Neutral Citation Number: [2023] EWHC 1049 (Comm)

Case No: LM-2022-000220

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 4 May 2023

Before :

MRS JUSTICE DIAS DBE

- -

Between :

Fibula Air Travel Srl	**Claimant**
- and -	
Just-Us Air Srl	**Defendant**

- -

- -

Mr Matthew Bradley KC and Ms Seohyung Kim (instructed by Hudson Morgan Williams Ltd) for the Claimant

Mr Jonathan Dawid and Ms Emilie Gonin (instructed by Consortium Legal) for the Defendant

Hearing date: 24 March 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 9:30am on Thursday 4th May 2023.

Mrs Justice Dias :

Introduction

1. This is an application by the Claimant ("Fibula") to amend its Reply and Defence to Amended Counterclaim.

2. The underlying claim was for the return of a security deposit paid by Fibula pursuant to an aircraft leasing agreement dated 9 December 2019 on the basis that the lease had been validly terminated for repudiatory breach, alternatively *force majeure*, alternatively that it had been frustrated. Although Fibula is not named as a party to the lease, it was nonetheless a signatory to the lease agreement and was referred to as the "Charterer". It is therefore accepted by both parties that it is to be treated as being in the position of a lessee. The Defendant lessor ("Just-Us") counterclaims for approximately €5 million allegedly due as the balance of the minimum fee payable under the lease by way of stage payments. As will therefore be obvious, the critical issue between the parties concerns the termination or otherwise of the lease.

3. Fibula issued the claim on 8 October 2020 seeking the return of the deposit on the sole ground that the lease had been terminated by *force majeure* on 17 March 2020. The Particulars of Claim were amended on 16 November 2020 to add further allegations (amongst others) of termination on grounds of repudiatory breach and frustration/illegality. A Defence and Counterclaim was served on 30 November 2020, followed by a Reply and Defence to Counterclaim on 21 December 2020. At this stage, the Counterclaim merely sought declarations that the lease had not been terminated and that Just-Us was entitled to retain the security deposit. However, Just-Us then served a Defence and Amended Counterclaim on 9 March 2021, claiming payment of the stage payments under the lease, to which Fibula responded with a Reply and Defence to Amended Counterclaim on 6 April 2021. The Defence to Amended Counterclaim essentially relied on the facts and matters asserted in the Particulars of Claim to assert that Just-Us had no entitlement to the sums claimed in circumstances where the lease had been validly terminated.

4. On 2 April 2021, Just-Us applied for reverse summary judgment seeking dismissal of the claim. The application came before HHJ Pelling on 1-2 March 2022, who dismissed the claim on all grounds. Permission to appeal to the Court of Appeal was refused by Males LJ on the basis that it would have no real prospect of success. Fibula's further application to adduce new evidence was also refused by him on the grounds that the criteria for admission of new evidence on appeal were not satisfied. In particular, it had not been shown that the evidence in question could not have been obtained for the hearing before HHJ Pelling.

5. The summary judgment application did not address the counterclaim at all and Fibula now seeks to amend its Reply and Defence to Amended Counterclaim to introduce new defences to the counterclaim relying, in part, on the new evidence which it unsuccessfully sought to adduce before the Court of Appeal in relation to the claim. Fibula admits and avers that the substance of the defences which it now seeks to raise would have prevented the summary dismissal of the claim. Indeed, it submits that they would have resulted in the claim succeeding. Just-Us objects to the proposed amendments on the grounds that they amount to a collateral attack on the judgment and that the defences raised are either *res judicata* by virtue of an issue estoppel or abusive on the principle stated in *Henderson v Henderson* (1843), 3 Hare 100.

The Parties and the Lease

6. Fibula is a Romanian company which sells package holidays to various destinations, including Turkey, Bulgaria, Cyprus, Malta, the Seychelles and the UAE. Just-US is also a Romanian company which offers wet leases (i.e. aircraft, crew, maintenance and insurance) to commercial airlines wishing to increase their capacity.

