Neutral Citation Number: [2019] EWHC 1927 (Comm)

Case No: CL-2018-000651

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 19/07/2019

Before :

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

- -

Between :

ODYSSEY AVIATION LTD	**Claimant**
- and -	
GFG 737 LIMITED	**Defendant**

- -
- -

Michael McLaren QC and Nicolas Damnjanovic (instructed by **King & Spalding International LLP**) for the **Claimant**
Robert Lawson QC (instructed of **Clyde & Co LLP**) for the **Defendant**

Hearing date: 7 June 2019

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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.

....

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

Mr Peter MacDonald Eggers QC:

Introduction

1. The Claimant, Odyssey Aviation Ltd ("Odyssey"), is a company incorporated in the British Virgin Islands. The Defendant, GFG 737 Ltd ("GFG"), is a company incorporated in the Isle of Man.

2. On 28 May 2018, Odyssey and GFG entered into an Aircraft Sale and Purchase Agreement ("the APA"). Under the APA, Odyssey agreed to sell and GFG agreed to buy a Boeing Business Jet B737-72U, serial number 29273 ("the Aircraft"), for US$30,000,000.

3. Prior to the conclusion of the APA, on 23 April 2018, GFG caused a refundable holding deposit in the sum of US$2,500,000 ("the Deposit") to be deposited with an Escrow Agent, Insured Aircraft Title Service LLC ("IATS").

4. The Scheduled Delivery Date under the APA was 19 July 2018. On 20 July 2018, GFG purported to terminate the APA on the grounds of a breach of a warranty as to title to the Aircraft in clause 6.1 of the APA and the non-fulfilment of a number of conditions precedent in clause 2.4 of the APA. Odyssey denies that there has been a breach of warranty in clause 6.1 or that the conditions precedent in clause 2.4 have not been fulfilled, and therefore denies that GFG had any entitlement to terminate the APA. Following GFG's failure to pay the balance of the purchase price and 50% of the Escrow Agent's fees by the Scheduled Delivery Date, on 21 August 2018, Odyssey purported to terminate the APA.

5. If GFG was entitled to terminate the APA, it is entitled to a refund of the Deposit held by IATS (pursuant to clause 2.7 of the APA), but if GFG was not entitled to terminate the APA, Odyssey was entitled to terminate the APA on 21 August 2018 and is entitled to be paid the Deposit (pursuant to clause 2.6 of the APA).

6. Each party applies for summary judgment, pursuant to CPR rule 24.2, in respect of the Deposit.

Events prior to the conclusion of the APA

7. Negotiations towards the APA had begun earlier in 2018. In an exchange of emails on 25 and 26 March 2018, Mr Doohan of Global Jet International informed Mr Sanjeev Gupta (the beneficial owner of GFG) of the state of the negotiations towards the price of the Aircraft. Mr Doohan also informed Mr Gupta that the Aircraft was owned by a South African company. The company to which Mr Doohan was referring was Toerama Proprietary Ltd ("Toerama"). Global Jet International, and a related concern Jetcraft, shall be referred to in this judgment as "Global Jet". Global Jet was GFG's agent in respect of the APA.

8. On 23 April 2018, GFG paid the Deposit of US$2,500,000 to IATS as the Escrow Agent. Upon receipt, IATS sent a letter "*To Whom It May Concern*" stating that the deposit would be held in escrow and was considered fully refundable pending receipt of further instructions or a fully executed purchase agreement governing the funds in escrow. The letter stated that it was signed "*subject to IATS terms & conditions*",

which accompanied the letter. According to paragraph 20 of the witness statement of Mr James Potter, who was the Head of Family Office of the GFG Alliance and was authorised to execute the APA on GFG's behalf, the IATS terms and conditions ("the IATS Terms") were attached to the "*GFG SPA*", which I understood to be a reference to the APA. The IATS Terms were known to the parties prior to the execution of the APA.

9. The IATS Terms provided that:

> "*Notwithstanding anything to the contrary contained in any contract between any purchaser and seller, the parties acknowledge and agree that, from time to time, IATS is requested to serve as the escrow agent in connection with a series of transactions involving the same aircraft and the simultaneous closings of such transactions. To that end, each transacting party acknowledges that the transaction to which it is a party may involve a situation where (1) the aircraft being acquired may be being purchased from another seller, (2) the aircraft that is being sold by a seller may be being immediately resold to a different purchaser, (3) that there may be simultaneous closings of the purchases and sales, and (4) that all funds being used to fund the purchases and sales of the aircraft may be being deposited with IATS by the ultimate purchaser, and that IATS, upon authorization from the appropriate parties, may use said funds to fund the purchase of the aircraft or otherwise dispose of the funds in accordance with terms of the contract(s) involving the purchase(s) and sale(s) of the aircraft.*"

10. On 3 May 2018, IATS wrote to Mr John Roumeliotis, who is the sole director and shareholder of Odyssey, stating that the renewal process at the International Registry for Odyssey appointing IATS as the administrator had been completed and attached a screenshot from the International Registry showing that Odyssey had been approved as a transacting user entity (until 2 May 2019).

11. On 24 or 25 May 2018, Mr Gupta paid to the Escrow Agent an additional amount of US$196,865 in respect of the costs of the Aircraft's demonstration flight ("*agreed flights costs and return flight costs from South Africa to Abu Dhabi and back*"). On 24-25 May 2018, there was an exchange of emails between IATS, Mr James Potter (GFG's agent), and Mr Sean O'Leary and Mr Mick Doohan, both of Global Jet. In one of those emails, Mr Potter said that "*What we need to do is ensure these funds are released immediately to the account details of the seller that's been provided by Sean O'Leary*". IATS confirmed receipt of the funds and said "*I will just need the physical address for Toerama (Pty) Ltd*". Mr O'Leary replied that IATS should have all of the account details for payment already, which IATS confirmed. That sum was transferred by IATS to Toerama on 25 May 2018. In his witness statement, at paragraph 21, Mr Potter stated that he "*did not read this exchange, nor did I realise that Toerama was the owner/seller*".

The APA

12. The APA was concluded on 28 May 2018. The APA included the following provisions:

> "*1.1* ***Definitions***

…

*"**Delivery**" means the passing of title to the Aircraft from the Seller to the Buyer pursuant to and in accordance with this Agreement, as evidenced by the execution and delivery of the Bill of Sale …*

*"**Escrow Agent**" means Insured Aircraft Title Service, Inc …*

*"**International Registry**" means the International Registry located in Dublin, Republic of Ireland established pursuant to the Cape Town Convention;*

*"**Latest Scheduled Delivery Date**" means 25 July 2018 or such other date as may be agreed between the Seller and the Buyer …*

*"**Scheduled Delivery Date**" means the later of:*

(a) the date which is five (5) Business Days after the date on which the rectification of any Discrepancies in accordance with clause 4.1(g) have been certified by the applicable maintenance facility, or

(b) such other date as agreed in writing between the Parties,

provided that the Scheduled Delivery Date shall be no later than the Latest Scheduled Delivery Date …

2 AGREEMENT TO SELL AND TO PURCHASE AND CONDITIONS PRECEDENT

2.1 Agreement to sell and to purchase

Subject to the terms of this Agreement, at Delivery the Seller agrees to sell to the Buyer and the Buyer agrees to purchase from the Seller all the Seller's legal, equitable and beneficial right, title and interest in and to the Aircraft.

2.2 Seller's condition precedent

The obligation of the Seller to sell the Aircraft to the Buyer shall be subject to the fulfilment of the following conditions precedent:

(a) on or before the date of this Agreement, the Seller shall have received evidence reasonably satisfactory to the Seller that the Buyer has duly authorised the execution and delivery of this Agreement and all matters contemplated by the Agreement;

(b) the Escrow Agent shall have received the Deposit from the Buyer in accordance with clause 3.1(a) …

(d) on or before the Scheduled Delivery Date, the Seller shall have received evidence of the establishment of the Buyer as a transaction user entity with the International Registry;

(e) on or before the Scheduled Delivery Date, the Escrow Agent shall have received the balance of the Purchase Price (being the Purchase Price less the Deposit) together with an amount equal to fifty per cent (50%) of the Escrow Agent's Fee …

2.3 Waiver by Seller

The conditions precedent set forth in clause 2.2 have been inserted for the benefit of the Seller and may be waived or deferred by the Seller in writing, in whole or in part and with or without conditions.

