Neutral Citation Number: [2018] EWHC 519 (Comm)

Case No: CL-2016-000783

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2018

**Before** :

**Mrs Justice Cockerill DBE**

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**Between :**

| | |
|---|---|
| **AQUILA WSA AVIATION OPPORTUNITIES II LIMITED** | **Claimant** |
| **- and -** | |
| **ONUR AIR TASIMACILIK AS** | **Defendant** |

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**David Caplan** (instructed by **White & Case LLP**) for the **Claimant**
**Stephen Cogley QC** (instructed by **Freeths LLP**) for the **Defendant**

Hearing dates: 17 February 2018

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# Approved Judgment

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

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MRS JUSTICE COCKERILL

## Mrs Justice Cockerill:

1. This is an application for summary judgment brought by the Claimant ("Aquila") against the Defendant ("Onur") arising out of an agreement to lease an aircraft engine ("the Engine") dated 11 September 2015 ("the Lease").

2. Aquila is an Irish company and its activities include leasing aircraft and aircraft-related assets. Onur is a commercial airline based in Turkey which operates a fleet of around 25 aircraft.

3. On 11 September 2015, the parties entered into the Lease. The Lease was made up of two parts: a set of standard International Air Transport Association Master Short Term Engine Lease Agreement terms ("the Master Agreement") and various bespoke terms presented in a document entitled "Lease Agreement" ("the Lease Agreement").

4. At the time of conclusion of this agreement Onur signed a key document in this dispute – an acceptance certificate ("the Acceptance Certificate"). As will be explained further below, the provision of such a document was contemplated by the terms of the Lease. The terms of the Acceptance Certificate as given are as follows:

> "[Onur] hereby confirms to [Aquila] that: (i) [Onur] has unconditionally accepted the Engine for all purposes hereof and of the [Lease]; (ii) [Onur] has inspected the Engine and the Engine satisfies the conditions set forth in the [Lease] and this Acceptance Certificate constitutes conclusive proof that the Engine satisfies such conditions; and (iii) [Onur] has no rights and/or claims against [Aquila] with respect to the delivery condition of the Engine."

5. Unlike many aircraft lease arrangements, the Lease in this case was a very short term arrangement, with an anticipated duration of just 10 months from September 2015. The Engine was required by Onur as a stop-gap, to temporarily cover one of Onur's other PW4168 engines whilst it underwent a shop visit. That gap was actually only 90 days, but 10 months was the minimum term available in the market at the time.

6. The Engine had first been marketed to Onur by TES Parts Ltd ("TES"), which was responsible for the bulk of the negotiations leading to the Agreement on behalf of World Star Aviation ("WSA"), whose vehicle, Aquila, came to own the Engine.

7. The Engine was delivered on 22 September 2015. Onur says that it manifested a number of problems from an early stage. On 25 December 2015, however, it is common ground that a major failure occurred. The aircraft upon which the Engine had been installed experienced a "surge event" associated with a failure of the Engine as the aircraft was in the climb phase following its take off, on a flight with 186 passengers and 10 crew on board. Fortunately the air crew were able to make an emergency landing and there was no loss of life or serious injury to passengers or crew. The Engine was thereafter removed from the aircraft and has not been used since.

8. It is Onur's case that the cause of the failure was a "latent defect" in the high pressure turbine module in that the Engine's 1st stage HPT Brush Seal Support and inner air seal were defective and liable to complete failure at any point ("the Defect"). This, Onur says, rendered the Engine inoperable for passenger carrier purposes. Onur says that the Defect would or ought to have been known to Aquila, because there had been 58 reports of Part 55 cracking and 15 instances of the Defect causing an in-flight shutdown as at early 2012 and in particular because the Defect had in March 2012 been made the subject of an Airworthiness Directive ("AD") – AD 2012-18-03 – issued by the Federal Aviation Administration, as well as a "Service Bulletin" issued by the Engine's manufacturers. The AD did not require any immediate action, but did require all potentially affected engines to have the relevant parts examined and/or replaced the next time the HPT module was removed from the engine.

9. Onur says that the consequence of the Defect was that the Engine was a "ticking time bomb" when it was delivered under the Lease.

10. What is in focus before me however is not the evidence as to the cause of this failure, but a preliminary point which is, in summary, whether Onur's defences have any real prospect of success or whether the terms of the Lease and the Acceptance Certificate preclude any such defences.

**The relevant contractual background**

11. There is not a lot between the parties on what the various contractual documents say. In summary the relevant provisions are as follows.

12. Clause 5 of the Master Agreement provides:

> "***WITHOUT PREJUDICE TO 2.2.2, 2.3, 9 OR 12, THE ENGINE PACKAGE IS TO BE DELIVERED AND LEASED HEREUNDER 'AS IS, WHERE IS'.***
> ***SAVE AS EXPRESSLY STATED IN THIS AGREEMENT, PARTIES UNCONDITIONALLY AGREE AS FOLLOWS, IT BEING EMPHASISED THAT THE FOLLOWING IS FUNDAMENTAL TO THE TERMS OF THIS AGREEMENT:***
>
> ***(i) LESSOR MAKES NO WARRANTIES, GUARANTEES OR REPRESENTATIONS OF ANY KIND, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, WITH REGARD TO THE ENGINE PACKAGE; AND***
>
> ***(ii) LESSEE WAIVES ALL RIGHTS, REMEDIES AND DAMAGES, INCLUDING INCIDENTAL AND CONSEQUENTIAL DAMAGES, EXPRESS OR IMPLIED, ARISING BY LAW OR OTHERWISE, WITH REGARD TO THE ENGINE PACKAGE, AND LESSOR IN THAT CAPACITY (AND, FOR THE AVOIDANCE OF DOUBT, ITS INSURERS) SHALL HAVE NO LIABILITY THEREFORE.***
>
> ***NOTHING IN 5(II) SHALL AFFECT THE LEGAL LIABILITY OF LESSOR, IF ANY, UNDER LAW ARISING FROM ITS WILLFUL MISCONDUCT OR GROSS NEGLIGENCE PROVIDED THAT***

> ***NEITHER THE TERMS OF THIS AGREEMENT NOR LESSOR'S CAPACITY HEREUNDER SHALL ITSELF EXPAND ANY SUCH LIABILITY."***

("Engine Package" is elsewhere defined as the Engine and certain documentation relating to it.)

13. There was an option in the Master Agreement to have an acceptance certificate as a condition precedent to delivery. That option was taken and delivery of the Engine Package was agreed to occur at the time and date shown on the Acceptance Certificate.

14. The Lease Agreement inserted a new Clause 2.4.5 into the Master Agreement. That Clause had two features. First, it recorded that the Engine was to be delivered to Onur "as is, where is" substantially in compliance with four delivery conditions ("the Delivery Conditions").

15. Those Delivery Conditions were that the Engine would be (inter alia):

    (1) Fresh from a "C" Check or equivalent level of inspection as pertaining to the Engine as required under the latest revision of Boeing or Airbus Maintenance Planning Document ("Delivery Condition 1");

    (2) Capable of certified, full rated performance without limitation throughout the entire operating envelope ("Delivery Condition 2");

    (3) Fresh from a hot and cold borescope ("Delivery Condition 3" – which is not relevant to the dispute before me);

    (4) Free from any reduced interval repetitive inspection requirement and the Engine shall not be on watch ("Delivery Condition 4").

