

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2020] EWHC 3787 (Comm)



No. CL-2020-000561

Rolls Building
London, EC4A 1NL

Tuesday, 29 December 2020

Before:

MR JUSTICE FREEDMAN

B E T W E E N :

(1) VARIOUS AIRFINANCE LEASING COMPANIES
(2) ALIF SEGREGATED PORTFOLIO COMPANY & Ors

Claimants

- v -

SAUDI ARABIAN AIRLINES CORPORATION

Defendant

-and-

INTERNATIONAL AIRFINANCE CORPORATION

Intended Third Party

THE CLAIMANTS did not appear and were not represented.

MR C. BÉAR QC, MR G. ROBERTSON and MR J. BARNES (instructed by **Norton Rose Fulbright**) appeared on behalf of the **DEFENDANTS**.

J U D G M E N T

This is a public version of a judgment given initially *ex tempore* on 29 December 2020 and confidentially in approved form to the parties on 12 January 2021. Redactions have been made to ensure that the remainder can be made public.

MR JUSTICE FREEDMAN:

Introduction

- 1 It is now 6.30 p.m. in the vacation on 29th December 2020. The court has before it an application made *ex parte* on notice on behalf of the defendants ("Saudia"). It is an interim injunction to restrain disclosure of confidential information both against the claimants and the person who is said to be their *de facto* controller, International Airfinance Corporation, an intended third party. The injunction is sought until a return date.
- 2 The claimants and Saudia are already involved in High Court proceedings in respect of leases relating to 50 Airbus aircraft to Saudia on long-term leases. Under the terms of those leases, financial information of Saudia which is not in the public domain must be provided to the lessors by no later than today. There is a concern that without an injunction that information will be leaked, in particular to the media, along with other confidential information relating to the parties' dispute.
- 3 The claimant has appeared before the court through Mr Charles Béar QC, together with Mr Giles Robertson and Mr Jonathan Barnes of counsel. The facts are set out in a witness statement of Anas Bafaqeh, dated 24 December 2020. The general background is as follows. Saudia is the national airline of Saudi Arabia, and is wholly owned by the Kingdom of Saudi Arabia. The intended third party, International Airfinance Corporation ("IAFC"), is a Dubai-based business, although registered in the Cayman Islands, and specialising in finance for aviation. The 50 leases are long-term leases on substantially identical terms save as to rent, and expire at various dates between 2027 and 2032. The sums involved are very large and the amounts of the rent and other maintenance payments for the full lease term is likely to be over \$1.5 billion. IAFC is the servicer of each lease, and is the person with whom Saudia is to communicate: see clause 20(p) of each lease. It was that party that originally signed term sheets with Saudia before the leases were incepted, and it was the original lessor under each lease before the reversion was acquired of the leases by the first claimant. The second claimant is the parent of the first claimant. When each aircraft was delivered, the rights and duties of the lessor were novated over to one of the lessors - the first claimant. It is submitted that they have no practical existence independent of IAFC, which acts on their behalf in all respects: see the witness statement of Mr Bafaqeh at para.57(e) and (i).
- 4 There are a number of disputes that have arisen between the parties which appear from the particulars of claim. It is not necessary for the purpose of this application to go through the details of that. However, it suffices to say that they relate to the amounts to be paid by way of rent payments, to alleged breaches in relation to maintenance obligations, to alleged failures to provide timely financial statements, and to what payments are due. The relief claimed includes various declarations in relation to the obligations and as to whether they trigger events of default. There are also claims made for what are said to be arrears in relation to payments of basic rent, maintenance payments and other payments, and damages.
- 5 In the course of this year there have been without prejudice discussions to attempt to settle the dispute or aspects of it. In the course of those without prejudice discussions there was a claim

form that was issued on 1 September 2020 but not served at that time. There was a mediation process that took place on 9 November 2020, which was unsuccessful. Saudia says that in the course of their commercial dealings there has been communicated sensitive and confidential information. The term sheets which were signed before the lease agreements were entered into provided that the parties agreed to keep the terms and conditions of the term sheets confidential, as well as the details of the final agreements. Each lease provided, at clause 20(j), a provision as to confidentiality:

"Each of the parties acknowledges the confidential and sensitive nature of this Lease and the terms contained herein and the transactions contemplated hereby and agrees not to disclose to any third party (other than their auditors and respective professional advisors, or to any Affiliates, Owner, Affiliates of Owner or Lessor Lender and their respective professional advisors or Lessor's potential purchasers, lenders or investors in respect of any potential sale, financing, refinancing of or related to the Aircraft and/or transfer or assignment of this Agreement or any right or interest therein, and except as otherwise required by Applicable Law) any non-public, proprietary information provided by and concerning the other party which the other party specifies as being of a sensitive and confidential nature without the prior written consent of such party."

