would otherwise have arisen in relation to whether CAI's incorrect assertions of the contractual position amounted to a renunciation, whether that renunciation was continuing and/or whether APFL affirmed the Framework Agreement by relying on its terms in various respects. Neither is it necessary for me to embark on the complex exercise of assessing the damages claimed by AFPL.

CAI's counterclaim

135. CAI's counterclaim raises complex issues, but appears to be of little commercial significance. CAI has an arbitration award against Toto, APFL's parent company, and Toto is paying that award by agreed instalments. A declaration or other determination that APFL is liable for the same sums if Toto defaults would seem to be of dubious value. It is nevertheless necessary to determine the counterclaim on its merits.

The relevant contractual provisions

136. The claim is under clause 8.7 of the Framework Agreement, providing that if Toto fails to pay "*any amount*" to CAI under the MA which "*falls due*" on or prior to 11 December 2013, APFL shall, 5 business days after CAI notifies APFL of such failure, pay "*any amount due and owing but unpaid*" to CAI. The central issue in the counterclaim is what liabilities, if any, Toto had incurred to CAI pursuant to the MA as at that date: it is not disputed that Toto ultimately became liable to CAI for €40.2m, as explained below.

137. By article 9(10) of the MA, Toto represented and warranted that the Air One subsidiaries had correctly and promptly paid any tax due.

138. Article 12.1.1 of the MA provided as follows:

> "*[Toto[3]] will be obligated to indemnify and hold harmless, under the terms and conditions indicated below, CAI …*

[3] Although the clause refers to AP Holdings SpA, Toto was jointly liable by virtue of article 12.1.5.

> *(a) For each and every instance of Damage suffered or experienced by CAI and/or [Air One] and/or one of the Subsidiary … as a result of or in relation to the inaccuracy or non-truthfulness, even partial, of the Representations and Warranties ….*"

139. "*Damage*" was defined widely as "*any liability, loss, damage (direct and/or indirect), charge, cost (including defence costs) of any kind or nature whatsoever, sustained or incurred by*" CAI.

140. CAI belatedly mounted an alternative case, not pleaded but advanced in closing argument, that Toto was also liable to CAI under article 12.1.4 of the MA, which provides (when properly translated) that if CAI takes advantage of a "Pardon" at the request of Toto, Toto will bear the tax/cost. However, in my judgment this provision plainly relates to the offer of a general pardon ("condono") which a taxpayer may, in the words of the article "*take advantage of*", not an individual tax settlement.

141. Article 12.2 of the MA set out the procedure for an indemnity claim. It provides for a notification and a response from Toto (within 20 business days in relation to a tax claim). Toto will be liable to pay CAI following ascertainment of the Damage, if necessary following an arbitration. However, the obligation to pay is accelerated under article 12.2.5:

> "*...in the event of a Third Party demand [Toto]...will be obligated to make available to CAI the sums necessary for the regular fulfilment of the obligations relating to the findings, injunctions, or measures of any authority which, even if they are not definitive, are immediately enforceable based on the current legislation, and which constitute for CAI an outlay that may not be delayed…the payment of these amounts must be made by [Toto] to CAI at least three (3) Business Days before the date indicated for the payment in the order of payment, sent by the third party to CAI…* "

The relevant facts

142. In about June 2013 the Italian Fiscal Police reported that the 15 subsidiaries of Air One (all incorporated in Ireland) had been domiciled in Italy and had not paid Italian tax dating back many years, estimating unpaid tax and fines of some €250m. The reports did not constitute any form of order to pay, but were provided to the Italian Revenue Agency.

143. The claims were disputed by Air One and Toto, but CAI (now the owner of Air One and its subsidiaries) issued letters of demand against Toto under the provisions of the MA.

144. The Air One subsidiaries entered discussions with the Revenue Agency, as contemplated by Article 6 of the *Decreto Legislativo no. 218 of 19 June 1997* ("the Decree").

145. On 10 December 2013 (one day before the cut-off date in clause 8.7 of the Framework Agreement), the Air One subsidiaries met the Revenue Agency and signed the "*Proceso Verbale*" or the Minutes of Meeting. The Minutes recorded (in Italian) that a "*definitive settlement*" for the tax periods 2002 to 2008 was reached, totalling €38.4m, and further stated that:

> "*In the light of the above, the hypothetical settlement illustrated in the present document may be summarised in the following table: and the interest ex lege should be added (susceptible to later calculation at the time of the settlement of the individual acts on the basis of the accounting to be conducted after the effective date of each settlement).*"

146. APFL accepts that this was an *Accertamento con adesione*, or Tax Settlement deed, as provided for in Articles 1 and 7 of the Decree, but contends that, as recorded in minutes of a meeting of CAI's board the very same day, it was a "*framework agreement, which shall define criteria for determination of the taxable amounts and taxes for the years 2003-2008*".

147. APFL contends that the settlement did not become final and binding until the issue to each subsidiary, in respect of each tax year, of a *Modalita di Pagamento* ("MdP"), formally setting out the amounts due (and in some cases differing slightly from those set out in the *Accertamento*) and the payment of the first instalment by the subsidiary. APFL refers to paras 8 and 9 of the Decree, which provide that the Revenue Agency will provide the taxpayer with a copy of the tax settlement after the first payment and that the "definition" of the agreement is finalised with that payment.