16. The second part of Clause 2.4.5 then linked to the Acceptance Certificate, stating:

> "[b]y signing the Acceptance Certificate, [Onur] confirms that [it] had the opportunity to fully inspect the Engine Package to its full satisfaction and to satisfy itself that the Engine Package is in accordance with the delivery conditions set out in this [Lease] on the date of delivery."

17. The form of the Acceptance Certificate was prescribed and equated to the Acceptance Certificate in fact given. It stated (as set out above) that Onur had unconditionally accepted the Engine, it had inspected the Engine, that the Acceptance Certificate constituted conclusive proof that the Engine satisfied the conditions set forth in the Lease, and that Onur had no rights and/or claims against Aquila with respect to the delivery condition of the Engine. The signature of the Acceptance Certificate in this prescribed form was a condition precedent to delivery of the Engine Package and commencement of the term of the lease.

18. Other relevant clauses include the following:

i) Clause 4.6.1 of the Master Agreement provided that Onur was obliged to procure that routine scheduled, condition-monitored, and on-condition line maintenance was performed on the Engine Package, in accordance with applicable regulatory and industry standards;

ii) Under Clause 4.6.2 Onur was to be generally responsible for the costs of repairing damage to the Engine, and replacing Parts (as defined) and/or performing maintenance thereon, caused during the Term;;

iii) Under Clause 8 Onur was to maintain certain insurances, including insurance covering all risks of loss or damage to the Engine whilst flying and on the ground, and reinsurance;

iv) Under Clause 11 Onur was obliged to redeliver the Engine in the same conditions as are set out in relation to the Delivery Conditions and in as good operating and physical condition as when delivered (subject only to normal wear and tear from ordinary operation) ("the Redelivery Conditions").

19. Clause 7 of the Master Agreement provided that, following acceptance of the Engine Package and commencement of the Term:

> "7.1 Risk of Loss
>
> Risk of loss or damage to the Engine Package during the Term resides with Lessee.
>
> 7.2 Partial Loss
>
> 7.2.1 In the event of Partial Loss to the Engine during the Term:
>
> (i) Lessee shall be responsible for the cost of prompt restoration of the Engine to its condition prior to the Partial Loss ….
>
> 7.3 Total Loss
>
> 7.3.1 In the event of a Total Loss of an Engine during the Term, where Lessor has not been paid the insurance proceeds as required by 8.1, Lessee shall pay Lessor the Stipulated Amount on the earlier of:
>
> (i) ninety (90) days following the Total Loss; and
>
> (ii) the second Business Day following the date on which Lessee receives the insurance proceeds in respect of the event giving rise to the Total Loss.
>
> 7.3.2 Rent shall not be abated by a Total Loss, and shall accrue and be payable until receipt by Lessor of the Stipulated Amount."

20. The Lease also contained an entire agreement clause at 17.2, providing:

> "This Agreement constitutes the entire agreement and understanding of Parties with respect to its subject matter, superseding any agreements or understandings relating to the leasing of any Engine."

## Procedural background

21. The Claim Form was issued by Aquila on 16 December 2016, accompanied by the Particulars of Claim. That claim is for:

    i) The "Stipulated Amount" of US$7,000,000 – on the basis that the Engine was a Total Loss; alternatively damages on the basis that the Engine is a Partial Loss;

    ii) Damages for breach of the contractual Redelivery Conditions;

    iii) Payment of "Rent" in the sum of US$860,400; and "Additional Rent" in the sum of US$1,237,500 to the date of the Claim and continuing thereafter;

    iv) A claim for its costs of these proceedings under a General Indemnity set out at Clause 10 of the Master Agreement.

22. After a jurisdictional battle, Onur filed a Defence and Counterclaim on 12 October 2017. In that document, Onur took four points which were said to give it both a defence and a counterclaim:

    i) First, it contended that in repudiatory breach of the Lease, the Engine was not in accordance with the contractual Delivery Conditions. By paragraph 11 of its Defence, Onur asserted inter alia that on a true construction those Delivery Conditions meant that the Engine had to be airworthy, fresh from a shop visit and in a condition to be safely used throughout the period of the Lease ("the Paragraph 11 Interpretations");

    ii) Second, it contended that it was entitled to rescind the Lease and/or Acceptance Certificate for misrepresentation. It said that (a) "[b]y presenting the [Engine] for acceptance and delivery" and/or (b) by "proffering the intended final version of the [Lease]", Aquila had made certain representations to Onur ("the Delivery Representations") the effect of which was that the "Delivery Conditions" and Paragraph 11 Interpretations had been or would be satisfied in full and that the Engine would be useable without the subject matter of the AD causing any failure of the Engine during the currency of the Lease; that those representations were false and made recklessly; and that they had induced Onur's entry into the Lease (and its execution of the Acceptance Certificate);

iii) Third, it contended that those representations also constituted warranties or collateral warranties, which have been breached; and

iv) Fourth, it contended that the condition of the Engine at delivery and/or its subsequent failure has led to a total failure of consideration.

23. On 26 October 2017, Aquila filed a Reply and Defence to Counterclaim. In that Reply, Aquila took issue generally with Onur's defences and counterclaims and took the points that give rise to this application.

24. On 16 November 2017, Onur filed a Reply to Defence to Counterclaim. The next day, Aquila issued this application. On 24 November 2017, directions for the application were given at a CMC.

25. In essence, Aquila says that on the true construction of the Lease the parties entered into an arrangement whereby:

i) The Engine was leased on an "as is, where is" basis;

ii) The Term would not commence unless and until Onur confirmed by the Acceptance Certificate inter alia that the Engine satisfied the Delivery Conditions;

iii) If Onur did so confirm, that confirmation would constitute conclusive proof that the Engine did satisfy the Delivery Conditions, and Onur would have no rights and/or claims against Aquila with respect to the delivery condition of the Engine; and

iv) During the Term, responsibility for, and risk in relation to, the Engine Package was to lie with Onur.

26. It says that these terms mean that Onur's defences cannot have a real prospect of succeeding.

## The principles and background

27. The principles were not controversial. In short:

i) The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v Hillman* [2001] 2 All ER 91, 92.

ii) The dividing line has been indicated in the authorities which state that:

a) A claim is 'fanciful' if it is entirely without substance: see Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [95].

b) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable: see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472.

iii) The overall burden of proof remains on the claimant to establish the negative proposition that the defendant has no real prospect of success and (where that is relevant) that there is no other reason for a trial: Henderson J in *Apovodedo v Collins* [2008] EWHC 775 (Ch) at [32].

iv) Short points of law and construction can be suitable for summary determination if the Court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument since (if a point is bad in law) the sooner it is determined the better: see *ICI & Polymers v TTE Trading* [2007] EWCA Civ 725 at [12] per Moore-Bick LJ;

v) The object of the rule is to winnow out cases that are not fit for trial. It follows that the Court must avoid conducting a 'mini-trial' without disclosure and oral evidence. The Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process where the trial judge will have many advantages over the judge at summary judgment. The Court should bear in mind what evidence can reasonably be expected to be available at trial: see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17];

vi) The Court should be alive to the warning in *Easyair* [2009] EWHC 339 (Ch):

> "If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

28. Onur submits that the following points must be assumed for the purposes of this hearing:

(1) The Delivery Conditions had contractual effect and that, understood in the light of all the background that was reasonably available to these parties in the circumstances of this case, they are to be interpreted as asserted by Onur.