- 6 The mediation agreement provided at clause 16 that the parties, their representatives and advisors and the mediator agreed, in relation to all information and statements disclosed in the mediation, to keep them confidential and not to use them for a purpose other than the mediation, with the usual exclusions, including as may be required by law.

Background to the application

- 7 This application arises following attention of the media in relation to the dispute. On 26 October 2020 an email was sent by Reuters to Saudia in which it was stated that Reuters was working on a story on which they wished to have the comment of Saudia. The email went on to say:

"Reuters understands that based on documents we have obtained - that Saudi Arabian Airlines is being sued by Alif Segregated Portfolio Company in a London Commercial Court. Alif Segregated Portfolio Company claims Saudia has breached several clauses of lease agreements for 50 Airbus aircraft (ordered in 2015). Alif is suing Saudia for \$461 million in unpaid rent and maintenance fees. The company also claims further damages, costs and interests. Alif said Saudia had failed to pay basic rent after seeking to reduce its amount and engaged in unauthorized engine and part swaps."

- 8 The next day, on 27 October 2020, an email was sent by Reuters to Mr Springthorpe of Norton Rose Fulbright, the solicitors on behalf of Saudia. That email read as follows:

"I am a Reuters correspondent covering the Gulf region. We have a story on a lawsuit filed against Saudi airlines Saudia in a London commercial court from Alif fund over the lease of 50 Airbus aircrafts. Alif Segregated Portfolio Company is claiming Saudia was in breach of various clauses of lease agreements of the 50 aircrafts bought from Airbus in 2015.

Alif is suing Saudia for the alleged breaches including for around \$461 million in unpaid rent and maintenance cost, along with further damages and interest.

Alif said in the court documents -- seen by Reuters -- Saudia has failed to pay basic rent after seeking to reduce its amount and engaged in unauthorized engine and part swaps.

Could you confirm that you represent Saudia in this case? Would you like to make a comment on behalf of your client?

We obviously welcome any other information that you would provide [to] us to balance our coverage."

9 The response on behalf of Saudia, by email of 27 October 2020, was as follows:

"Saudia will stand by its contractual commitments, and is also prepared to defend itself against inaccurate claims. Saudia will not comment on the specific details of this matter but would emphasise that active legal proceedings have not commenced. We are currently in discussions with the lessor to resolve contractual differences, and we believe that common sense will prevail in the end. We have no further comment at this stage."

10 It is to be noted that the reference to court documents being seen by Reuters in the email sent by Reuters to the solicitors for Saudia appears to indicate that Reuters had in some way had access to the claim form and/or the particulars of claim in this case. That is because at that stage there had not been an acknowledgement of service, and copies of the documents in the proceedings would therefore not in the normal course have been available to a non-party: see CPR 5.4C. This was all proximate in time to preparation for a mediation which was due to take place, and did take place, on 9 November 2020. It was also proximate to the service of the claim form which was served under cover of a letter of 2 November 2020.

11 On 28 October 2020 there was an email sent without prejudice and subject to contract from the solicitors for Saudia, together with various attachments. [REDACTED]

12 [REDACTED]

13 On 5 November 2020, pursuant to the leases, there was provided an unaudited consolidated financial statement in relation to Saudia, comprising a condensed interim consolidated statement of comprehensive income for the half year ended 30 June 2020. [REDACTED] That information is regarded as highly confidential by Saudia. It is not in the public domain. Saudia is a private company and its accounts are not published. [REDACTED] The information was only provided to IAFC because of the provisions in the lease. The information was not expressed to be confidential but it is said that it would have been understood to be confidential.