2.4 Buyer's condition precedent

The obligation of the Buyer to purchase the Aircraft from the Seller shall be subject to the fulfilment of the following conditions precedent:

(a) on or before the date of this Agreement, the Buyer shall have received evidence reasonably satisfactory to the Buyer that the Seller has duly authorised the execution and delivery of this Agreement and all matters contemplated by the Agreement;

(d) on or before the Scheduled Delivery Date, the Seller shall have positioned the Aircraft in the Delivery Condition at the Delivery Location at Buyer's sole cost …

(f) on or before the Scheduled Delivery Date, the Buyer will have received evidence of the establishment of the Seller as a transaction user entity with the International Registry;

(g) on or before the Scheduled Delivery Date the Buyer will have received copies of all back to birth bills of sale …

2.5 Waiver by Buyer

The conditions precedent set forth in clause 2.4 have been inserted for the benefit of the Buyer and may be waived or deferred by the Buyer in writing, in whole or in part and with or without conditions.

2.6 Non-fulfilment by Buyer

If:

(a) any of the conditions precedent referred to in clause 2.2 remain outstanding at midnight on the due date and are not waived or deferred by the Seller in writing; or

(b) the Buyer is otherwise in default of its obligations hereunder and any applicable grace period allowed to the Buyer to comply with such obligations has expired …

then, unless this Agreement has been terminated in accordance with its terms, the Seller may terminate this Agreement by written notice to the Buyer and the

Escrow Agent. Following any such termination, the Seller shall be entitled to retain the Deposit for its own account and the Escrow Agent shall pay the Deposit to the Seller and return the balance of the Purchase Price, if already received, to the Buyer, whereupon all further obligations and liabilities of the Seller and the Buyer pursuant to this Agreement shall cease.

2.7 Non-fulfilment by Seller

If:

(a) any of the conditions precedent referred to in clause 2.4 remain outstanding at midnight on the due date and are not waived or deferred by the Buyer in writing; or

(b) the Seller is otherwise in default of its obligations hereunder and any applicable grace period allowed to the Seller to comply with such obligations has expired …

then, unless this Agreement has been terminated in accordance with its terms, the Buyer may terminate this Agreement by written notice to the Seller and the Escrow Agent. Following any such termination, the Deposit shall become refundable and the Escrow Agent shall immediately return the Deposit and the balance of the Purchase Price, if already received, to the Buyer, whereupon all further obligations and liabilities of the Seller and the Buyer pursuant to this Agreement shall cease.

3 PURCHASE PRICE AND PAYMENT

3.1 Purchase Price

The Purchase Price shall be payable as follows:

(a) prior to the date of this Agreement, the Deposit has been paid by the Buyer to the Escrow Agent's Account; and

(b) the balance of the Purchase Price (being the Purchase Price less the Deposit) shall be paid by the Buyer to the Escrow Agent's Account on or before the Scheduled Delivery Date …

5 DELIVERY

5.1 Delivery

(a) On or before the Scheduled Delivery Date: …

(iii) the Buyer shall, prior to the commencement of any pre-positioning flight required to make the Aircraft available at the Delivery Location in accordance with the provisions of this Agreement, pay the balance of the Purchase Price … together with an amount equal to … fifty percent (50%) of the Escrow Agent's Fee to the Escrow Agent's Account …

(vi) the Seller shall deposit the executed but undated Bill of Sale with the Escrow Agent …

(b) On the Scheduled Delivery Date, subject always to clauses 5.2 and 5.3, the Seller shall tender the Aircraft for delivery at the Delivery Location in the Delivery Condition … and the Parties shall, by email

(c) instructions to the Escrow Agent, procure that the Escrow Agent (and the Escrow Agent shall) simultaneously:

(i) release the Purchase Price to the Seller;

(ii) date and release the Certificate of Acceptance of Delivery to the Seller,

(iii) date and release the Bill of Sale to the Buyer …

(v) release the Certificate of Airworthiness, to the Buyer; and

(vi) register the Bill of Sale with the International Registry as a contract of sale;

(d) Risk of loss in the Aircraft shall pass from the Seller to the Buyer on Delivery

(e) With effect from Delivery, the Seller hereby transfers and assigns to the Buyer (or the Buyer's Nominee) absolutely and with full title guarantee all of the Seller's right, title and interest in the Aircraft …

6 WARRANTY, INDEMNITY AND DISCLAIMER

6.1 TITLE WARRANTY

The Seller hereby warrants to the Buyer that it holds and is free to convey to the Buyer ... at Delivery pursuant to this Agreement, good and marketable legal and equitable title and interest in and to the Aircraft, free and clear of all Security Interests other than any such Security Interests created by the Buyer …

10 FURTHER PROVISIONS

10.1 Further Assurance

Each Party shall, at the request and cost of the other, do and perform such further acts and execute and deliver such further documents which are necessary or desirable to give effect to the intent and purpose of this Agreement …

10.8 Waiver

Neither Party's rights shall be prejudiced by any indulgence or forbearance extended by such Party to the other or by any delay in exercising or failure to exercise any right and no waiver by either Party of any breach of this

> *Agreement shall operate as waiver of any other or further breach hereof. Any waiver or consent given by a Party under or in relation to this Agreement must, in order to be effective, be in writing…*"

13. The APA is expressed to be governed by English law (clause 10.13).

14. As mentioned above, the Purchase Price under the APA for the Aircraft was US$30,000,000. On the same day that the APA was concluded, a similar contract for the sale and purchase of the Aircraft was agreed between Odyssey and Toerama, under which Odyssey agreed to purchase and Toerama agreed to sell the Aircraft for the sum of US$29,000,000.

15. At the date of the APA, the legal title and interest in the Aircraft was held by Toerama and the Aircraft was subject to a Security Interest not created by GFG, namely Aircraft/Engine Mortgage M1245 entered on the Bermuda Register of Aircraft/Engine Mortgages on 28 November 2017 in favour of First Rand Bank Limited.

The purported terminations of the APA

16. On 8 June 2018, Mr Potter was informed by Mr Mark Bisset of Clyde & Co LLP ("Clyde & Co"), GFG's solicitors, that they had consulted the Bermuda Civil Aviation Authority Registry which recorded that the current owner of the Aircraft was Toerama. Mr Potter then asked Mr Doohan whether the sale was a "*back to back*". During an exchange of WhatsApp messages with Mr Sean O'Leary, Mr O'Leary informed Mr Potter that Odyssey's representative "*confirmed it has been structured as a back to back transaction*". Mr Potter's evidence is that he was not aware that the sale to GFG would be back-to-back with the purchase from Toerama until 8 June 2018 (paragraph 22 of Mr Potter's witness statement).

17. On 22 June 2018, Jet Aviation undertook a pre-purchase inspection of the Aircraft at Basel. In its inspection report, Mr Rogerio Machado of Jet Aviation identified the Aircraft Owner as Toerama and the customer as Global Jet. The report referred to and included an image of the certificate of registration of the Aircraft in Bermuda stating that the registered owner was Toerama, and the Certificate of Airworthiness.

18. In late June 2018, there was an exchange of emails indicating that Mr Gupta was also considering the purchase of another aircraft, instead of the Aircraft which was the subject of the sale contract with Odyssey. In one of these emails, Ms Georgina Crumpton (the General Manager of GFG) stated that "*Sanjeev is serious about this purchase - but I want to get [t]his right - I also need to man[a]ge the potential exit of the other BBJ and the relationship with Mick Doohan - so want us all to be joined up and 100% clear on the opportunity*".

19. On 28 June 2018, Mr Doohan sent an email to Mr Potter informing him that "*we are preparing all documentation in order to close on the BBJ either on the 4th or 5th of July*" and requested confirmation that the remaining funds would be paid to the Escrow Agent prior to 4 July 2018.

20. On 30 June 2018, Global Jet requested a "*Board Resolution authorizing the purchase of the aircraft*". A copy of the board minutes dated 24 May 2018 was sent to Mr Potter and others in early July 2018 (paragraph 18 of Mr Potter's witness statement).