(2) The Engine was not delivered in accordance with, i.e. there was as a matter of fact a breach of, the Delivery Conditions.

(3) Subject to Aquila's alleged contractual estoppel and reliance on disclaimers (discussed below), the Delivery Representations were in fact made (and made recklessly), were relied on by Onur and were false.

(4) As a matter of fact, the Engine was not what was bargained for and Onur was deprived of the whole or substantially the whole benefit it was entitled to under the Agreement (either at all or prospectively for the remaining term of the Lease following the failure of the Engine).

29. Aquila disputes that the first, third and fourth of these propositions should be assumed and submits that any assumptions should be confined to pleaded issues of fact.

30. I broadly accept Aquila's submission, although I would accept that the principle also extends to factual issues raised in the evidence for the hearing. The Court must assume disputed questions of fact in favour of the party against whom the application for summary judgment is made. So as to the representations issue, if the case were that the representations relied on were said to have been made expressly, and the fact of their being made was disputed, I would have to assume that.

31. However where representations are said to arise from facts which are not disputed, and from contractual interpretations which are not alleged to be dependent on disputed factual matrix, it is perfectly open to the Court on a summary judgment application to determine those points. Similarly, the question of what the parties bargained for and what therefore constitutes a total failure of consideration is, in the absence of a dispute of fact as to the context, a matter of interpretation which the Court is perfectly capable of carrying out summarily.

**Contractual estoppel**

32. Aquila, while disputing the factual case on breach of the Delivery Conditions in its pleading, accepts that for the purposes of this hearing it must be assumed that there is a breach. However, it says that even if that were so, Onur is contractually estopped from relying on any such breach.

33. It relies on the doctrine of contractual estoppel as explained in the cases of *Peekay International Ltd v Australia and New Zealand Banking Group Ltd* [2006] 1 CLC 582 and *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] 2 CLC 705.

34. In *Peekay*, a claim was made under section 2(1) of the Misrepresentation Act 1967. In that case the Court of Appeal held that although misrepresentations had been made as to the nature of a financial instrument, the terms of the contract that had been entered into made clear the nature of those instruments, and that it was the claimant's decision to sign the contract despite not having read it which had induced entry into the contract, and not the prior misrepresentation.

35. It was also held that a contractual confirmation that the claimant had given, to the effect that it understood the nature of the transaction it was entering into, created a contractual estoppel which precluded it from relying on misrepresentations as to the nature of the investment. On this topic, Moore-Bick LJ (with whom Chadwick LJ and Lawrence Collins J agreed) held as follows:

> "56. There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an

> existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel…
>
> …
>
> 60…By confirming that [it] had read and understood the statement and returning it with [its] instructions to make the investment [the claimant] offered to enter into a contract with [the defendant] on those terms and that offer was accepted by the [defendant] when it implemented [the claimant's] instructions. As a result it was part of the contract between them that [the claimant] was aware of the nature of the investment it was seeking to purchase…In those circumstances, and since it is not suggested that [the defendant] misrepresented to [the claimant] the effect of the documents, I do not think that it is open to [the claimant] to say that it did not understand the nature of the transaction…; and if that is so, it cannot assert that it was induced to enter into the contract by a misunderstanding of the nature of the investment derived from what [the defendant] had said about the product…"

36. *Springwell* was a decision in a complex claim also relating to misrepresentations allegedly made in relation to more or less the same financial instruments as were under consideration in *Peekay*. In this decision the Court of Appeal considered and affirmed the existence of the concept of contractual estoppel, affirming *Peekay* in the process, since the point was explicitly taken that *Peekay* was decided without reference to *Lowe v Lombank* [1960] 1 WLR 196 and was therefore *per incuriam*. Aikens LJ (with whom Rimer and Rix LJJ agreed) said:

> "143… If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like… there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties. .... A 'conclusive evidence' clause in a sale contract, viz. that a report on e.g. the amount or condition of a commodity sold under a contract between A and B shall be 'conclusive evidence' of the matters stated in the report is to the same effect. The parties are agreeing that the statements in the report shall be the case for the purposes of the contract of sale and the parties cannot go behind that agreement.

> 144. So, in principle and always depending on the precise construction of the contractual wording, I would say that A and B can agree that A has made no pre-contract representations to B about the quality or nature of a financial instrument that A is selling to B. Should it make any difference that both A and B know at and before making the contract, that A did, in fact, make representations, so that the statement that A had not is contrary to what each side knows is the case?...I am unaware of any legal principle to that effect….
>
> …
>
> 156. In contrast to *Lowe v Lombank*, there is a series of cases which support the proposition that parties can agree that a state of affairs will be the basis of their contractual dealings with one another, even if they know that it is not the case…
>
> …
>
> 169… In my view the statements of Moore-Bick LJ [in Peekay] are consistent with principle and authority…I respectfully regard the principles stated in Peekay as good law. That case has now been followed in a large number of first instance cases which need not be analysed in any detail.
>
> 170…The correct analysis [in this case] must be the same as that in Peekay. Springwell signed the terms and conditions more than once. In law it is to be taken as having read and understood them. Therefore the terms are part of the contract ... and Springwell is bound by them. Springwell and Chase contract[ed] ... on the basis that Springwell is bound contractually to its statement, or acknowledgement, that no representation or warranty has been made by Chase. Moreover, Springwell must be bound by the terms of Section 5(e), which means that it accepts that CMSCI has not made any representations or warranties of the kind set out there.
>
> …
>
> 177… To my mind, once it is accepted that there is a separate doctrine of 'contractual estoppel' then there is no room for a requirement that the party which wishes to rely on that estoppel must demonstrate that it would be unconscionable for the other party to resile from the conventional state of affairs that the parties have assumed. The reason why that is a requirement in the case of 'estoppel by convention' is precisely because there is no contract between the parties..."

37. Aquila also draw my attention to the pure contractual approach of Andrew Smith J in *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) where at [310] he regarded contractual estoppel as a convenient label and cited Wilken and Ghaly, Law of Waiver, Variation and Estoppel (3rd Ed, 2012) at

paragraph 13.22 where they suggest that the true rationale of *Peekay* is a simple contractual approach:

> "Since the parties have agreed X to be the case, then the party which denies that X is in fact the case is in breach of contract. The Courts will not permit a party to benefit from its own wrong – including its own breach of contract. The Peekay contractual estoppel would be a reflection of that principle."

38. Aquila relies also on *Olympic Airlines SA v ACG Acquisition XX LLC* [2013] EWCA Civ 369; [2013] 1 Lloyd's Rep. 658, the case factually closest to the current one, as concerning also leasing in the air industry (though there the lease of a whole plane). There, as in this case, there was a Certificate of Acceptance, though in slightly different circumstances in that the lease itself provided it would be "conclusive proof" that the defendant had examined the aircraft and that it was "satisfactory" to the defendant and the Certificate of Acceptance contained a specific confirmation by the lessee that the aircraft was in the contractual condition.