14 [REDACTED] There is a confidential annex that is attached to the witness statement of Mr Bafaqeeh, which refers to the change. The significance of this is that the information [REDACTED] appears to have been provided to Reuters. On 17 November 2020 Reuters wrote to the Media Relations of Saudia and stated the following:

[REDACTED]

Sources have said [REDACTED] was conditioned with a restructuring process and the review of some contracts, including with Alif and Rolls-Royce's maintenance contract. The source said the review of the company's contracts is linked to a potential takeover by the PIF."

There were then various questions that were asked with a view to having confirmation about the receipt of these amounts and their purpose, and how they were to be treated. It was also asked:

[REDACTED] What is the reason for this move? Is it a sign that the PIF is planning to list or privatise Saudia?"

15 Again, there was a response by the Media Relations of Saudia, of 18 November 2020, to the effect that it did not comment on financial matters and would stand by its contractual commitments.

16 Saudia submits that it appears from the email of 17 November 2020 that [REDACTED] Saudia's case, to which I shall refer in more detail below, is that it is likely that that information came from IAFC/the claimants in this case.

17 There was then an article that was published by Reuters on 18 November 2020 referring to [REDACTED]

"The finance ministry approved a payment of 13.6 billion riyals (\$3.6 billion) for Saudia in 2019, and a further 6.4 billion riyals in the first half of this year, according to the documents reviewed by Reuters."

It was stated that the amounts were labelled as "government compensation". It referred to other information relating to a loan provided by Saudi Arabia's wealth fund. It also referred to this action in the High Court, and said that that was a claim over:

"... an alleged breach of the agreement, Saudia asked for a 20% cut in the agreed rent and the cancellation of a government guarantee clause, court documents showed."

18 The reference to [REDACTED] appears, says Saudia, to be the result of a leak of information in without prejudice negotiations between the parties. In a without prejudice letter, dated 9 April 2020, from Saudia to IAFC, [REDACTED] In a response, also without prejudice, dated 12 April 2020, from IAFC, [REDACTED]. Saudia draws attention to the fact that although the press coverage was referring [REDACTED] appears to have come from the request that was made in without prejudice correspondence. [REDACTED]

19 At para.22 of the particulars of claim, there was reference to a dispute in relation to alleged overpayment of basic rent as alleged by Saudia. The last sentences of para.22 read as follows:

[REDACTED]

20 Saudia submits that much of the material in Reuters' November article can only have been drawn from Saudia's confidential information that was provided to IAFC. In particular they draw attention to the following:

(1) [REDACTED] Further, the reference to [REDACTED] is a reference [REDACTED] to which reference has been made.

(2) [REDACTED].

(3) The reference to the [REDACTED] appears to come from the without prejudice letter referred to above of 9 April 2020.

(4) The reference to the [REDACTED] appears to come from the [REDACTED] sent in a without prejudice letter from Saudia's solicitors to the IAFC parties' solicitors, under cover of a letter dated 28 October 2020.

21 Saudia submits that the only possible sources of this information are Saudia, the IAFC parties and their respective advisers. The material has not been sent to anybody else. It submits that the possibility that advisers leaked the material in breach of their professional duties should be "quickly discounted". Saudia itself has no interest in leaking the material. IAFC denies the leak and says that the publicity was not in IAFC's interest. The claimant submits that in fact there is a high probability that the leak does come from IAFC and that it was deliberate. The suggestion that it was not in their interests is contrasted with the particulars of claim referring, at para.22, to Reuters' November article, [REDACTED]. They also draw attention to the fact that the only parties that would have thought that the [REDACTED] was still applicable after 13 November 2020 were the IAFC parties, because the matter had been the subject of a correction that had not yet been disclosed to IAFC parties at that stage. Thus, when the article was published on 17 November 2020, the [REDACTED] was by that stage historic, but not known to be so by the IAFC parties. That, it is said, strongly suggests that the documents that Reuters have seen came from IAFC. [REDACTED]

22 There has been correspondence between the solicitors in relation to this matter. The allegations of misuse of confidential information have been put by the solicitors for Saudia to the solicitors for the IAFC parties. They have responded in letters dated 21 December 2020 and 23 December 2020. In summary, the IAFC solicitors, King & Spalding, say the following:

(1) Saudia's case is based on inference, and say that there is no legitimate inference to be drawn, and that it is entirely speculative. Saudia say that it would be expected that their case would be based on inference but they submit that the inferences are strong enough for an interim injunction at this stage.