The Minutes of a Meeting of the Board of Directors of GFG stated that they were minutes of a meeting held on 24 May 2018. Present at the meeting were Ms Anna Mazzilli and Mr Olwen Watterson, both representing Vorana Ltd as a director of GFG. The Minutes stated:

"…

*6. **PURCHASE - BOEING BUSINESS JET BBJ-737***

*The Chair referred to the board meeting minutes dated 20 April 2018 whereby the board had considered the purchase, by the Company, of a Boeing Business Jet (737-BB1) with Manufacturer's Serial Number MSN 29273 and Bermudian Registration Number VP-BBJ (the "**Plane**") for a purchase price of US$30,000,000 ...*

***IT WAS NOTED THAT** the registered owner of the Plane was Toerama (Pty) Limited, registered office ... South Africa, however, the Chair confirmed that the Company was contracting with Odyssey Aviation Limited, a company incorporated under the laws of the British Virgin Islands ...*

***IT WAS NOTED THAT** a draft Offer to Purchase and Letter of Intent in respect of the Plane had been drafted and that whilst negotiations were undertaken, a refundable holding deposit had been lodged with the escrow agent, Insured Aircraft Title Services Inc ("IATS") ...*

***IT WAS NOTED THAT** a refundable holding deposit of US$2,500,000 ... had been paid by the beneficial owner directly to IATS' client account to be treated as an unsecured, interest free, repayable on demand loan to the Company from the beneficial owner for the purpose of purchasing the Plane and a copy of the bank transfer details for IATS were tabled ...*

*7. **CONDITION AND MAINTENANCE SURVEY***

The Chair presented to the meeting a physical condition survey, maintenance status and valuation as prepared by McLarens Aviation in relation to the Plane and confirmed that the physical inspection had been carried out in Cape Town, South Africa ...

The board noted that McLarens Aviation had concluded that the 20 year old aircraft was considered to be in very good physical condition, taking into account its age and specification.

*8. **AIRCRAFT SALE AND PURCHASE AGREEMENT***

The Chair presented to the meeting an Aircraft Sale and Purchase Agreement between the Company (as "buyer") and Odyssey Aviation Limited (as "seller") in relation to the Plane for review and careful consideration by the board.

*9. **APPROVALS***

*After due discussion and consideration, **IT WAS RESOLVED THAT:***

...

- the Aircraft Sale and Purchase Agreement be and is hereby approved …

- that James David Potter, an employee of GFG Alliance Limited be and is hereby authorised to sign and enter into the Aircraft Sale and Purchase Agreement (whether in the form produced to the meeting or in such other form as may be approved) for and on behalf of the Company and that James David Potter be authorised to approve and sign any ancillary document, and to do all acts and things as may be necessary in connection with, or reasonably incidental to, the matters contemplated in the Aircraft Sale and Purchase Agreement.

IT WAS FURTHER RESOLVED *to confirm, approve and ratify:*

- *the appointment of Insured Aircraft Title Services Inc … as escrow agent …*"

21. In his witness statement, Mr Potter stated that the Minutes of the Meeting were back-dated (paragraph 17 of Mr Potter's witness statement). It is unclear when the meeting in fact took place.

22. On 6 July 2018, GFG's solicitors, Clyde & Co, sent an email to Mr Roumeliotis stating that they looked forward to closing the transaction and raised a question about the fact that the Aircraft was recorded on the Bermuda Registry as being subject to a mortgage in favour of First Rand Bank and enquired whether the mortgage would be discharged prior to delivery without using the purchase price funds. In reply, Mr Roumeliotis stated that the intention was for the Escrow Agent first to pay off the loan with the proceeds of the purchase price, adding that First Rand Bank had already agreed to release its lien upon the Escrow Agent's confirmation of the payment of the loan amount. In response, on 6 July 2018, Clyde & Co referred to the possibility of Bermudan counsel holding whatever documents are required by the Bermudan Civil Aviation Authority "*to reflect the change of ownership from Toerama to Odyssey and from Odyssey to GFG 737*".

23. On 10 July 2018, a Certificate of Airworthiness was provided to GFG's agent and the Scheduled Delivery Date was agreed by the parties to be 19 July 2018. In addition, on 10 July 2018, copies of the back to birth bills of sale were emailed to Mr Daniel Renwick and Mr Doohan of Global Jet, GFG's agent. There were three bills of sale tracing the transfer of title from the manufacturer (The Boeing Company) ultimately to Toerama.

24. On 11 July 2018, a test flight for the Aircraft took place (paragraph 17 of Mr Doohan's witness statement).

25. On 12 July 2018, PST Aviation (who had been engaged by GFG to assist with pre-purchase inspection and pre-engineering works) sent an email to Mr Potter and Mr Doohan attaching "*all release paperwork for VP-BBJ. Furthermore, Jet Aviation issued a letter regarding a minor light issue where they confirm to fix this problem at their cost. From the technical side, the plane is in delivery condition …*". The documents attached to this email included (1) a document without a title, but appears to refer to defects which have been rectified, which document identifies the

"*Operator*" as Toerama; (2) a Carried Forward Items List prepared by Jet Aviation which referred to the "*Customer*" as Toerama; and (3) a Work Report prepared by Jet Aviation which referred to the "*Customer*" as Toerama.

26. On 12 July 2018, Mr Roumeliotis sent an email to Clyde & Co attaching an addendum to the APA detailing the closing procedure "*including the payoff of the loan amount and filing of the lien release*". On 13 July 2018, Mr Roumeliotis asked Clyde & Co for a response and stated that the Aircraft had returned to service the previous day and that the parties should be coordinating for a closing the following week. Mr Roumeliotis enquired when the funds would be paid to the Escrow Agent.

27. On 16 July 2018, Mr O'Leary of Global Jet circulated to Mr Roumeliotis and Mr Doohan an email from Mr Stuart Metcalfe of the Jet Business stating that the lien in favour of the mortgagee would be released prior to delivery of the Aircraft and added that "*This will now mean the aircraft meets the delivery conditions as outlined in the APA dated 28th May 2018 (schedule 2) and the closing procedure will be as per schedule 5.1(b) of the same APA. The current operator is now arranging the pilots for the delivery flight on Thursday but as Per the APA section 5.1(a)(iii) The buyer must have fully funded Escrow prior to the aircrafts Departure from Basel. Failure to fund Escrow by COB on Wednesday the 18th now the aircraft meets the delivery conditions will result in the total loss of the Deposit held on account with IATS*". In a further email dated 16 July 2018, Mr Roumeliotis stated that the loan would be paid with Odyssey's own funds and the mortgagee's lien would be released prior to closing. In the event, the discharge of the mortgage on the Aircraft was evidenced in the Bermuda Civil Aviation Authority Register on 17 July 2018 (paragraph 24 of Mr Roumeliotis' first witness statement).

28. On 16 July 2018, in an exchange of emails GFG wrote to Mr Doohan of Global Jet requesting an extension to the completion date of 20 Business Days, explaining that the reason for the request was that this was the first time that it had purchased a Boeing Business Jet and had underestimated the time it would take. According to Mr Doohan, the reason for this request was that GFG was unable to get its financing in place by 19 July 2018 (the Scheduled Delivery Date) (paragraph 19 of Mr Doohan's witness statement).

29. On 18 July 2018, in a WhatsApp message, Ms Georgina Crumpton informed Mr Doohan that

> "*We are delighted the seller was able to provide the additional 20 days we need - That's great news … We (Sanjeev) really wants this plane, of that I can assure you. I'm happy to legally confirm this is the only BBJ we are interested in, and also to want to assure you we are doing everything we can to get this over the line. We can even acknowledge the back to back nature of the transaction to take that off the table. We have all put in a lot of time and effort into this deal, you, us and indeed the seller and none of us want to see this deal fall down now. The only way we can get there, is that I need you to do all you can to get us the extra time we need, but without us putting any further capital at risk at this stage. If we are able to complete sooner than the 20 days that is our aim, and can commit do doing that …*"

30. On 18 July 2018, Ms Crumpton informed Mr Gupta that she had spoken to Mr Potter and Mr Doohan and explained that "*we needed 20 days to close*", but Odyssey had flatly rejected this request unless further funds were paid into escrow. Ms Crumpton added that "*It seems the seller has released the lien & paid off the $28m of finance that was outstanding on the plane ... This is not great news for us, as this was one of our main arguments about this being a B2B deal and them not being able to provide clear title & the aircraft being unencumbered ... So makes our exit position weaker*".

31. On 18 July 2018, Clyde & Co, on behalf of GFG, wrote to Odyssey notifying it that Odyssey was in breach of clause 6.1 of the APA because it did not have good and marketable legal title to the Aircraft, free and clear from all Security Interests, as at the date of the APA, and Odyssey had not to that date fulfilled the conditions precedent in clauses 2(4)(a), (c), (d), (f) and (g) and that GFG was entitled to terminate the APA. In this letter, Clyde & Co stated that:

> "*Notwithstanding the above, having invested considerable time and cost in the process to date including external legal fees and expenditure on the Aircraft's pre-purchase inspection our Client's current intention is to proceed to purchase the Aircraft.*
>
> *We would propose the following, without prejudice:*
>
> *• An extension to the period for preparation for closing referred to in the definition of "Scheduled Delivery Date", from 5 Business Days to 25 Business Days*
>
> *• Amendment of the definition of "Latest Scheduled Delivery Date" - to 15 August 2018 ...*
>
> *The above to be subject to the following:*
>
> *• Provision by yourselves of evidence satisfactory to the Buyer that the First Rand Bank Mortgage over the Aircraft has been discharged and deleted from the BCAA Registry*
>
> *• Provision by yourselves of evidence satisfactory to the Buyer that back-to-birth bills of sale will be provided as a pre-condition to the Buyer's obligation to purchase the Aircraft under the SPA, demonstrating a chain of transfers of title ending with Odyssey Aviation*"

32. GFG did not pay the balance of the Purchase Price or an amount equal to 50% of the Escrow Agent's Fee on or before 19 July 2018.