39. The analysis in *Olympic* does not proceed by reference to *Peekay* and *Springwell*, which appear not to have been cited; however it arrives at a result consistent with them. Tomlinson LJ (with whom Rix and Kitchin LJJ agreed) said as follows:

> "52. The lessor's obligation to present the aircraft for delivery in the contractually required condition is in no way diluted. Clause 7.9 [the conclusive proof Clause] merely provides a contractually agreed mechanism whereby it can be determined whether the condition of the aircraft on delivery is to be treated as compliant…There is no obligation on the lessee to accept delivery unless the aircraft is in the condition required…The combined effect of Clause 7.9 and the Certificate of Acceptance is that the lessor is conclusively agreed to have satisfied…its positive obligation to deliver the aircraft in a condition compliant with [the lease]…
>
> …
>
> 55…The Certificate of Acceptance contains no representation by the lessor as to the condition of the aircraft. By contrast, it does contain a representation by the lessee that the condition of the aircraft is contractually compliant. [Counsel for the defendant] submits that [the claimant], by tendering the aircraft for delivery and asking [the defendant] to sign the Certificate of Acceptance, represented that it had satisfied the condition precedent. This submission flies in the face of the contents of the Certificate of Acceptance. In the lease itself it is nowhere suggested that by tendering the aircraft for delivery the lessor makes such a representation. I can see no room for this implied representation, the argument in support of which fails, I think, to have regard to the overall shape and nature of the transaction."

40. Aquila also relies on two further points which arise out of *Olympic Airlines*. Firstly it notes a parallel on the subject of commerciality. In *Olympic* ([41-42]) the Court made some observations about the commerciality of the conclusion it reached (and conversely the uncommerciality of the defendant's submissions). These related to the fact that the aircraft was owned by a financial lessor, not an aircraft operator and so risk was likely to rest away from that party. It also noted that such definitive allocation provisions serve a useful purpose in the context of such complex mechanisms where disputes could drag on for years.

41. Secondly, Aquila notes that the Court of Appeal held (obiter at [55]) that the Certificate of Acceptance was an independent binding contract precluding the defendant from contending that the aircraft's condition on delivery was anything other than that stipulated in the lease.

42. On this legal foundation Aquila says that the current case is analogous to these authorities and the same result should follow. It submits that a strong starting point is to be found in Clause 5 of the Master Agreement which provided that, save as expressly stated in the Lease, the Engine Package was to be delivered "as is, where is", and that the parties agreed "unconditionally" that it was "fundamental to the terms of [the] Agreement" that Aquila made no warranties or guarantees of any kind, express or implied, statutory or otherwise, with regard to the Engine Package.

43. While it accepts that Clause 2.4.5 of the Lease Agreement imposed an obligation upon Aquila to deliver the Engine "as is, where is…substantially in compliance with" the Delivery Conditions, it says that when Onur executed the Acceptance Certificate it thereby provided a confirmation that was absolutely clear, formed part of the contractual bargain between the parties, and estops Onur either from asserting that the Engine was not in a contractually-compliant condition or from bringing any claim in relation to its condition.

44. Aquila contends that that conclusion is reinforced by the second part of Clause 2.4.5 of the Lease Agreement (immediately after the Delivery Conditions). It is said that that too forms part of the contractual bargain between the parties and estops Onur from asserting that the Engine was not in a contractually-compliant condition as at the date of delivery. It says that Aquila's attempt to read this section disjunctively from the Acceptance Certificate is artificial and would deprive the Acceptance Certificate (which contextually is plainly significant) of all effect.

45. Aquila makes two other points. The first is that it does not matter whether the Acceptance Certificate constitutes a "freestanding" independent binding contract, but (if necessary) Aquila would submit, following *Olympic*, that it plainly does: it points to Clause 15.1(v) of the Master Agreement, which is a representation given by both parties to the other that "its obligations under this Agreement and the documents contemplated hereby constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms".

46. The second is that the Paragraph 11 Interpretations pleaded as arising from the Delivery Conditions go far beyond the Delivery Conditions and are simply not contained in the Lease, nor can they arise in light of Clause 5 of the Master Agreement (or indeed the entire agreement clause contained in Clause 17.2). Aquila says that the obligations pleaded represent a wholesale attempt to rewrite the Lease,

and are inconsistent with, and would undermine, both the express terms of the Lease and its overall commercial purpose and effect.

47. Overall Aquila submits that this is a case which is at least as strong on the facts as *Peekay* and *Springwell* and that the same result should be produced by an application of the law to the facts.

48. Onur joins issue on this point. It says that this case is far from the case in *Olympic* on the facts. Some of these differences Onur relies on particularly in the context of the misrepresentation claim and will be dealt with later. So far as concerns the pure contractual part of the claim, it relies in particular on the fact that in *Olympic* there was a conclusive evidence clause actually in the contract, whereas here the only aspect which pertains to conclusive evidence is the additional wording at the end of the Acceptance Certificate. It also points to the fact that the clause in the *Olympic* contract specified a fuller effect – by having the lessee positively confirm that the aircraft was in fact in accordance with the delivery conditions.

49. It says that this must also be viewed in the light of the fact that (as it submits) the Acceptance Certificate here really pertains to delivery – by the terms of boxes 5 and 6 of Part I of the Lease Agreement the Acceptance Certificate appears as the trigger for the delivery. It submits that it should not be seen as having a wider purpose as contended for by Aquila and that nothing in the contract requires it to be so treated.

50. Onur also argues that the approach contended for by Aquila effectively denudes the Delivery Conditions of any meaning. It suggests that on Aquila's approach, Aquila could have delivered a hologram of an engine rather than an engine. An approach which renders the Delivery Conditions nugatory is, it says, one not to be followed.

51. In Onur's submission, it is at the very least well arguable that the scope of the effect of the Acceptance Certificate is limited by reference to Clause 2.4.5 only to Onur confirming that it had an opportunity to undertake the matters set forth in the remainder of the Clause (a confirmation that of course is contrary to what the parties both knew to be the case). In other words, the contractually agreed effect of the Acceptance Certificate is so limited. It submits that I cannot at this hearing resolve how this paragraph in the contract sits with the other bespoke alterations.

52. On the other points, Onur submits that the Acceptance Certificate does not and cannot have any freestanding contractual effect of its own. It submits that any such alleged contract would fail for lack of consideration. The only consideration identified by Aquila in its Reply is "the delivery of the Engine and the commencement of the Term". But those things cannot be consideration for the Acceptance Certificate as a contract because Aquila was already contractually obliged to provide them under the Lease.

53. As for the suggestion that the Acceptance Certificate constitutes an independent binding contract because of Clause 15.1(v) of the Master Agreement, and Aquila's reliance on the discussion in *Olympic* (at [55]) of the position in that case, it says that not only was the discussion in *Olympic* entirely obiter at best, but it related to a point (estoppel by representation) that had not been pleaded by the defendant in that case and does not arise here.

54. As to Clause 15.1(v) it submits that it is impossible to see how, given consideration is lacking, Clause 15.1(v) could assist: this would simply be a boot-straps argument. Further, since Clause 15.1(v) expressly provides that it is "subject to… enforceability" under the relevant law, it cannot render valid a contract lacking consideration.