(2) Others have had access to [REDACTED] information. Saudia says that that is true to an extent in respect of the [REDACTED] but it is not correct as regards the [REDACTED]. It is also inapplicable as regards the without prejudice correspondence.

(3) The security trustee has had access to the [REDACTED]. Saudia's answer to that is that in practice the [REDACTED] have not been sent to the security trustee: see Mr Bafaqeeh's statement, para.26. The security trustee's role is administrative and it is submitted that they would have no reason to leak the information: see Mr Bafaqeeh's statement, para.55(g).

(4) The Reuters' article contains a number of general statements relating to Saudia's financial position, which is a matter of public record. Saudia responds by saying that that was not the case, and the information in relation to, for example, [REDACTED] Saudia submits that it is

telling that neither of the King & Spalding letters put forward a positive explanation as to how the without prejudice material might have ended up in Reuters' hands. Saudia also relies upon the express reference in Reuters' article to seeing court documents and to the October article being written having seen the claim form, despite its not being available at that stage.

- 23 In the evidence of Mr Bafaqeeh, at paras.58 to 59, it is stated that the effect of the leak of Saudia's confidential information is to damage Saudia. The details of the leases are commercially sensitive and would affect the terms Saudia could achieve in negotiations with other lessors. Similarly, the details of Saudia's financial situation affect what it is able to negotiate with third parties and the payment terms it can achieve. Mr Bafaqeeh explains the wider fear that, in view of the information IAFC has access to, there is a danger that there could be further breaches of confidential information which could cause very substantial damage to Saudia. Its immediate fear is because under the terms of the leases it must disclose financial information to the IAFC parties by today, 29 December 2020. These contain detailed information not in the public domain: see Mr Bafaqeeh, para.59(c).

The obligations of confidence

- 24 Saudia relies on obligations of confidence established in contract and in equity. In contract the leases refer to clause 20(j), to which reference has been made above. Clause 20(j) acknowledges the confidential and sensitive nature of the lease terms contained therein and the transactions contemplated thereby. It is right to say that the parties have not been careful to label the information they exchange as being sensitive and confidential information. The obligation in clause 20(j) refers to non-public proprietary information, which is specified as of a sensitive and confidential nature by the parties. The IAFC parties have an argument as to whether, in the absence of such labelling, the information is to be regarded as confidential. As regards the future, Saudia is going to be providing that label. There is an argument that the correct construction of clause 20(j) is that it extends generally to the information that is provided under the lease, even in the event that the parties do not make the matter clear by the labelling process.
- 25 Reliance is also placed on the term sheets, to which reference has been made above, and to the obligation of confidentiality. Under the term sheets, reliance is also placed on the mediation agreements referred to above. Even in respect of documents which predate the mediation agreement but which were produced or arise in relation to the mediation, it has been held that that was covered by a confidentiality clause in the case of *Instance v Denny Bros* [2000] FSR 869. In respect of the without prejudice correspondence, it is submitted that there is an implied agreement between the parties that without prejudice correspondence shall not be disclosed: see *Unilever v Proctor Gamble Co* [2000]1 WLR 2436, 2442. The implied agreement extends to those who are "commercially and corporately connected" with the parties to the communications: see *Instance v Denny Bros*, above, at p.884. This therefore covers the information about [REDACTED] and also other without prejudice letters between the London solicitors.
- 26 Further, or in the alternative, Saudia relies on duties of confidence imposed as a matter of equity in accordance with the principles set out in the judgment of *Coco v AN Clark* [1968] FSR 415. To the extent that non-labelling of documents provided pursuant to the contracts means that the contractual clause cannot be imposed, it is submitted that the acknowledgement about the confidential and sensitive nature of the information is such that the parties and their agents must have understood that their dealings were protected by equity and that that covers all of the confidential information about whose disclosure Saudia complains.

27 Saudia also makes a claim in relation to economic torts. That is made particularly in respect of the IAFC parties, who are fixed with the consequences of the behaviour that has been determined by the same directing minds.