7. The contract here was for the wet lease of an Airbus A320 aircraft by Just-Us to Fibula for a 6-month term from 1 April 2020 to 31 October 2020. It provided for Fibula to pay a security deposit of €765,000 on signing the lease followed by stage payments totalling a further €4,590,000. The stage payments corresponded to a minimum of 2,100 "block hours" which Fibula guaranteed to perform under the lease unless prevented due to default on the part of Just-Us. As appears from the Payments condition recited below, the obligation to make stage payments arose following *"pre-agreed successful audit from lessee quality and compliance department to lessor"*. This latter obligation was referred to in argument as the "Audit Condition".

8. The lease also provided that it would come into force only *"when Turkish and Romanian Civil Aviation Authorities' approvals obtained as well as Malta CAA. Lessor will provide Romanian CAA acceptance letter but not later than 30 days after agreement execution together with all requested dox for Turkish CAA Application."* This was referred to as the "Approvals Condition".

9. Further relevant terms of the lease were as follows:

   "<u>WHEREAS:-</u>

   …

   Lessee hereby declares that he has all rights and required authorizations, AOC and licenses to operate the Flights in accordance with the Flight schedule (as defined herein) and has obtained all approvals and authorizations, if needed, to enter into this Agreement and wet lease the Aircraft from Lessor.

   Subject to the conditions and pursuant to the terms of this Agreement and subject to any applicable approvals, lessor agrees to wet lease and operate the Aircraft with its own or cabin and cockpit crew for the Term on ACMI basis.

   …

   <u>NOW IT IS HEREBY AGREED</u> as follows:

   …

   Minimum Guaranteed BH

   (Guaranteed BH) for the Period – Means totally 2.100 Guaranteed Block hours for aircraft.

   For avoidance of doubt, Lessee guarantees the payment of the Guaranteed Block Hours during the lease period, even when during Term, not all Guaranteed Block Hours have been performed due to default of Lessee. In case of not all Guaranteed Block Hours have

been performed due to default of lessor, all done payments and security deposit will be refund for non-performed hours after reconciliation.

…

Payments:

- *Charterer, following the pre agreed successful audit from Lessee quality And compliance department to lessor, shall unconditionally and without any set-off pay the following wet lease payments (the "Due Payment") defined therein below, which shall be received by Lessor on its account on the following dates and amounts.*

…

Confirmations:

- *Lessee confirms that all traffic rights, authorizations and clearances for entering into this Agreement and assuming obligations under this Agreement will be obtained. Lessee shall obtain and maintain in full force and effect all authorizations for the time being required by all applicable laws, including the laws or regulations of the state to which/from which Flights to be performed or any other applicable jurisdiction, to enable Lessor to perform its obligations under this Agreement.*

…

Lessee Responsibilities:

…

- Lessee will perform technical, safety, security and operational checks or audits of the Aircraft and will inform Lessor about findings. Lessor prepare corrective action plan within 3 business days which shall be approved by the Lessee. …

…

Other conditions:

…

- Lessor will provide a statement from its own Civil Aviation regulatory which confirms all operational responsibilities will on Lessor account and all operational and technical surveillance will be done by themselves according to EASA/ICAO rules during the lease term

Force Majeure

- *Lessor or Lessee shall not be liable for any failure or delay in the performance of any obligations under this Agreement due to Force majeure. In the event of a Force Majeure situation continuing for a period of ten (10) days or longer (during which time the parties shall use their best efforts to alleviate the effects of the Force Majeure situation), either party will be free immediately to terminate the leasing of the Aircraft under this Agreement by notice in writing to the other, provided always that any such*

termination shall be without prejudice to any obligations accrued at the date of termination and to any continuing obligations under this Agreement.

…"

The judgment of HHJ Pelling

10. As at the date of the summary judgment application, Fibula's claim to recover the security deposit was based on the following facts and matters amongst others:

    (a) Measures taken by the Romanian Government:

        (i) On 16 March 2020, Romania declared a state of emergency which prohibited people in Romania from travelling to airports and/or flying for the purposes of a holiday;

        (ii) On 21 March 2020, it was decreed that all but Romanian citizens would be prevented from entering the country as from 22 March 2020;

        (iii) On 23 March 2020, people were prohibited from leaving their residence except to purchase goods for basic needs or for medical assistance;

        (iv) On 4 April 2020, all flights between Romania and Turkey were prohibited as from 5 April 2020;

    (b) Suspension by Turkish Airlines on 27 March 2020 of flights between Bucharest and Istanbul;

    (c) Measures taken by the Turkish Government on 28 March 2020 to prohibit all flights between Turkey and (amongst others) Romania initially until 17 April 2020;

    (d) Measures taken by the Egyptian Government:

        (i) On 16 March 2020 Egypt's airports were shut down from 19 March 2020 until, initially, 31 March 2020;

        (ii) On 24 March 2020 the suspension of flights was extended for a further two weeks from 1 April 2020.