33. Odyssey's case is that the Aircraft was ready for delivery on 19 July 2018, save that it was not positioned at the Delivery Location.

34. On 20 July 2018, Lombard North Central plc (the potential financier with whom GFG was working) wrote to GFG stating that it would arrange for the inspection of the aircraft records in Basel on the basis that they were not on site when the Aircraft was originally inspected.

35. On 20 July 2018, GFG served upon Odyssey a notice purporting to terminate the APA on the same grounds as those set out in Clyde & Co's letter dated 18 July 2018, stating that the APA is "*hereby terminated by the Buyer in accordance with its terms and/or rescinded by the Buyer*". In this notice, GFG stated that the deposit was now refundable.

36. On 23 July 2018, in a WhatsApp message, Ms Crumpton informed Mr Doohan that "*we have responded through our lawyers, which is what you told us to do originally and we are sticking with your advice as is easier, which is what you had said … We are pushing Lombard very hard and hope to withdraw our termination notice and to close this one out ASAP*". In a further WhatsApp message on 25 July 2018, Ms Crumpton informed Mr Doohan that "*It is ABSOLUTELY our intent to close …*".

37. Odyssey alleged that it was working towards a Scheduled Delivery Date of 17 August 2018. However, GFG contests that there was any such agreement to extend the Scheduled Delivery Date.

38. On 15 August 2018, Mr Roumeliotis wrote to Clyde & Co observing that there had been no update from GFG concerning their financing arrangements since 24 July 2018 and requested confirmation that the balance of the purchase price would be paid into escrow by 17 August 2018, being the 20th business day from the original closing date under the APA, "*since this was the delay that Buyer had requested and was provided by Seller*".

39. GFG did not pay the balance of the Purchase Price or an amount equal to 50% of the Escrow Agent's Fee on or before 17 August 2018.

40. On 21 August 2018, Odyssey served upon GFG a notice purporting to terminate the APA on the basis that GFG had failed to comply with clause 2.2.

41. On 2 June 2019, Odyssey's solicitors, King & Spalding International LLP, asked IATS to explain its role as Escrow Agent with respect to a back-to-back sale such as that which Odyssey had intended to carry out (by Odyssey purchasing the Aircraft from Toerama and then selling it to GFG). In an undated letter, IATS stated that it had received two deposits, one deposit of US$2,500,000 in respect of the Odyssey/GFG APA and another deposit of US$1,000,000 in respect of the Toerama/Odyssey APA and then stated that:

> "*IATS confirmed receipt of each deposit and provided the parties with IATS' standard Terms and Conditions … which provides in relevant part [IATS then quoted from the Terms and Conditions quoted above] … It is IATS' practice when acting as escrow agent in aircraft purchase transactions to provide IATS' standard Terms and Conditions when confirming receipt of deposit amounts, and when IATS is a party to aircraft purchase agreements. In each such case, the Simultaneous Closing Terms and the Closing Authorization Terms are provided to the parties …*
>
> *… following the receipt of the executed APAs, IATS continued to hold the deposits and undertook to act as Escrow Agent upon the terms and conditions supplied to the parties pursuant to the obligations attributable to IATS under the APAs and in accordance with IATS' standard Terms and Conditions …*

As of July 18, 2018, IATS believed that it held all documents required to be lodged with IATS under APA No. 1 [Toerama/Odyssey APA] and otherwise had what it needed under APA No. 2 [Odyssey/GFG APA] save for the balance of the purchase funds under APA No. 2, which were due from GFG. As explained further below, but for receipt of the balance of the purchase price, and subject to instructions, the closings under both APAs would have successfully occurred at the same time …"

42. IATS identified what it had received from GFG (namely, the deposit), from Odyssey (namely, a signed but undated bill of sale from Odyssey to GFG, and a signed, but undated, certificate of acceptance of delivery from Toerama), and from Toerama (namely, a signed but undated bill of sale from Toerama to Odyssey). IATS then explained the completion instruction emails it expected to receive from each of the parties. IATS continued:

"*Had IATS received instructions to date and release the Certificates of Acceptance and Delivery and the balance of the purchase funds under APA No. 2 from GFG, and emails from each of the parties substantially similar to those above, IATS would have taken the actions under clause 5.1(b)&(c) of the APAs and consummated the transaction.*

To be clear, the closing would not have commenced until IATS had received the email instructions from Toerama, GFG and Odyssey. GFG's purchase funds would only be released simultaneously with the release of the bills of sale from Toerama to Odyssey and from Odyssey to GFG. After receipt of the email instructions, the closing would have been concluded simultaneously, and GFG would have received title to the aircraft from Odyssey. If for whatever reason Odyssey did not authorize the completion under its APA, then the closing with GFG would not have been effected, and GFG's purchase monies would have remained in the escrow account. Similarly, if, for whatever reason, Toerama did not authorize completion under its APA, then the closing with Odyssey would not have been effected, and GFG's purchase monies would have remained in the escrow account.

The purchase funds deposited by GFG would only have been credited for the benefit of Odyssey once we were satisfied we would be able to transfer the Certificate of Acceptance to GFG, and the completed bills of sale passing title from Toerama to Odyssey and from Odyssey to GFG. This is standard practice in cases where there is one, or more, simultaneous closing(s) in relation to the same aircraft. The buyers' funds would not have been released unless there were simultaneous closings in relation to the same aircraft …"

43. The Deposit remains with the Escrow Agent pending the outcome of this action.

The applications for summary judgment

44. Each party claims it is entitled to the Deposit. Odyssey did have an additional claim for damages, but that is no longer pursued.

45. To this end, each party has issued an application for summary judgment. Odyssey seeks summary judgment declaring that the Deposit held by IATS be paid to it as a result of its purported termination of the APA on 21 August 2018 for GFG's failure to pay the balance of the purchase price and 50% of the Escrow Agent's fee due under the APA. For this purpose, Odyssey maintains that GFG's purported termination of the APA on 20 July 2018 was invalid.

46. GFG mirrors Odyssey's summary judgment application with its own application for summary judgment seeking the return of the Deposit on the grounds that it had validly terminated the APA on 20 July 2018 by reason of a breach of the warranty in article 6.1 of the APA relating to title and/or breach of a number of conditions precedent set out in clause 2.4(a), (d), (f) and (g). GFG had earlier relied on an alleged breach of clause 2.4(c), but this was no longer relied on by GFG.

47. Odyssey denies that GFG's termination of the APA on 20 July 2018 was valid. GFG maintains the validity of its termination of the APA on that date, but accepts that if its termination was not valid, then Odyssey's termination of the APA on 21 August 2018 was valid. If GFG's termination was valid, GFG is entitled to the return of the Deposit under clause 2.7 of the APA, but if Odyssey's termination was valid, the Deposit must be paid to Odyssey, not GFG, pursuant to clause 2.6 of the APA.

48. The Court may grant summary judgment under CPR rule 24.2 where there is no real prospect of the party (against whom judgment is sought) succeeding in its claim or defence and there is no other compelling reason why the relevant issues should be tried. The general principles underlying the determination of a summary judgment application are well established and are explained by Lewison, J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), at paragraph 15, including that a claim with a real prospect of success is one which carries conviction, as opposed to being merely arguable, that the evidence presented to the Court should not be taken at face value if there is clear, contrary evidence, and that the Court should have in mind both the evidence presented in support of or in response to the summary judgment application but also the evidence which could reasonably be expected to be produced at a trial. In other words, the question is whether the Court is in a position, based on the evidence before it and reasonably anticipated evidence, fairly to determine the legal and factual issues critical to the success or failure of a claim. In *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415; [2014] 1 WLR 2006, at paragraph 27, Floyd, LJ referred to Lewison, J's summary and said that the Court should consider carefully before determining single issues on a summary judgment application. Indeed, Lewison, J said that "*the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*".