Jurisdiction

28 As regards the jurisdiction to bring the claims, the jurisdictional basis is set out at paras.28 to 31 of the skeleton argument:

"28 The overall framework will be familiar to the Court and is summarised in the White Book at 6.37.13. The applicant must show (internal references omitted):

(a) that there is a good arguable case that the claim against the foreign defendant falls within one or more of the heads of jurisdiction for which leave to serve out of the jurisdiction may be given as set out in para.3.1 of PD 6B;

(b) that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim;

(c) that in all the circumstances (a) England is clearly or distinctly the appropriate forum for the trial of the dispute (forum conveniens), and (b) the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

29 No jurisdictional issue arises in relation to Saudia's counterclaim against the Claimants, who are existing parties to the proceedings.⁴ As against IAFC, however, Saudia must obtain permission under CPR Part 6.36.⁵

30 For IAFC:

(a) Saudia can, at the least, rely on PD6B para. 3.1(4), because IAFC is a necessary or proper party to its counterclaim depends the Claimants (being the entity most likely to have disclosed the information).

(b) There is authority that an agreement to conduct negotiations 'without prejudice' extends also to bind any connected parties: see *Instance Printing v Denny*, para.25(d) above. Saudia can therefore rely on the contractual gateways.

(c) Saudia has an additional argument. As noted above, IAFC was a party to the Term Sheets originally executed in 2015 which provided for English law and 'London courts'. Moreover, it was initially a party to the Leases with Saudia (which have English governing law and jurisdiction clauses: cl. 20(b) [AB1/116-118]), as each Aircraft was delivered, the Leases were novated, with a Lessor taking IAFC's place as Lessor. However, Saudia suggests the jurisdiction and governing law agreements survive. On ordinary principles such terms are

separate to the contract as a whole.⁶ Although the deeds of novation provided at clauses 3.1 and 3.2:

3.1 The Original Lessor and the Lessee hereby release each other from their obligations under the Lease Agreement as from the Effective Date, save as provided in clause 4 (Pre-existing claims)

3.2 The Lessee releases and discharges the Original Lessor from all future claims and demands whatsoever in respect of the Lease Agreement and accepts the liability of the New Lessor under the Lease Agreement from the Effective Date,

clause 4 of the deeds of novation maintained 'Pre-Existing Claims':

Nothing in this Deed shall affect or prejudice any claim or demand whatsoever which either the Original Lessor or the Lessee may have against the other relating to matters arising prior to the Effective Date.

The jurisdiction and governing law clauses in the Leases thus continue to have effect, on any view, for 'Pre-Existing claims'. Saudia relies on the presumption in *Fiona Trust re Privalov* [2007] Bus LR 1719 against attributing to reasonable parties an intention that there should be multiple sets of proceedings (see paras.26-28). It is also relevant that (i) the Deeds of Novation were themselves governed by English law, and (ii) that IAFC is the 'Servicer' in each Lease (and would therefore post-novation continue to have a role in an English-law governed contract). Given all that, Saudia suggests that the original Leases and/or the Deeds of Novation should be construed so that the jurisdiction and governing law clauses to which IAFC originally agreed continue to apply to it in relation to the Leases as novated.

(d) In relation to Saudia could thus rely on PD6B para. 3.1(6)(c) and (d) based on either the agreement to conduct WP negotiations, the Term Sheet or the Leases.

31 As a further basis, the tort claims against IAFC, like a breach of confidence claim in equity under gateway (21), found jurisdiction if the harm is sustained within the jurisdiction. The purpose of Rs in leaking the information is to be explained precisely by a motivation to cause Saudia embarrassment, and thereby to put pressure on it to come to terms in the underlying proceedings. The detriment sustained by Saudia includes detriment to its conduct of the proceedings and of any negotiations. Such detriment is sustained in England.

⁴ No permission is required to serve a counterclaim: White Book, 6.36.1.

⁵ 'Claim form' is not limited to claim forms in the normal sense: see White Book 6.37.2 referring to CPR Part 6.2(c):

'claim' includes petition and any application made before action or to commence proceedings and 'claim form', 'claimant' and 'defendant' are to be construed accordingly'

⁶ See e.g. Brussels I Recast regulation EU 1215/2012 reg.25(5)."

29 Further, as regards the application of English law, that is set out at paras.32 to 33:

"32 To establish the application of English law:

(a) As against the Lessors, Saudia relies on the governing law clauses in the Leases and Mediation Agreement.