*Discussion*

55. On this point it appears to me that the argument as advanced by Aquila is plainly right and that Onur has no real prospect of success.

56. This portion of the dispute is the kind of point of contractual construction which is eminently suited to disposal on a summary basis. It is about the words of the contract. There is no suggestion, so far as this point is concerned, of relevant factual matrix or the relevant evidence being different to what I have before me now. Any argument that the point should be deferred to trial to await evidence is very much of the "something may turn up" variety which I should reject.

57. Certainly on my reading of the Lease it speaks very plainly. In particular the key section at Clause 5 is staringly emphatic both in its terms (as is where is, unconditional, fundamental, no representations of any kind express or implied) and in its presentation (capitals, bold italic and so far as "as is where is" is concerned, underlined). There could hardly be a clearer sign that the starting point agreed between the parties was an "as is where is" basis.

58. That clause is said to be without prejudice to various clauses. Clause 2.4.5 is not one of them. That means either that the parties did not see that clause as derogating from Clause 5 or that they considered Clause 5 took priority.

59. Approaching Clause 2.4.5 as Onur would ask me to do (as limiting the agreement to Onur confirming that it had had an opportunity to undertake the various matters) would amount to derogating hugely from Clause 5. It would also place the contents of the Acceptance Certificate at odds with the wording of Clause 2.4.5. That would be odd. It is also contrary to basic principles of contractual construction which urge an approach which looks at the whole document, so far as possible, to produce a harmonious result. Onur's approach is in my view exactly the sort of laboratory analysis of one part of a contract without reference to the whole which is frowned on by the authorities on construction of contracts.

60. A fair reading of Clause 2.4.5 as a whole (in the context of the clauses requiring an Acceptance Certificate and the pro forma certificate agreed by the parties in advance of the Lease) shows that the parties intended not to create self-standing obligations as to the delivery condition which undermined the "as is where is" basis of the contract, but rather that Onur should, in taking the Engine, be placed in a position of agreeing that the Engine was in a certain defined condition and could not complain of that condition. I should add that there is nothing in the "factual matrix" evidence relied on in the context of the misrepresentation argument which in any way contradicts this (see paragraphs 89-90 below).

61. This is also entirely consistent with a still broader review of the thrust of the contract, which may well reflect both the commercial background of Aquila not being a user of

engines but only a lessor, and Onur's admitted need for the Engine and the relative lack of such engines. It is a tough contract which makes Onur responsible for insurance, maintenance and so forth as well as explicitly placing the Engine at Onur's risk during the currency of the Lease.

62. Nor can I accept that the Acceptance Certificate should be marginalised by regarding it as a document which only has reference to the timing of delivery. That makes a nonsense of its contents; why have such a content if it is not referable to delivery condition? Further (again panning out from the microscopic focus urged by Onur) the contractual provisions appear to demonstrate that the reason for tying the Acceptance Certificate to delivery is that (as in *Olympic*) the intention is that the lessee shall not take delivery and start the contract running without having given the confirmation (in effect) that no claims as to delivery condition exist. In this the mechanism may be subtly different to that used in *Olympic*, but the intention is the same.

63. I therefore have no difficulty in concluding that the effect of the relevant provisions (Clause 5 coupled with Clause 2.4.5 and the Acceptance Certificate) falls plainly within the ambit of the authorities on which Aquila relies. The parties have wittingly and willingly agreed to a risk allocation. That risk allocation sits somewhat heavily on Onur. However, it has agreed to provisions which on their face mean that if Onur signs the Acceptance Certificate it cannot complain of the condition of the Engine. Onur did sign that certificate, in the full knowledge that those were the terms it had agreed. It cannot now resile from the position as set out in the Contract and the Acceptance Certificate. I do not consider that the fact that the parties knew that Onur had not in fact inspected the Engine can have any impact on the effect of the contractual scheme.

64. I do not consider that there is any material difference here from *Olympic* simply because in that case there was a conclusive evidence clause in the contract, whereas here the only mention of conclusive evidence is in the certificate. Were there no other indications, there might be some mileage in this argument, but against the broader contractual context what the parties are doing is in my judgment perfectly clear.

65. So far as the argument that this denudes the Delivery Conditions of meaning is concerned, a similar argument was raised in the *Olympic* case (see paragraph 38).

66. As in *Olympic* the lessee is under no obligation to accept the Engine unless it is in the contractual condition; but the deal is that unless it formally confirms that it is, it does not get the Engine. That is, as I have said, a tough deal, but it is a perfectly sensible and clear one. I bear in mind here, too, what the Supreme Court had to say about bad deals at [19-20] in *Arnold v Britton* [2015] AC 1619.

67. As for the question of whether the Acceptance Certificate had separate contractual effect I would incline to the view that it did. The argument in *Olympic* is certainly obiter, and I do not regard it as binding in any sense. However, it shows a very distinguished panel considering a very similar point, and is therefore persuasive to some degree. I do not regard the slightly different context in which it arose as being relevant to the reasoning on the point.

68. As to the similarity of the issue, the argument in *Olympic* was also based on a contractual representations clause being used to give legal status to the certificate.

That clause was to very similar effect to Clause 15.1(v) in the present case. The only difference is that the Certificate of Acceptance in that case was expressly included in the wording of the clause. However the words "documents contemplated hereby" are plainly apt to cover the Acceptance Certificate.

69. So far as concerns the argument that there is no consideration, that might equally have been said in *Olympic*. But the answer is plain: the execution of the Acceptance Certificate is a condition precedent to the delivery of the Engine; that provides whatever consideration is needed.

70. I will also deal here with the question of whether the Paragraph 11 Interpretations cannot arguably succeed, as submitted by Aquila. Although this does not require to be decided in the light of the conclusion I have reached under this initial head, the scope of the contractual obligations has an impact on the misrepresentation claim.

71. In my judgment, the submission that the Paragraph 11 Interpretations go far beyond the Delivery Conditions is plainly right. They amount to a very considerable extension and rewriting of the Delivery Conditions – and in particular of Clause 5. Indeed they would, as Aquila submitted, have the effect of entirely reversing the allocation of risk in the Lease. Of course such interpretations might conceivably arise against the appropriate factual matrix background. No such factual matrix background is pleaded (as it would be required to be under paragraph C1.3(h) of the Commercial Court Guide). No such factual matrix beyond the two emails referred to below was relied on in argument before me or suggested to be likely to exist. Even taking such further (unpleaded) material into account, the other clauses of the Lease and in particular Clause 5 must prevent such remarkably different obligations from arising.

**Misrepresentation**

72. The question therefore arises as to whether the misrepresentation argument can provide a route around my conclusion on contractual estoppel. Aquila says it cannot, essentially for three reasons.

73. First it says that the conduct which is said to give rise to the alleged representations is simply incapable of doing so in the light of the terms of the Lease (including the Acceptance Certificate). The misrepresentation argument, Aquila points out, was an argument roundly rejected by Tomlinson LJ in *Olympic* at [55], where he described it as "flying in the face of" the Certificate of Acceptance and having insufficient regard for the overall shape and nature of the transaction. The position here, it says, is similar: taking both the terms of the Lease and the Acceptance Certificate (both signed by Onur) and the overall structure of the deal it is nonsensical to say that by proffering documents which say "no representations are made", representations to contrary effect are somehow made.