GFG's submissions

49. Mr Robert Lawson QC of Clyde & Co LLP, on behalf of GFG, submitted that:

   (1) The agreed Scheduled Delivery Date under the APA was 19 July 2018, which was not extended by agreement.

(2) Odyssey was in default of the warranty in clause 6.1 of the APA in that it did not have good and marketable legal and equitable title in and to the Aircraft, free and clear of all Security Interests at the date of the conclusion of the APA, namely 28 May 2018, and/or at midnight on 19 July 2018. In particular, GFG contended that the two contracts which were concluded by Odyssey (the contract for the purchase of the Aircraft from Toerama and the contract for the sale of the Aircraft to GFG) were two separate contracts and GFG's obligation under the APA to pay the balance of the purchase price to IATS, who held the funds in escrow to be paid to Odyssey, and Odyssey's like obligation under its contract with Toerama, were intended to be performed simultaneously, but this was not permitted by the APA because Odyssey intended to use the funds paid by GFG to pay Toerama, but Odyssey had to transfer title to GFG upon payment of those funds, and Odyssey could not transfer title to GFG until it had acquired that title from Toerama, and it could not acquire title from Toerama without paying to Toerama the funds it received from GFG. GFG also said that it appeared that Odyssey did not in fact have any funds to purchase the Aircraft from Toerama without using the purchase funds which were to be paid by GFG.

(3) No grace period had been agreed by GFG to allow Odyssey to comply with the warranty under clause 6.1 of the APA.

(4) The condition precedent in clause 2.4(a) at the date of the APA had not been satisfied in that, according to GFG, GFG had not received evidence reasonably satisfactory to it that Odyssey had duly authorised the execution and delivery of the APA and matters contemplated by the APA.

(5) The conditions precedent in clause 2.4(d), (f) and (g) as at midnight on 19 July 2018 had not been satisfied, namely that:

(a) Odyssey had not positioned the Aircraft in the Delivery Condition at the Delivery Location. In this respect, GFG contended that it is irrelevant that it had not complied with its payment obligations under clause 5.1(a)(iii), which required such payment "*prior to the commencement of any pre-positioning flight required to make the Aircraft available at the Delivery Location*", because that was not a condition precedent to the performance of the condition precedent under clause 2.4(d).

(b) GFG had not received evidence of the establishment of Odyssey as a "*transaction user entity*" with the International Registry.

(c) GFG had not received copies of all back to birth bills of sale, in particular the bill of sale from Toerama to Odyssey.

(6) GFG did not, in writing, waive or defer the satisfaction of the conditions precedent in clause 2.4.

(7) Although GFG had not paid the balance of the purchase price and 50% of the Escrow Agent's fee by the Scheduled Delivery Date, which was a condition precedent to Odyssey's obligation to sell the Aircraft to GFG under clause

2.2(e) of the APA, that was irrelevant to GFG's right of termination for two reasons. First, each party's right of termination was independent of the other's. Second, Odyssey's inability to purchase the Aircraft from Toerama was independent of any breach of clause 2.2(e) (see *Aircraft Purchase Fleet Ltd v Compagnia Aerea Italiana* [2018] EWHC 3315 (Comm), para. 108-115, 132-133).

Odyssey's submissions

50. Mr Michael McLaren QC on behalf of Odyssey submitted that:

(1) As at 19 July 2018, GFG was in breach of its obligation to pay the balance of the purchase price and 50% of the Escrow Agent's fees in accordance with clause 5.1(a)(iii).

(2) Accordingly, there had been a breach of the condition precedent in clause 2.2(e) and Odyssey was entitled to terminate the APA pursuant to clause 2.6.

(3) As a matter of construction, clause 6.1 of the APA is a warranty applicable only at Delivery and not earlier. This clause does not amount to a warranty that there would be no back-to-back transaction for the sale and sub-sale of the Aircraft.

(4) The warranty in clause 6.1 of the APA was not breached because it required Odyssey to have title to the Aircraft only at the time of Delivery and Delivery had not taken place.

(5) GFG was aware at all times that the Aircraft was owned by Toerama, not Odyssey, and had raised no objection to this. Had an objection been raised, Odyssey would have arranged funding from Jetcraft to purchase the Aircraft from Toerama prior to the delivery to GFG (paragraphs 27 and 40 of Mr Roumeliotis' second witness statement).

(6) As to the conditions precedent set out in clause 2.4(a), (f) and (g), GFG had not requested these documents from Odyssey (prior to the purported termination on 20 July 2018) or indicated to Odyssey that GFG lacked them or would rely on their absence as not fulfilling the conditions precedent. In this respect, Odyssey relied on clause 10.1 of the APA and/or an implied term that GFG would request copies of such documents or information required reasonably in advance of Delivery and would raise with Odyssey any issues in relation to such documents reasonably in advance of Delivery if such issues might delay or otherwise impact the completion. GFG cannot complain about the non-compliance with any such conditions precedent if it could have requested such documents from Odyssey or other persons and/or could have obtained the information from public sources (on an international register), but did not do so.

(7) As to clause 2.4(a), as that condition precedent required compliance before or on the date of the APA, and as GFG had not received evidence of Odyssey's authorisation of "*the execution and delivery of this Agreement and all matters contemplated by the Agreement*" before signing the APA, GFG had in effect

waived compliance with this condition precedent by signing the APA, because after that time, it would have been impossible for Odyssey to comply with the condition precedent. According to Mr Roumeliotis (at paragraph 51 of his second witness statement), the directors of Odyssey had agreed to a back-dated resolution evidencing such authorisation. This condition precedent is not expressed to be an obligation on Odyssey as seller to provide the authority; it is expressed in passive terms that GFG as buyer "*shall have received evidence*" of such authorisation (unlike for example clause 2.4(d)). That phrase, Odyssey argued, is significant in that it required GFG to raise any issues about inadequate evidence before seeking to rely on the non-provision of such evidence as a reason for terminating the APA. Indeed, GFG itself had failed to produce the evidence of its own authorisation required under clause 2.2(a) of the APA until June or early July 2018, when it produced the allegedly back-dated minutes of the GFG board meeting referred to above. Neither party had treated the APA as being ineffective or bound to fail because of any incurable non-fulfilment of this condition precedent and, as both parties worked towards completion, they proceeded on the basis of a mutually agreed assumption that the APA was effective, with the result that GFG is estopped by convention from relying on any failure to comply with this condition precedent as a ground for termination (*Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84).

(8) As to clause 2.4(d), the obligation upon Odyssey to position the Aircraft at the Delivery Location by the Scheduled Delivery Date was subject to the due performance by GFG of its payment obligations under clause 5.1(a)(iii). Further, it is argued that, on the proper construction of the APA, GFG cannot rely on the non-fulfilment of clause 2.4(d) as a ground of termination where it has breached clause 5.1(a)(iii) (in not having paid the balance of the purchase price and 50% of the Escrow Agent's fee) as that would permit GFG to take advantage of its own wrong (see *Alghussein Establishment v Eton College* [1988] 1 WLR 587).

(9) As to clause 2.4(f), the condition precedent required GFG to have received evidence that Odyssey was registered as a transaction user entity with the International Registry. The evidence indicated that Odyssey was so registered on 19 July 2018. The question is whether GFG received such evidence. In reliance on the evidence of Mr Roumeliotis, such registration was readily available to the public, without cost, from the International Registry's website and that it was Mr Roumeliotis' experience that he did not have to send such evidence to counterparties, including those transactions involving Clyde & Co, since evidence of registration is readily available to the parties. Accordingly, it can be inferred - it is argued - that Odyssey did not provide this evidence because Odyssey had assumed that Clyde & Co would obtain that evidence by a simple search/enquiry of the International Registry. As with clause 2.4(a), Odyssey did not receive any evidence of GFG's registration as a transaction user entity in accordance with clause 2.2(d) of the APA. Given that the condition precedent requires GFG to have received evidence, as opposed to imposing an obligation on Odyssey to supply such evidence, any omission by GFG to search the International Registry precluded it from contending that this condition precedent has not been complied with.

(10) As to clause 2.4(g), there has been no failure to fulfil the condition precedent requiring the provision of back to birth bills of sale to GFG, because all of the available bills of sale, *i.e.* up to Toerama's acquisition of the Aircraft, were provided on 10 July 2018. There would be no bill of sale in respect of Odyssey's acquisition from Toerama until the simultaneous completion of the two sales, as reflected in the IATS Terms and as contemplated by the parties.