(b) English law is also obviously the governing law of any agreement to engage in 'without prejudice' communications in the context of actual or prospective English court proceedings.

(c) As against IAFC, Saudia relies on the governing law clause in the Leases (on the basis explained above) and the Term Sheets.

(d) In the alternative against IAFC, and as against the Portfolio Companies, the Rome II Regulation (Regulation (EC) 864/2007) applies. (That regulation will with immaterial changes be preserved after 31 December 2020.) Within Rome II's framework:

(i) Saudia suggests the relevant provision is Article 4 (which gives the general rule). Article 4 provides:

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

(ii) The 'country in which the damage occurs' is not easy to identify in a breach of confidence case, and there does not appear to be authority on the point. Dickinson in 'The Rome II Regulation: The Law applicable to Non-Contractual Obligations' identifies it as the state where 'the confidentiality of the claimant's information was first, compromised and

diluted by the defendant's actions' - presumably, therefore, Dubai (where IAFC and Reuters' journalists both are) - but goes on to observe: '[T]hat, in a case such as this, the location ... may provide only a tenuous connection to the tort/delict is again to be taken into account in applying the Art 4(3) "escape clause" ...' (para.4.68).

(iii) Saudia suggests, however, that the pre-existing relationships between the parties indicate that England is manifestly more closely connected to the tort than Dubai. As noted above, the Leases are all governed by English law. Even though they are not parties, the Portfolio Companies have sued on those Leases and are plainly closely connected to them. Further, the disclosure of confidential information appears intended to influence the settlement or outcome of that English litigation. Compared to that, Saudia suggests the location of the Reuters journalists is a substantially weaker factor.

(e) Saudia accepts that in a number of decided cases, Article 6 of Rome II (on unfair competition, giving jurisdiction to the market affected) has been applied to commercial claims of breach of confidence. But here Saudia is not competing with the IAFC Parties, and the interests addressed by Article 6 do not apply.

(f) Alternatively, if Article 6 does apply in principle, Saudia suggests that the acts in question exclusively affect a single competitor (Saudia) and thus under Article 6(2), Article 4 applies in any event.⁷

33. Saudia therefore satisfies the 'good arguable case' test which applies in relation to meeting the gateways under PD6B. As to the other elements of the overall jurisdictional decision, these are addressed below.

⁷ Any alternative analysis leads to the unpalatable conclusion that, because of Article 6(4), Saudia and the IAFC Parties are forbidden from determining for themselves what law would apply to the non-contractual obligations between them. But if Article 6(1) does apply, then the 'competitive relations' and (on the basis that Saudia is a 'consumer', the 'collective interests of consumers') are located in the Kingdom of Saudi Arabia. For present purposes, Saudia would then rely on the presumption that foreign law is the same as English law."

30 The usual principles for the grant of an interlocutory injunction are set out in *American Cyanamid v Ethicon*, that there must be shown a serious question to be tried, in the sense that the claim is not frivolous or vexatious and that the claimant would not be adequately compensated in damages and that the balance of convenience favours the granting of an injunction. In this case damages are obviously an inadequate remedy, having regard to the sensitivity of the lease information, the internal financial information and the negotiation information.

Application for interim injunction

31 However, the *American Cyanamid* threshold of an arguable case is subject to section 12 of the Human Rights Act 1998, to which I now turn. It reads as follows:

"Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

'court' includes a tribunal; and

'relief' includes any remedy or order (other than in criminal proceedings)."

32 As is apparent, section 12 is engaged where the court is considering whether to grant relief which might affect the exercise of the Convention right to freedom of expression. In those circumstances, the court is required to be satisfied under section 12(3) that the applicant is likely to establish that publication should not be allowed. In my judgment, it is necessary to consider section 12 in this case because what is at stake is the freedom of expression in relation to the information to which reference has been made. The word "likely" means more likely

than not: see *Cream Holdings v Banerjee* [2005] 1 AC 253. The normal *American Cyanamid* approach should therefore be modified to take this into account: see Lord Neuberger MR's Practice Guidance (Interim Non-Disclosure Orders) [2002] 1 WLR 1003.