74. It also points to Clause 5 of the Master Agreement which provided that the parties agreed “unconditionally” that it was “fundamental to the terms of [the] Agreement” that Aquila made no representations of any kind, express or implied, statutory or otherwise, with regard to the Engine Package. This, it says, is absolutely clear, forms part of the contractual bargain between the parties, and has the effect that the alleged

representations, if made, would be deemed not to have been made: see *Springwell* at [144, 170].

75. It also says that the representations that are alleged, which are tied to the Paragraph 11 Interpretations pleaded by Onur, are imprecise and would appear to relate to a whole host of alleged obligations and matters, and cannot on any view have arisen on the basis of the pleaded conduct.

76. So far as concerns the fact that this is, unlike *Springwell*, a case about rescission, not damages, Aquila says that it would make no sense for the remedy sought to make a difference. The clause relied on goes to exclude the establishing of any representation – a logically prior step. The existence of the representation cannot be delineated by reference to the remedy available. Further, it submits that such an argument would effectively undercut or erode the effect of the clause, given that rescission is a remedy available in a wide variety of circumstances – not confined to fraud or even negligence. It also points me to the case of *Trident Turboprop* [2008] EWHC 1686 (Comm); [2009] 1 All E.R. (Comm) 16 as authority for the proposition that rescission cannot make a difference to the impact of such clauses.

77. Aquila also submits that the Clause also means that Onur was not (and cannot have been or assert that it was) induced into entering into the Lease (or into signing the Acceptance Certificate) by the alleged representations, if made. It also says that on Onur's own evidence the question of inducement cannot succeed, in that it is plain that Onur knew that the AD was open (ie. had not been dealt with) and its concern was simply that it should not fall due to be dealt with on its watch. It also says that there is and can, on Onur's own evidence, be no suggestion that Aquila knew of the existence of the latent defect.

78. Further, Aquila says, Onur's execution of the Acceptance Certificate (which was not induced by the alleged representations) estops it from contending that the alleged representations, relating as they do to the delivery condition of the Engine, were false.

79. So far as concerns the argument which has dominated oral submissions, that the plea of reckless misrepresentation means that the relevant clauses cannot bite because fraud unravels everything, Aquila returns a fourfold answer.

80. First it says that such an argument can only bite in relation to a properly pleaded case of recklessness/fraud and that what is before me on the pleadings is not a properly particularised plea so as to establish the basis for this principle to operate. It cannot, it submits, be the case that a mere invocation of the word "reckless" can be apt to save a case from summary judgment.

81. Second it submits that this principle could only apply if what was alleged was a misrepresentation as to the effect of the relevant terms. Here, it says, there is no suggestion that Aquila misrepresented the terms of the Lease in this case.

82. Thirdly it says that, in any event, the points on inducement remain, whether the representation is negligent or fraudulent.

83. Fourthly it says that there is nothing stopping me, in a clear enough case, from determining summarily that even allegations of reckless/fraudulent misrepresentation

cannot succeed. This, it says, is just such a case for the reason already canvassed. In particular the question of the existence of a representation is a logically prior step and if there is no prospect of establishing this, the question of the nature of the misrepresentation cannot arise.

84. Accordingly, it submits that Onur's defence based on alleged misrepresentation has no real prospect of success, and nor does its counterclaim based on those same alleged misrepresentations.

85. Onur's case orally was concentrated on this latter issue as to the impact of the recklessness plea. It says that provisions such as Clause 5 (and entire agreement clauses) do not apply to oust claims for fraudulent as opposed to innocent misrepresentation and points me to *Kommunale Wasserwerke Leipzig GmbH v UBS AG* [2014] EWHC 3615 at [773] where it was accepted that entire agreement and non-reliance clauses could not assist the party invoking them to defeat a claim in fraud, and would only be relevant if any misrepresentation was negligent or innocent.

86. It also points me to the judgment of Aikens J in *Trident Turboprop* at [42] where in the context of a clause waiving rights arising out of representations he said:

> "[Fraudulent representations] will not be excluded because of the law's attitude to fraud, particularly in a commercial context. Fraud is "a thing apart", proof of which unravels all. On public policy grounds the law does not permit a party to exclude liability for its own fraud. Liability for the fraudulent acts of a party's agents will only be excluded if the language of the contract is in clear and unmistakable terms: see the HIH case at paragraphs 15–16 per Lord Bingham of Cornhill. Rights in respect of fraudulent misrepresentations, whether by Trident or its agent, are therefore not waived …"

87. Particularly in the light of this point Onur then submits that Aquila's first arguments are simply not open to it; it says that Aquila cannot, at least on a summary basis, contest the fact that the Delivery Representations were made because the question of whether and, if so, what representations were made is quintessentially a question of fact that requires proper consideration at trial.

88. It points to the judgment of Mance LJ in *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] 2 All ER (Comm) 833 at [30]:

> "… whether there is a representation and what its nature is must be judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee".

89. Insofar as the representations are to be implied from Aquila's words or conduct, it submits that they are even less amenable to summary dismissal. As Longmore LJ put it in *Graiseley Properties Ltd v Barclays Bank plc* [2013] EWCA Civ 1372 at [25]:

> "Put very shortly. I consider that any case of implied representation is fact specific and it is dangerous to dismiss summarily an allegation of implied representation in a factual vacuum."

90. Onur also, with an eye on [55] of *Olympic* where a similar argument was given very short shrift, submits that there are key differences between the situation in this case and the situation in *Olympic* which inform the overall nature and shape of what the Court has to consider. It points me to the fact that in *Olympic* the aircraft was already on lease, that there was no de facto reliance because of the ample opportunities for testing, that there was no known latent defect and the lease was a finance lease not an operating lease. Here, by contrast, it says the Engine was in storage, the latent defect was known of and Aquila knew or should have known of the actual problems to which it had given rise. It also did know that there had been no inspection and that the Acceptance Certificate was therefore not true.

91. Most of all Onur points to two email exchanges immediately before the Lease was finalised in which Onur insisted that delivery and redelivery conditions be harmonised and where a representative of Aquila said: "can confirm it meets the delivery requirements to mirror box 21." It also claims that there is some relevance in the drafting history of Clause 2.4.5 pointing to the fact that the terms of the Acceptance Certificate went hand in hand with the drafting of the Clause.

92. Onur therefore says that the making of the Delivery Representations recklessly and Onur's reliance on the same plainly have a real prospect of success. It points to the whole context of the entry into the Lease and Aquila's conduct in proffering the draft agreement and points to what it says are obvious foundations in the documentary record.

93. Three other points were advanced which would arise independently of the fraud case. The first is that a key distinction between this case and the authorities relied on for Onur is that the claims advanced in cases like *Springwell* and *Peekay*, which are much relied on by Aquila, were claims for damages for misrepresentation, and not for rescission. By contrast, in the present case Onur seeks confirmation that the Agreement has been avoided by reason of Aquila's misrepresentations. This point is in fact directly acknowledged in *Peekay* itself: see at [57] per Moore-Bick LJ (in a passage approved in *Springwell* at [165]).