51. Odyssey had an additional claim for damages, but that claim was not pursued.

Clause 6.1: warranty as to title

52. It is common ground that, at the date of the APA, the legal title and interest in the Aircraft belonged to Toerama and not Odyssey and that there was a Security Interest not created by GFG, namely an Aircraft/Engine mortgage entered on the Bermuda Register of Aircraft/Engine Mortgages on 28 November 2017 in favour of First Rand Bank as mortgagee.

53. Odyssey's case is that it had entered into two aircraft purchase agreements for completion at the same time, whereby it had contracted to purchase the Aircraft from Toerama and then to sell the Aircraft to GFG, and that this was known to GFG and, further, that the IATS received the Deposit on the basis of the IATS Terms, which contemplated the simultaneous sales and purchases of an aircraft between more than two parties, in other words a chain of sales from seller to buyer to sub-buyer.

54. Clause 6.1 of the APA provided that:

> "*The Seller hereby warrants to the Buyer that it holds and is free to convey to the Buyer ... at Delivery pursuant to this Agreement, good and marketable legal and equitable title and interest in and to the Aircraft, free and clear of all Security Interests other than any such Security Interests created by the Buyer ...*"

55. Mr Lawson QC on behalf of GFG argued that clause 6.1 in effect contained two separate warranties: first, because of the use of the present tense "*holds*", there was a warranty that Odyssey held the relevant title (free and clear of all Security Interests) at the date of the contract (the APA) on 28 May 2018; second, because of the words "*at Delivery*", there was a warranty that Odyssey was free to convey the relevant title (free and clear from all Security Interests) at the date of Delivery. However, during oral argument, I understood Mr Lawson QC to develop this construction so that the promise relating to title being free and clear from all Security Interests applied only at the date of Delivery, not at the date of the APA.

56. Mr Lawson QC's construction was based on separating the words "*holds*" and "*is free to convey*" so that clause 6.1 should in effect be read so that Odyssey warranted that it held the relevant title at the date of the APA and that it would be free to convey the relevant title at Delivery. Mr Lawson QC said that it would have been important to a buyer in the position of GFG to know that Odyssey as seller had title at the date of the APA, before committing itself to the APA.

57. The evidence was that the mortgage in favour of First Rand Bank was discharged before 19 July 2018, but after the date of the APA.

58. I do not accept GFG's construction. First, I see no basis for construing the words used in the way that it submits. The word "*holds*" and the words "*is free to convey*" are both in the present tense. I do not see that a meaningful distinction in terms of the timing of both promises is to be drawn. Second, there is only one indication of timing in clause 6.1, namely "*Delivery*". There is no suggestion in that provision that the warranty must be complied with at the date of the APA.

59. Although there was in fact no Delivery (as defined by the APA), Mr Lawson QC argued that as the Delivery had to take place by the Scheduled Delivery Date, it was impossible for Odyssey to hold the relevant title at Delivery and so this constituted a breach of warranty. Mr Lawson QC also argued that insofar as the warranty in clause 6.1 applied as at "*Delivery*", that must be taken to refer to the Scheduled Delivery Date. However, I do not think that can be right. They are separately defined terms in the APA. The "*Scheduled Delivery Date*" is defined as an agreed specific date (in this case, 19 July 2018) and "*Delivery*" is defined, not as a date, but as an event, namely "*the passing of title to the Aircraft from the Seller to the Buyer ... as evidenced by the execution and delivery of the Bill of Sale*". The passing of title and the delivery of the Bill of Sale were to take place upon the exchange of the Aircraft and the bill of sale for the payment of the purchase price (clauses 5.1(b)-(e)). Therefore, I do not accept the submission on behalf of GFG that as Delivery would not take place because it had terminated the APA on the grounds of the alleged breaches of conditions precedent as at 19 July 2018, that necessarily meant that there was a breach of warranty. The warranty in clause 6.1 was not expressed to be complied with as at the Scheduled Delivery Date (unlike, for example, the conditions precedent in clauses 2.2 and 2.4), but at Delivery.

60. Mr Lawson QC further argued that, although the APA did not expressly prohibit back-to-back transactions, the structure of the APA militated against such back-to-back transactions, because Odyssey could not acquire title to the Aircraft until it paid the purchase price to Toerama, and it could not acquire title and pay the purchase price to Toerama until Odyssey had received the purchase price from GFG, which Odyssey would not pay without first acquiring title (which at that stage would have belonged to Toerama).

61. The logic of Mr Lawson QC's argument is correct. However, it ignores the fact that the parties had contemplated at the date of the APA that there might well be simultaneous transactions between Odyssey and GFG on the one hand and Odyssey and the then current owner of the Aircraft on the other hand. This is principally evidenced by the fact that when the Deposit was paid to IATS as the Escrow Agent, which was referred to in and had taken place before the conclusion of the APA, IATS received the Deposit and accepted its appointment as Escrow Agent on the basis of the IATS Terms, which provided that:

> "*each transacting party acknowledges that the transaction to which it is a party may involve a situation where (1) the aircraft being acquired may be being purchased from another seller, (2) the aircraft that is being sold by a seller may be being immediately resold to a different purchaser, (3) that there may be simultaneous closings of the purchases and sales, and (4) that all funds being used to fund the purchases and sales of the aircraft may be being deposited with IATS by the ultimate purchaser, and that IATS, upon authorization from the appropriate parties, may use said funds to fund the purchase of the aircraft or*

otherwise dispose of the funds in accordance with terms of the contract(s) involving the purchase(s) and sale(s) of the aircraft"

62. Accordingly, it must have been contemplated by the parties at the date of the APA that Odyssey might acquire the Aircraft to be sold to GFG in a transaction which would be simultaneously completed with Odyssey/GFG transaction. Mr Lawson QC said that this provision was applicable only if the parties, in particular GFG, authorised such back-to-back transactions referring to the words "… *IATS, upon authorization from the appropriate parties, may use said funds to fund the purchase of the aircraft ...*" (quoted above). However, I do not read the reference to "*authorization*" in that sentence as referring to approving the simultaneous transactions as such, but rather the performance of such transactions which would require each of the participating parties to send an email instruction to IATS confirming the release of the purchase funds (see clauses 5.1(b)-(c) of the APA). Further, this does not pay regard to the acknowledgement at the beginning of the provision quoted above.

63. In addition, it was apparent to the parties at the date of the APA and afterwards that the Aircraft then belonged to Toerama as the registered owner, and not to Odyssey. The fact that the Aircraft was not owned by Odyssey and was owned by Toerama at the time of the APA was known to GFG and/or its agents before the agreement of the APA (at least by 24 May 2018) and up to the execution of the APA (paragraph 17 of Mr Roumeliotis' first witness statement), and, if relevant, after the APA was signed, as is evident from the events referred to earlier in this judgment. Prior to Clyde & Co's letter of 18 July 2018, GFG had not registered any concern or objection as to the back-to-back nature of the transactions (see paragraph 40 of Mr Roumeliotis' second witness statement). Mr Potter's evidence is that he was not aware that the transaction was to be back-to-back until 8 June 2018, but he was speaking only of his own personal knowledge (paragraphs 21-22 of his witness statement). I also understand that Mr Potter had advised Global Jet that GFG would not enter into a back-to-back transaction (paragraph 20 of Mr Potter's witness statement). According to Mr Roumeliotis' second witness statement, at paragraph 36.1, he was told by Mr Doohan and Mr O'Leary that no such statement was made to them by Mr Potter. I am not in a position to resolve this conflict of evidence on this application. In any event, Mr Potter's alleged objection to this transaction was not communicated to Odyssey prior to the conclusion of the APA (paragraph 36.3 of Mr Roumeliotis' second witness statement); I am not aware of any evidence indicating any such communication. There had, however, been an objection as to the existence of the mortgage prior to closing, which Odyssey arranged to discharge before the Scheduled Delivery Date.

64. For these reasons, there was nothing in the APA which prohibited the purchase of the Aircraft, and the parties contemplated the possibility that the Aircraft would be purchased, by Odyssey simultaneously with the sale to GFG. Indeed, the fact that an aircraft may be purchased and sold at simultaneous transactions is not surprising.

65. In these circumstances, both as a matter of the language of clause 6.1 and the contemplated transfer of title at Delivery, I consider that the warranty given by Odyssey in clause 6.1 applied only at the time of Delivery and not beforehand.

66. Given that Delivery never took place, there cannot have been a breach of that warranty. This conclusion is reinforced by the fact that the parties were aware that there was going to be or might be a simultaneous transaction involving an ultimate seller other than Odyssey.

67. In my judgment, therefore, GFG was not entitled to terminate the APA by reason of a breach of clause 6.1.

Clause 10.1 and the implied term

68. Before I consider the alleged breaches of the conditions precedent in clauses 2.4 of the APA, I must consider Odyssey's argument that clause 10.1 of the APA and an implied term have application to such issues.