148. CAI, on the other hand, supported by its expert on Italian law, Avv Cigolini contends that the effect of the Decree is that, on the first payment, the *Accertamento* becomes binding as from the date is was entered, that is to say, retrospectively.

149. MdPs were issued to the subsidiaries on various dates. One of the subsidiaries, Challey Ltd, received the demand in respect of 2002 on 10 December 2013 and paid the first instalment of €276,118.11 on 11 December 2013. Others were received on 12 December 2013 (and the first instalment was paid on 13 December) and on 17 December 2013 (the first instalment being paid on 19 December 2013).

150. Toto disputed its liability to pay CAI. On 12 March 2015 CAI commenced a second arbitration against Toto in Milan before a tribunal chaired by Mr Mourre. On 17 February 2017 the tribunal awarded CAI the sum of €40.2m ("the Mourre Award").

151. Following a challenge to the Mourre Award in the Italian courts, CAI and Toto concluded a settlement agreement, to which APFL was party. The settlement encompassed Toto's liability under the Mourre Award and other unrelated matters. The agreement provided that Toto would pay CAI €61 million, in monthly instalments from June 2017 until November 2019, and that CAI could not enforce the Mourre Award unless Toto defaulted on such payments. Toto agreed to discontinue its appeal against the Mourre Award. At the end of the trial Toto remained up to date with instalment payments.

152. Accordingly, although CAI claims the total amount of the Mourre Award (€40.2m plus €1,127,420.61 legal fees relating to the tax settlement), it accepts that that sum will be reduced as Toto makes instalment payments and that CAI would not enforce its "cause of action" whilst and to the extent that instalments are paid. Alternatively, CAI claims an appropriate declaration of APFL's alleged contingent liability.

The issues

When the Air One subsidiaries became liable for unpaid tax, giving rise to "Damage".

153. CAI contends (although only as its secondary argument) that the Air One subsidiaries' liability arose in the years 2002-2008, or when the Fiscal Police issued their reports in June 2013. However, CAI did not adduce any evidence to demonstrate that there was in fact liability in those years, and it is clear that the Police reports did not create any fresh liability. Nor can it be said that the Air One subsidiaries acknowledged or agreed that they were liable: the settlement in the *Accertamento* was reached expressly without admission of liability.

154. It follows that, as APFL contended, and the experts ultimately agreed, the source of the tax liability was the *Accertamento* concluded on 10 December 2013.

155. As the *Accertamento* was the source of liability, APFL must be right that it is necessary to consider when that settlement came into force. It was common ground that articles 8 and 9 of the Decree applied, providing that the settlement was not "finalised" until the first payment was made, but the Italian law experts disagreed as to whether this was a precondition of liability (as Professor del Prato contended) or, effectively, a condition subsequent (as Avv Cigolini argued).

156. In my judgment the clear intent of articles 8 and 9 of the Decree is to ensure that a taxpayer cannot rely on the compromise (that is to say, reduction) of its liabilities until it has made the payment agreed, or where payment by instalments is agreed, the first instalment and a guarantee of future payments. The fact that the taxpayer is not even provided with a copy of the *Accertamento* until after that payment confirms, in my judgment, that the tax settlement is not final and binding until then. That appears to be precisely what article 9 provides, and it is unclear why, in the usual case, there would not be any need for retrospective effect.

157. It follows that, save for the payment by Challey Ltd in relation to 2002, none of the settlement liabilities came into force until after 11 December 2013.

When did Toto become liable to make payments to CAI?

158. APFL accepts that Toto became liable to CAI three business days before the payment dates specified in the MdPs pursuant to article 12.2.5, but with the caveat that no such liability could arise until a first payment instalment had been paid. In my judgment that analysis follows from my conclusion above and is correct.

159. It follows that Toto's only liability to CAI on 11 December 2009 was in respect of the €276,118.11 paid by Challey Ltd on that date.

APFL's liability to CAI under the Framework Agreement

160. APFL contends that, even in relation to the €276,118.11, that sum is not "due and owing but unpaid by Toto" within the meaning of clause 8.7 of the Framework Agreement as it has been subsumed in the August 2017 settlement agreement, under which no sums are due and owing but unpaid.

161. However, CAI made demand of APFL under clause 8.7 in April 2015, at which point, even on APFL's case, Toto was in default in respect of its obligation to pay €276,118.11 to CAI. On the making of such demand, APFL's liability in respect of that unpaid sum crystallised. A subsequent agreement by the creditor, CAI, to compromise or defer the liability of the principal debtor, Toto, might have discharged APFL's liability if it was a true guarantor, but APFL disclaims any such defence, recognising the difficulty in relying on it in circumstances where APFL was itself party to the settlement agreement in question.

Conclusion on the counterclaim

162. CAI is accordingly entitled to judgment for €276,118.11, together with interest from 11 December 2013. It would be appropriate to record CAI's undertaking not to enforce that judgment unless and until Toto defaults on its payment obligations under the August 2017 Settlement.