- 33 There are obvious difficulties in relation to applying the standard as to whether a claimant would succeed at trial at a stage like this where the court is being invited to hold the ring and provide short-term relief. That is a matter that was considered by Lord Nicholls in *Cream Holdings v Banerjee*, where he said the following:

"18. What is to happen meanwhile? Confidentiality, once breached, is lost for ever. Parliament cannot have intended that, whatever the circumstances, section 12(3) would preclude a judge from making a restraining order for the period needed for him to form a view on whether on balance of probability the claim would succeed at trial. That would be absurd. In the present case the Echo agreed not to publish any further article pending the hearing of Cream's application for interim relief. But it would be absurd if, had the Echo not done so, the court would have been powerless to preserve the confidentiality of the information until Cream's application had been heard. Similarly, if a judge refuses to grant an interlocutory injunction preserving confidentiality until trial the court ought not to be powerless to grant interim relief pending the hearing of an interlocutory appeal against the judge's order.

...

22 In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

- 34 It is especially apparent from the last sentence that the necessary flexibility of the application of section 12(3) not having a single rigid standard is particularly important in connection with a "short-lived injunction", which is necessary to enable the court to hear and give proper consideration in relation to a short-lived injunction.

35 These matters were considered further recently by Miles J in a case called *Fortescue Metals v Argus Media Group* [2020] EWHC 1304 (Ch) at para. 29:

“Lord Nicholls explained that there may be exceptional cases where the court may depart from this general approach. The Claimants accept for the purposes of this hearing that the general rule in [22] of *Cream Holdings* applies and that they need to satisfy the court that they are more likely than not to obtain a permanent injunction at trial.”

36 The court has regard, in the circumstances of this case, to the importance of the Convention right to freedom. There are difficulties at this stage in not having all of the available information before me in assessing, without hearing argument from both sides, an examination of the public interest in disclosure. However, there is sufficient that is before the court for the court to conclude in the flexible manner contemplated by Lord Nicholls in *Cream Holdings v Banerjee* that it is appropriate to grant a short-lived injunction in this matter. The claimant has raised more than an arguable case in relation to the nature of the confidentiality and the damage to the claimant by the disclosure of the confidentiality. This is a very different case from cases where, for example, in *Cream Holdings*, an ex-employee raised a public interest defence concerning some form of corruption. This is a case where the claimant seeks to protect details of its own internal finances and its commercial terms on which it deals, and the conduct of its disputes with lessors, including their negotiations. There is also a public interest in maintaining confidentiality. That enables parties to conduct without prejudice negotiations and to assume, in the context of its commercial relationships with its counterparties, that the starting point will be that the confidentiality will be maintained.

37 Although it is right that the case is based upon inferences, in my judgment, on the information that I have been provided, there are sufficiently strong inferences against the IAFC parties for the claimant to apprehend that such information as has been provided to the press has come from IAFC. I do not in any way make a pre-judgment in relation to that, only to say that there is a reasonable basis for that belief on the part of Saudia at this stage. In the context of further confidential information being provided under the lease agreements in particular on 29 December 2020 and with undertakings being refused, there is a serious risk that there will be further confidential information leaked to the press unless the IAFC parties are restrained.

38 This is a case where on the information before the court at this stage it is more likely than not that the information referred to is confidential and, should have protection against the claimants. There are difficulties in not having all the information to date, but against that the IAFC parties have had the opportunity to deal with the allegations which has been taken into account. They have also been notified about the evidence and about the hearing, and they have refused to provide undertakings. They had no obligation to attend and there is no discourtesy by their non-attendance. However, the requirement in section 12(2)(a) has been satisfied. In my judgment, on the basis of the information before the Court, I conclude that it is more likely than not that publication will not be allowed. Alternatively, if that were not the case, the degree of likelihood is still, in my judgment sufficient to satisfy the flexible approach in *Cream Holdings* as cited above. This is a very different case from *Cream Holdings* where the employee raised a public interest defence. This is a case where the Applicant seeks to protect details of its own commercial finances and conduct of disputes with lessors including the negotiations. There is also a public interest in maintaining confidential information that enables parties to conduct without prejudice negotiations and inherent in commercial relationships.