69. Clause 10.1 of the APA imposed an obligation on each party, "*at the request and cost of the other, do and perform such further acts and execute and deliver such further documents which are necessary or desirable to give effect to the intent and purpose of this Agreement*". I do not see how this provision can be of assistance to Odyssey where there has been no request made by Odyssey to GFG, in respect of the issues raised in relation to the conditions precedent in clause 2.4, which I understand to be the case.

70. That leaves the implied term, which is pleaded at paragraph 8 of Odyssey's Reply in relation to clause 2.4 of the APA, namely that:

    (1) GFG would co-operate in the performance of the APA including doing such things as were reasonably necessary to ensure the timely completion of the purchase of the Aircraft; and

    (2) GFG would seek and request (a) copies of any documents and (b) the information, evidence or confirmation, referred to in clauses 2.4(a)-(h), reasonably in advance of Delivery, from Odyssey or other relevant third parties, in the event GFG required any of these things in order to complete the purchase of the Aircraft; and

    (3) GFG would raise with Odyssey any issues with any of the matters under clauses 2.4(a)-(h) reasonably in advance of Delivery if such issues might delay or otherwise impact the completion of the purchase of the Aircraft.

71. In support of the alleged implied term, Mr McLaren QC relied on the decision of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742, where Lord Neuberger said (at paragraphs 18 and 21):

> "*18. In the Privy Council case BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that:*
>
> > *"for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that*

'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract." …

21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266 , 283 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37. First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

72. In support of the implied term of co-operation, Mr McLaren QC referred me to the decision of the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531, where Lord Hughes (with whom the majority of the Judicial Committee agreed) considered implying a term requiring one party's co-operation in order to allow the other party to perform his or her obligations under the contract. The editors of Chitty on Contracts (33rd ed., 2018), at paragraph 14-023, refer to the statement of principle made by Lord Blackburn in *Mackay v Dick* (1881) 6 App Cas 251, 263 (also referred to by Lord Hughes),

"*I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which*

> *cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances*."

73. Where the parties have entered into a contract which includes a number of detailed provisions which have been drafted over time, there is an instinctive reluctance to imply further terms. However, where there are gaps in the understanding of the contract, a resort to an implied term may be of assistance. Nevertheless, as is evident from the principles governing the construction of a contract and the finding of implied terms, as commented on by Lord Neuberger, the circumstances in which terms are to be implied are constrained. Looking at clause 2.4, I make the following observations:

    (1) Clause 2.4 is expressed to contain a number of conditions precedent to GFG's obligations as a buyer, which must be fulfilled.

    (2) Some of the conditions precedent impose a clear obligation on Odyssey as seller, for example clauses 2.4(b) and (d) (relating to making the Aircraft available for inspection and to positioning the Aircraft at the Delivery Location).

    (3) Some of the other conditions precedent are expressed in terms of GFG having received a document or evidence or confirmation, for example clauses 2.4(a), (c), (e), (f), (g) and (h). However, in respect of some - but not all - of those clauses, the relevant document, evidence or confirmation can be obtained only from Odyssey as seller, for example evidence of Odyssey having authorised the APA (clause 2.4(a)).

    (4) There is at least one provision where the relevant evidence was obtainable from sources other than Odyssey, in particular evidence of Odyssey's registration as a transaction user entity with the International Registry (clause 2.4(f)).

    (5) Some of these provisions have their equivalent in clause 2.2 which stipulate a number of conditions precedent to Odyssey's obligation to sell the Aircraft, in particular clause 2.2(a) (evidence of GFG's authorisation of the APA) and 2.2(d) (evidence of GFG's registration as a transaction user entity with the International Registry).

74. In considering Mr McLaren QC's submissions on an implied term, I also have regard to the fact that clause 10.8 of the APA provides that "*Neither Party's rights shall be prejudiced by any indulgence or forbearance extended by such Party to the other or by any delay in exercising or failure to exercise any right and no waiver by either Party of any breach of this Agreement shall operate as waiver of any other or further breach hereof. Any waiver or consent given by a Party under or in relation to this Agreement must, in order to be effective, be in writing*". Nevertheless, this waiver provision does not affect the substance of any right or obligation provided for in the express or implied term; it only concerns whether or not there has been a waiver of an entitlement to exercise a right or of a breach of any such obligation.

75. In the circumstances of this case, in my judgment, there is an implied term along the lines of that submitted by Odyssey. That said, the term which I consider should necessarily be implied is not as broad as that contended for by Odyssey, but nevertheless falls within its parameters, namely that :

(1) In the event that clause 2.4 imposed a condition precedent that GFG shall have received a document, evidence or confirmation and clause 2.4 does not impose an obligation on Odyssey to supply that document, evidence or confirmation, GFG shall take reasonable steps to seek and request the document, evidence or confirmation referred to in clause 2.4, reasonably in advance of the Scheduled Delivery Date, from Odyssey or other relevant third parties, if GFG still required such document, evidence or confirmation in order to complete the purchase of the Aircraft under the APA.

(2) In the event that GFG is unable to obtain such document, evidence or confirmation, notwithstanding the taking of reasonable steps to obtain the same, GFG shall inform Odyssey, reasonably in advance of the Scheduled Delivery Date, of the fact that it still required such document, evidence or confirmation and has been unable to obtain it.

(3) If GFG fails to take reasonable steps to obtain the document, evidence or confirmation in question and has failed to inform Odyssey that it still required but has been unable to obtain such document, evidence or confirmation, GFG will not be entitled to rely on the non-provision of the document, evidence or confirmation in the exercise of a right of termination under clause 2.7 of the APA.

76. There would, of course, be a similar implied term, *mutatis mutandis*, applicable to the conditions precedent under clause 2.2 of the APA.

77. I consider that this implied term is reasonable and equitable. Further, and more importantly, it is necessary to give business efficacy to the APA and is sufficiently obvious, because unless the notification envisaged by the implied term is provided, one party will not know if the other party has "*received*" the document, evidence or confirmation referred to in the relevant condition precedent. The implied term could be expressed as an obligation upon the other party to make enquiries of its counterpart whether it has received the document, evidence or confirmation, but it seems to me that it is incumbent on the party requiring the document, evidence or confirmation to inform the other party that the document, evidence or confirmation has not been received and is still required, otherwise the other party might reasonably assume that satisfactory evidence has been received. I further consider that this implied term may be expressed in clear terms and does not contradict the express terms of the APA.

78. I am not convinced that an implied term is required where the express or implicit obligation is on one of the parties to supply the document, evidence or confirmation. In that case, that party will be aware whether the document, evidence or confirmation has been supplied. However, it is possible that the implied term might also exist and apply to those conditions precedent where each of the parties is required to supply to the other a particular or equivalent document, evidence or confirmation, and neither does. I do not consider that the existence of such an implied term is necessary for my decision in this case and so I do not consider it further.

Clause 2.4(a): Odyssey's authorisation

79. Both Odyssey as seller and GFG as buyer executed the APA on 28 May 2018 without having provided to the other evidence of their respective authorisation of the APA and the matters contemplated thereunder. Clauses 2.2(a) and 2.4(a) provided that it is a condition precedent that each party "*shall have received evidence*" of such authorisation on or before the date of the APA.

80. GFG's position is that it had provided such authorisation later by means of the production of the minutes of the board meeting backdated to 24 May 2018 to Odyssey in early July 2018. Although Odyssey had authorised the APA and the matters contemplated thereunder, evidence of such authorisation had not been provided to GFG prior to GFG's purported termination of the APA on 20 July 2018.

81. GFG's case therefore is that both parties were in breach of this condition precedent as at the date of the APA and it was open to either party to terminate the APA. As it turned out, GFG terminated the APA first on 20 July 2018 in reliance on this breach (as well as other breaches).

82. Odyssey rejected this, arguing that the parties necessarily waived compliance with these conditions precedent given that they had executed the APA in the knowledge that each lacked evidence of the other's authorisation. Mr McLaren QC submitted that the execution of the APA in these circumstances constituted the relevant waiver and that that waiver was in writing (as required by clauses 2.7(a) and 10.1 of the APA) in the form of the APA itself. I accept this submission. If it is relevant, as it was apparent to both parties that neither had provided the other with the relevant evidence of authorisation and as both parties had signed the APA notwithstanding, both parties proceeded on the assumption (evidenced in writing by their signature of the APA) that the non-receipt by either party of evidence of authorisation was not to be treated as a failure to comply with the condition precedent in clause 2.4(a) or clause 2.2(a), with the result that GFG (and Odyssey) would be estopped by convention from contending otherwise.