94. The second is that on its true construction Clause 5 was only referable to representations going forward, not to precontractual representations. Onur relied on the wording of the Clause, submitting that if precontractual representations were aimed at, one would expect different wording referring to supercession of prior promises.

95. Onur also submitted that it is important to construe carefully the particular provision, and its effect, in context. It contended that Clause 5 is expressly qualified by the opening words "save as expressly stated in this Agreement". In essence, the Delivery Representations spring – at least on one basis – from the express bespoke words contained in the Lease when proffered i.e. the Delivery Conditions; and, therefore, such representations are not precluded by the Clause to that extent.

*Discussion*

96. The starting point which seems best is to consider what would be the position if it were common ground that the misrepresentations alleged were innocent or even negligent. I will therefore deal first (and in reverse order) with the last three points outlined above.

97. The issue as to "save as is expressly provided" seems to me not to bear much scrutiny. The Clause states "save as expressly provided" and refers to warranties, guarantees and representations. In looking for something which does qualify the effect of Clause 5 one therefore has to look for wording which expressly provides one of those things. It is not said in the Lease that the Delivery Conditions themselves are representations; or for Onur that they even have the content of the representations relied upon. It is an unacceptably large stretch to say that such representations are captured by this "save as expressly provided" wording.

98. Similarly I consider that the submission as to the construction of Clause 5 is unsustainable. Given the "save as expressly provided" wording it is plain that the Clause is aimed at something other than representations going forward, which are expressly set out in the terms of the Lease. This construction would reduce the meaning of this part of Clause 5 to nothing, which is plainly not what was intended – it can be seen from the most cursory examination to be a point of significance intended to have a real effect.

99. So far as concerns the distinction between a claim where damages is sought and one where rescission is sought, I accept Aquila's submissions. The distinction made by Onur does not appear to be sustained on the authorities; in at least one case a claim for rescission was involved. Further nor would I expect it to have; permitting the argument where the claim was for damages and not when there was a rescission element would, for the reasons given by Aquila, produce unacceptable results, not least given that rescission is a frequent alternative claim.

100. That then takes me to the question as to whether such issues as the existence of a representation are ever suitable for summary determination. On this also, I cannot accept Onur's submissions (which to be fair were not pressed particularly hard in this context). Of course there will be many cases where a Court cannot properly or safely decide the question of the existence of a representation (perhaps particularly an implied representation) summarily. But I do not think that the authorities come close to saying that it can never be appropriate. The *Graiseley* case arose in a very different context – the representations in question relating to the genuineness of the LIBOR rates applicable - where one can readily see that factual issues would arise.

101. In the absence of clear authority that a point is incapable of summary determination, it must be for the judge deciding the summary judgment application to determine whether he or she has all the material necessary to decide the point.

102. This is in part an assessment of the nature of the point and also of the kind of evidence necessary to determine it – in which context what is being said about such evidence by the parties will be significant. Here it is striking that (unlike in many summary judgment cases) nowhere in the evidence or in the written submissions is it said for Onur that further evidence of X sort will be wanted in the context of this misrepresentation case. That is entirely consistent with the pleaded case which is that the representations were made first by "presenting the aircraft for acceptance and delivery" and secondly by "proffering the intended final version of the Agreement (and in particular with the bespoke Delivery Conditions therein) as well as the draft of the Acceptance Certificate". It is very hard to see what room there is for other evidence to inform the representations alleged. Orally, Onur pointed to the two email communications referred to above as also informing the issue. It did not however suggest that the evidence relevant to the existence of the representations went any wider than that.

103. I do accordingly consider that this would be a question which I can determine summarily.

104. There then remains the question of whether any such representations can in fact be spelled out from what is advanced.

105. On the first point one has to distinguish between the possibility that such representations as can be spelled out from the Delivery Conditions themselves are made by the proffering of a contract containing them and the different case run, which posits much wider Delivery Representations, based on the Delivery Conditions and the Part 11 Interpretations. As to the latter, in the circumstances (which aside from the two emails) are circumstances which tend to negate the existence of any undertaking of responsibility by Aquila to Onur I do not see that it is arguable that the representations go wider than the contractual obligations, whatever those are.

106. I have considered above the extent to which the obligations alleged, which form the basis for the representations, can be arguably made out. I have concluded that no obligations beyond those set out in the Delivery Conditions are arguably established. It follows that the representations made can go no wider than this.

107. Were this simply a case of innocent or negligent misrepresentation I would conclude that the argument has no real prospect of success, essentially for similar reasons to those given by the Court of Appeal at paragraph 55 of *Olympic*. One must bear in mind that the basis of any case in misrepresentation is that there is a representation of fact which is given in circumstances where the representee is entitled to rely on it. In circumstances where the contractual backdrop is what it is, I find it completely unconvincing for it to be said that there was a representation, much less that it was intended to be relied on. I do not consider that the differences in the factual situation between this case and *Olympic* highlighted by Onur have any impact on this conclusion.

108. I do not consider that the unpleaded emails relied on by Onur advance matters at all. The context of the drafting of the Acceptance Certificate and Clause 2.4.5 adds nothing; Onur wanted delivery and redelivery conditions to match up and the price of that was the addition of the final paragraph to the Clause and the certificate. No representation emerges. As for the email confirmation, in the context of the email chain it is plain that this is, as Aquila submitted, simply a confirmation that the drafting change has been made, not a representation as to compliance. Even if it were, against the background of the subsequent documents it becomes a representation caught by Clause 5 and the Acceptance Certificate.

109. As to inducement, here Onur faces two problems. The first is again the effect of the contractual scheme, this time on inducement. For the reasons given above, at least in the context of an innocent or negligent representation, the contractual scheme operates as a road block preventing Onur from establishing inducement. Accordingly, I do not consider that there is an arguable case for inducement.

110. Further it appears quite clear on Onur's own evidence for this application that there was in fact no such reliance. Mr Oruc's evidence is candid about the fact that Onur was provided with a pack of documentation which made it clear that the AD was an open item. Onur therefore knew that the relevant parts had not so far been replaced (relevant to Delivery Conditions 1 and 3 and 4). It also seems clear from Onur's expert evidence that Aquila could not know before that work was done whether there was a problem (relevant to Delivery Condition 2). It was clear that Onur's concern was not that the relevant shop visit had not been undertaken, but that the relevant shop visit should not fall due on its watch.

111. The question then becomes whether matters are changed by the fact that Onur has pleaded that the representations were made recklessly.

112. I will deal first with the point which undoubtedly sounds in Onur's favour. Insofar as any fraudulent representation is properly pleaded and can arguably be established, it seems to me that the portions of the clauses relied upon by Aquila which relate to representations are highly unlikely to bite as a matter of law. This reality underpinned the concession in *Trident Turboprop* and is reflected in a wealth of authority. The rationale behind this is that a party should not benefit from his fraud. This is a broad rationale and I think suggests that the argument advanced by Aquila that the rule should only operate if the misrepresentation were as to the terms of the contract is incorrect. Therefore if there is a case of fraud, Aquila cannot in my judgment get summary judgment based on a reliance on the passage in Clause 5 which relates to representations or the Acceptance Certificate insofar as it relates to representations.