- 39 A point can be made against Saudia that there has been delay on its part. It has known about this matter since the time of the publication of Reuters, and in particular the November publication. The relevance of its delay is that it might be said that it therefore did not regard the matter as sufficiently serious to bring an application at an earlier stage. However, on the basis of the information which I have seen, delay is simply a matter to be taken into account. There may have been an expectation that they would have been able to have resolved the matter in the course of correspondence, but recent correspondence has led to a total denial and a refusal to provide undertakings. In these circumstances, although delay is a factor against Saudia, in my judgment, it is still appropriate to make an order in their favour.
- 40 In those circumstances, I am satisfied that it is right in the circumstances of this case to make a proportionate order in order to protect that confidentiality. In my judgment, the draft order that has been provided to the court is an appropriate order in respect of the negative injunction that is sought.

Form of Order

- 41 Turning now to the terms of the draft order, in my judgment, the Saudia has satisfied the court that it is appropriate to make an order in the negative form as set out in para.7 of the draft order, and containing the confidential Schedule 2 to the order. That should be for a limited period. It is to be until a return date. The return date, unless I have some information to the contrary, should be in the first week of term, which is to commence on 12th January. It should be at the earliest possible date for the court after 12th January 2021. It is impossible at this time to be able to fix the date itself. The parties should endeavour to bring the matter on at the earliest opportunity to the Commercial Court.
- 42 An order is sought, at para.9, in a mandatory form, that the respondents should, within seven days of service of the order, disclose to Saudia's solicitors the following:
- "(a) the identity of each and every journalist, press or media organisation, press agent or publicist or any other third party with a view to publication in the press or media or otherwise, to whom the Respondents have disclosed all or any part of the Information;
 - (b) the date upon which such disclosure took place and the nature of the information disclosed including any communication sent by the Respondents containing the Information and any response received by the Respondents to such communication;
 - (c) the name and position of any natural person or persons who made or were responsible for or participated in any such disclosure and an explanation as to how he or she came into possession of the Information."

- 43 That is a mandatory order. It requires the respondents to provide information relating to publications. The submission of Mr Béar QC on behalf of Saudia is that the information sought is that this should provide no prejudice to the claimants, bearing in mind that there have been denials about the disclosure of information. Further, as regards the position of Saudia, it is important to them at an early stage to be able to go to the recipients of the information and to seek such undertakings or remedies as may be available in order to prevent the information from leaking further. In my judgment, it is inappropriate at this stage for a

mandatory injunction to be granted. In reaching that conclusion, I have in finding following matters, namely:

(1) The court is generally reluctant to make a mandatory injunction at an *ex parte* stage. The Court is holding the ring at this stage. The IAFC parties may have some reasons why they ought not to be subject to an order to disclose information of this kind.

(2) Without this matter coming in on notice, the IAFC parties will not have the opportunity easily to deal with that, and in my judgment is it not an answer to say that they can simply do that on a liberty to apply because of the difficulty of convening a hearing at this time of the year..

(3) Although the Court is satisfied that the necessary likelihood is established as above, in the context of a mandatory injunction the Court sometimes requires a particularly high degree of assurance that the injunction will stand scrutiny: it is better that that takes place on the return date.

(4) This application has not been brought on with such promptness that Saudia can say that it is a matter of the greatest urgency for it to be able to go to the recipients of the information. In my judgment, justice is done by that matter being held over until the return date.

For all these reasons, no mandatory injunction in that form is to be provided and, accordingly, paras.9 and 10 are to be removed.

44 Paragraph 11 is to be amended because that is to be limited in time, but I am prepared, on the information received, to grant injunctions in the form of paras.12 and 13. To that extent I therefore grant the relief that has been sought.

Addendum

45 Following consideration of the draft order, after giving judgment but before approving it, the court refused the injunction in para. 14 of the draft order because there was no intention to inform third parties at this stage. At that time also, a return date of 13 January 2021 was fixed.

46 A part of the judgment contains information which Saudia submit is part of the confidential information which they wish to protect. It remains for the Court to consider further which parts of the judgment may be published and which, if any, are to remain in private. Only as an interim measure, until that exercise has been considered by the parties and the Court and permission has been given, this judgment be subject to the restraint set out above the heading of this action.

Signed and approved

A handwritten signature in black ink that reads "Mr Justice Freedman". The signature is written in a cursive, slightly slanted style.

23 February 2021

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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