Clause 2.4(d): positioning of the Aircraft at the Delivery Location

83. As at 19 July 2018, the Aircraft had not been positioned at the Delivery Location. In order to determine whether or not this is a breach of the condition precedent in clause 2.4(d), I consider that one must also have regard to clause 5.1(a)(iii) of the APA, which provided that:

> "*the Buyer shall, prior to the commencement of any pre-positioning flight required to make the Aircraft available at the Delivery Location in accordance with the provisions of this Agreement, pay the balance of the Purchase Price … together with an amount equal to … fifty percent (50%) of the Escrow Agent's Fee to the Escrow Agent's Account*"

84. Clause 2.4(d) required that the Aircraft be positioned at the Delivery Location by the Scheduled Delivery Date and clause 2.2(e) required GFG to have paid the balance of the purchase price and 50% of the Escrow Agent's fee by the Scheduled Delivery Date. Even though these two provisions required the Aircraft's pre-positioning and the relevant payments to be undertaken by the same time, *i.e.* by the Scheduled

Delivery Date, it is clear from clause 5.1(a)(iii) that the payment obligation was to be performed before the positioning obligation was to be performed, indicating that the parties' intention was that the positioning obligation was conditional on the payment obligation and that if the payment obligation was not performed by GFG as buyer, there was no requirement upon Odyssey as seller to perform the positioning obligation. It might be said that if Odyssey did not wish to perform the positioning obligation, in the absence of payment, it could have terminated the APA and, if it did not terminate the APA, it remained obliged to position the Aircraft at the Delivery Location. I would not accept any such argument, because in my judgment the positioning obligation set out in clause 2.4(d) presupposed that GFG has discharged its payment obligations under clause 5.1(a)(iii). If I am wrong in this conclusion, I accept Mr McLaren QC's argument that GFG cannot rely on clause 2.4(d) as a ground of termination in circumstances where it has not paid the balance of the purchase price and 50% of the Escrow Agent's fee, because so do to would be to permit GFG to capitalise on its own breach of contract (contrary to the presumption referred to by the Court of Appeal in *Alghussein Establishment v Eton College* [1988] 1 WLR 587).

Clause 2.4(f): evidence of Odyssey as a "*transaction user entity*"

85. Odyssey registered as a transaction user entity with the International Registry on 3 May 2018, which registration was valid until 2 May 2019, as evidenced by the International Registry's certificate which refers to Odyssey as a "*transacting user entity*".

86. The question is whether GFG received evidence of such registration. At paragraph 54 of his second witness statement, Mr Roumeliotis stated that evidence of such registration was publicly accessible and would have been available to GFG and its lawyers:

> "*Clyde have access to the International Registry which operates a website via which details of a registered transacting user entity can be obtained by the public, using its search facility without the payment of any fee or any special authorization, after the click of a few keyboard keys … This simple process would have confirmed Odyssey's registration. I imagined that this was something that Clyde would have done for GFG, if thought necessary to obtain, and it was unnecessary for me to do anything about it. Otherwise, GFG or Clyde could have simply asked myself or IATS if Odyssey was a transacting user entity on the International Registry. In all my previous aircraft transactions, including the previous ones working with Clyde, I do not remember ever having to send evidence to a buyer or a seller that Odyssey is a transacting user entity since it is something that is easily obtained by the parties. Nonetheless, if such evidence were required from Odyssey direct, it could have been provided by me in a few minutes at most*."

87. No evidence has been adduced by GFG that Mr Roumeliotis' evidence is wrong or mistaken. Indeed, there is no reason to doubt Mr Roumeliotis' evidence. At paragraphs 46-47 of his witness statement, Mr Potter stated that the evidence of Odyssey's registration which had been obtained by Odyssey was never forwarded to him and added that "*Nor did Odyssey provide GFG with any other evidence demonstrating that it is a transaction user entity with the International Registry*". Mr

Potter does not say that GFG did not receive any evidence of such registration from a source other than Odyssey. However, according to paragraph 13(2) of GFG's Defence, it is asserted that GFG did not receive "*anything complying with any of the requirements contained in conditions precedent contained in clause 2.4(c), and/or (f) and/or (g) of the APA, such as to fulfil those requirements either adequately or at all*". This plea was supported by a statement of truth signed by Mr Mark Bisset of Clyde & Co. I therefore understand that GFG's case is that it did not receive evidence of Odyssey's registration as a transaction user entity by the Scheduled Delivery Date.

88. In these circumstances, having regard to the implied term that I have found to exist in the APA, it was incumbent on GFG to inform Odyssey that it had not obtained evidence of Odyssey's registration as a transaction user entity with the International Registry and that it continued to require such evidence. This is especially so in circumstances where neither party had provided such evidence of its own registration to the other and there had been no indication by either party that such evidence was still required. It would have been reasonable for either party to assume that the other party had received such evidence as part of its consultation with the International Registry.

89. In these circumstances, on the basis of the implied term, GFG is not entitled to rely on non-fulfilment of clause 2.4(f) in support of its purported termination of the APA.

Clause 2.4(g): back to birth bills of sale

90. Although the back to birth bills of sale evidencing the transfer of title to the Aircraft from Boeing (the manufacturer) to Toerama had been provided to GFG on 10 July 2018, there existed no bill of sale evidencing a transfer of title from Toerama to Odyssey as at 19 July 2018. Of course, there would be no such bill of sale until completion of the sales under the two aircraft purchase agreements - namely, from Toerama to Odyssey and from Odyssey to GFG - took place, which Odyssey said was to take place simultaneously, as was contemplated by both parties in accordance with the IATS Terms. In addition, an undated and executed bill of sale conveying title from Toerama to Odyssey and an undated and executed bill of sale conveying title from Odyssey to GFG were provided to IATS (the Escrow Agent) on 6 July 2018 and 3 July 2018 respectively (see paragraph 55 of Mr Roumeliotis' second witness statement).

91. Mr McLaren QC argued that this was sufficient for the purposes of clause 2.4(g) and, if necessary, called in aid the implied term which he advanced. This submission was developed during oral argument to explain that this was sufficient because there would be simultaneous closing transactions and the Toerama-Odyssey bill of sale would not exist until completion of Delivery.

92. Given that, as I have found above, the parties had agreed to and contemplated that there would be a back-to-back simultaneous sale and purchase between Toerama and Odyssey on the one hand and Odyssey and GFG on the other hand, it would follow that the bill of sale from Toerama to Odyssey would not yet exist until Delivery. Accordingly, the back to birth bills of sale referred to in clause 2.4(g) of the APA must refer to those then existing as at the Scheduled Delivery Date. Therefore, I do not consider that there has been a breach of the condition precedent in clause 2.4(g). If of course Odyssey were unable to deliver title to the Aircraft, along with the bill of

sale from Toerama to Odyssey at the time of Delivery, Odyssey would have been in breach of the APA and would have been answerable to GFG for damages. However, the Aircraft was never delivered to GFG.

Waiver in respect of an extended Scheduled Delivery Date

93. At paragraph 11 of its Particulars of Claim, Odyssey pleaded that it had agreed to GFG's request for an extension of the Scheduled Delivery Date by 20 working days to 17 August 2018. GFG disputed that there was any such agreement.

94. During oral submissions, Mr McLaren QC confirmed that there was no agreement for the deferment of the Scheduled Delivery Date. Mr McLaren added that "*I can best put it like this -- there was an understanding that … they were working towards trying to achieve completion 20 working days subsequently*".

95. In determining the parties' applications, I have not relied on any alleged waiver or grace period reflected by this supposed extension of time. If it were relevant to my decision, I would have decided that it should be tried and would have refused both parties' applications for summary judgment.

Conclusion

96. It follows from my decision above that GFG was not entitled to terminate the APA on 20 July 2018 for the reasons relied on.

97. Accordingly, Odyssey's termination of the APA on 21 August 2018 was valid and effective. As a result, Odyssey is entitled to be paid the Deposit.

98. In these circumstances, I do not consider that GFG has a real prospect of successfully defending the claim and I do not consider that there is any compelling reason why this claim should proceed to trial. In reaching my decision, I have had regard to the facts which were common ground or not disputed and which I do not consider will benefit from any further investigation pending trial. Ultimately, the outcome of the applications depended on the Court's consideration of the meaning, terms and effect of the APA.

99. Therefore, I allow Odyssey's application for summary judgment and dismiss GFG's application for summary judgment.

100. I will discuss the form of relief with the parties' counsel. I am grateful to both counsel for their very helpful and engaging submissions.