113. However, I do not see how this affects the position on inducement. Even if one ignores the portion of Clause 5 which records the parties' agreement that there are no representations made, that does not delete the remainder of the parties' contractual bargain. What this means is that the effect of the remainder of Clause 5 and the Acceptance Certificate on any such representations is to prevent Onur saying that they were induced by any such misrepresentations. And again Onur's problems on inducement based on their own evidence are unaffected. I would therefore if necessary find that the misrepresentation case, even to the extent that it is a proper fraud case, would fail on this head.

114. There is also, it seems to me, a real question about whether the case as pleaded can be taken to be a case in fraud. That plea is advanced briefly in paragraph 22 of the Defence: "Aquila was reckless when making the said representations as it made the same not caring whether they were true or false in the sense that it knew it had not complied with any aspect thereof, but took a gamble that the subject matter of the AD would not place it in breach of any of the Delivery Conditions prior to the end of the Lease/operating envelope…".

115. I accept the submission advanced by Aquila that this is not an adequate pleading of fraud. The Commercial Court Guide paragraph C1.3(c) states that "(i) full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality; and (ii) where an inference of fraud or dishonesty is alleged the facts on the basis of which the inference is alleged must be fully set out." To similar effect is PD16 paragraph 8.2. There is also authority, for example *Three Rivers DC v Bank of England (No.3) (Summary Judgment)* [2001] UKHL 16, [2003] 2 A.C. 1 and the judgment of Flaux J (as he then was) in *JSC Bank of Moscow v Kekhman and others* [2015] EWHC 3073 (Comm) which emphasises the importance of pleading facts on which to base inferences – particularly where the inference is one of fraud.

116. On the case as pleaded, therefore, no proper case of fraud is raised. It should not be open to a party to avoid summary judgment by means of an invocation of fraud which is not properly based. Mr Cogley QC for Onur urged me not to take too formalistic a line about this issue. He says that I should take into account the case which could be advanced by way of amendment, even if it is not formally part of the pleading. It seems to me that this is probably a correct approach in the context of summary judgment, if a clear case is made out by way of draft amendment or in written submissions or even orally. However the striking point in this case was that this was not done, save in oral argument and as regards (i) the reliance on the two emails referred to at paragraph 90 above and (ii) the list of things known referred to at paragraph 89 above.

117. I have attempted ex post facto to write these matters into the pleading. My conclusion is that as regards Delivery Conditions 1 and 4, the matters relied on are not relevant to these representations. As regards Delivery Condition 2 (which as Tomlinson LJ noted in *Olympic* would have to be seen as a representation as to Aquila's best knowledge), the matters relied on would not give rise to a proper plea of recklessness. Even with these additions therefore, the case in fraud would not be properly pleaded.

118. Thus the matter should be considered on the basis of a case in innocent or negligent misrepresentation; but whichever way it is regarded the case has no real prospect of success.

119. Accordingly the misrepresentation claim fails also.

**The allegation of breach of warranty/collateral warranty**

120. Onur's third contention in the pleading is that that the alleged representations which form the subject matter of its misrepresentation claim also constituted warranties or collateral warranties, which have been breached. However Onur did not pursue this as a separate head in written or oral argument. It was accepted that it added nothing to the other main points advanced.

## The allegation of total failure of consideration

121. Onur's fourth contention is that the condition of the Engine at delivery and/or its subsequent failure has led to a total failure of consideration.

122. On this Aquila submits that Onur was provided with precisely what it was due under the Lease, namely possession and use of the Engine Package on the terms and conditions specified in the Lease (Onur having accepted that by signing the Acceptance Certificate). It says that Onur cannot assert that the Engine was not in a contractually compliant condition when it was delivered to Onur because of the terms of the Lease.

123. Further Aquila submits that the fallacy in Onur's approach is clear from the fact that there is a contractual scheme for loss in Clause 7 catering for Total Loss and Partial Loss. Aquila submits that Onur cannot sensibly say that destruction of the Engine leads to a total failure of consideration when the parties have considered and contractually agreed a scheme for loss which expressly provides for Total Loss.

124. Accordingly, it says, Onur's defence based on total failure of consideration has no real prospect of success, and nor does its linked counterclaim.

125. On this issue Onur says that Aquila's case consists only of assertion that Onur did receive the benefit for which it contracted and/or a relevant benefit and that that is a factual issue. It submits that the question of whether there was illusory consideration or a failure of consideration are factual issues which should proceed to trial.

126. It contends that it goes without saying that the purpose of leasing the Engine was that Onur would pay a sum and for that it would get something which satisfied the Delivery Conditions. Or put another way, the bargain was not to enter into a short fixed term lease for an engine with a ticking time bomb and to be able to use the engine only on whatever limited number of occasions that might be possible prior to the bomb exploding.

127. Onur also submits that Aquila is guilty of trying the have things both ways in that it does not claim for a Partial Loss and yet try to avoid the consequence of a Total Loss which is that there is a total failure of consideration.

*Discussion*

128. On this the submissions have been short, and this reflects the fact that on the primary point the argument is really another way of saying the same thing. The pleaded case is that "The consideration or benefit for which Onur bargained under the Lease was for an engine which met the Delivery Conditions."

129. It follows that an assertion of total failure of consideration hinges on Onur being able to say that the Engine did not meet the Delivery Conditions. However, as I have found above, Onur is precluded from making that assertion. It therefore follows that its argument on total failure of consideration has no real prospect of success.

130. I should add that while there is a conceptual distinction between total failure of consideration and Total Loss it seems to me that there is some force, if it were needed,

in the submission that the contractual scheme covering both Total and Partial Loss reinforces the conclusion that in this contract there is no room for a total failure of consideration argument.

131. Onur's argument by reference to the Total Loss/Partial Loss distinction goes nowhere. Aquila are claiming for both Total Loss and Partial Loss, although they say that the difference is de minimis.

**Set-off**

132. Aquila advances a further argument, though it submits that it is unnecessary. Clause 3.6 of the Master Agreement provides that:

> "[Onur's] obligations hereunder are absolute and unconditional, and not subject to set-off [and] shall not be reduced, or otherwise affected by any act, event, defense, contingency or circumstance whatsoever."

133. Accordingly, Aquila submits that it follows that the various cross-claims asserted by Onur could not affect its liability to pay the sums it is due to pay to Aquila under the Lease in any event and present no barrier to summary judgment being granted. It refers me in this connection to *Credit Suisse International v Ramot Plana OOD* [2010] EWHC 2759 at [40]-[45].

134. Onur submits that argument is misplaced. On Onur's case the Lease has (or ought to have) fallen away ab initio by reason of Aquila's misrepresentation – and therefore the no set-off clause has inevitably fallen away too. It submits that the *Credit Suisse* case was simply a counterclaim for damages and did not involve any assertion that the relevant agreement was avoided.

*Discussion*

135. In the light of my conclusions above, Aquila does not need to rely on this argument and I shall not express a firm view on it, given that it was not the subject of oral argument. However I can indicate that I would struggle to see how this applied to a case in fraudulent misrepresentation which avoided a contract ab initio.

136. It follows from my conclusions above that Aquila is entitled to summary judgment.