11. Against this factual background and so far as relevant to the present application, Fibula argued before HHJ Pelling that:

    (a) Just-Us had wrongfully repudiated the lease in that it ceased after 16 March 2020 to have all the required authorisations to perform flights under the lease, being unable lawfully to operate aircraft between Romania and Egypt from that date;

    (b) Fibula was entitled to terminate the lease under the *force majeure* clause on 17 March 2020 on the basis that the prohibition of flights between Romania and Egypt would prospectively continue for at least ten days; alternatively, such termination took effect on 26 March 2020;

(c) The lease had been frustrated in that the governmental measures set out above prevented the parties from performing their contractual obligations and/or performance by Just-Us had become illegal.

12. As appears from the judgment, Fibula's then counsel also suggested in argument at the hearing that it had not been sufficiently proved that the Audit Condition had been satisfied, such that the obligation to make payments under the lease did not arise at all. However, the judge held that this point had not been pleaded as was plainly required if it was to be relied upon. Moreover, whilst he might not necessarily have regarded the lack of pleading as decisive if an affirmative case had been advanced by Fibula in its evidence on the application, *"in fact no such evidence or even assertion has been made. I proceed, therefore on the basis that if the claimant asserts seriously that no such inspection has occurred, that is a case which is fanciful, and therefore does not give rise to a realistically arguable basis for resisting this application."*

13. Dealing with the points that were pleaded by Fibula he held in essence as follows:

(a) The assertion of repudiatory breach was no more than fanciful because it was Fibula and not Just-Us which was under an obligation to obtain all necessary rights, authorisations and clearances for the contemplated flights. The obligations of Just-Us were all concerned with technical operation. In any event, Just-Us never came under any obligation to operate the aircraft unless and until Fibula had made the first of the stage payments which was due on 18 March 2020. It followed that Just-Us could not have been in breach of agreement on 17 March 2020 which was when Fibula purported to accept the alleged repudiation.

(b) A declaration of *force majeure* could only be made after the ten day period had expired and the *force majeure* event relied upon did not take effect until 19 March 2020, such that notice could not be given earlier than 29 March 2020. In any event, there was no contractual provision which limited the operation of the aircraft to flights between Romania and Egypt, nor was it pleaded that the parties had entered into the lease on the agreed but unexpressed basis that the aircraft would be flown only between Romania and Egypt. Accordingly, the prohibition of flights between those two countries did not prevent performance of the agreement since the aircraft could have been directed to fly elsewhere.

(c) The frustration argument failed for much the same reasons as the *force majeure* argument, namely, that the lease did not impose any geographical restrictions on the use of the aircraft and that Fibula had not pleaded any factual basis for saying that the lease was agreed on the joint assumption that flights to and from Egypt would be permitted. Neither the Egyptian decree of 16 March 2020 nor the Romanian restriction of 4 April 2020 was a frustrating event and the mere fact that it may have become more expensive and difficult for Fibula to utilise the aircraft in the circumstances which had occurred did not itself result in frustration.

(d) There was no relevant supervening illegality: (i) none of the decrees on which reliance was placed made operation of the aircraft illegal; (ii) the only obligation of Just-Us was to put the aircraft at the disposal of Fibula in Romania and operate it at Fibula's direction; (iii) Just-Us was under no obligation to do anything until payment under the lease had been made; (iv) only illegality under the law of the place of performance was relevant and no restrictions under Romanian law were imposed until 4 April 2020.

Accordingly, it could not be said that performance of the lease had become illegal as at 17 March 2020 but in any event Fibula could not establish any frustrating event.

14. In giving his judgment, HHJ Pelling scrupulously reminded himself of the principles applicable to an application for summary judgment. In particular, he was at pains to emphasise (i) that the court should not conduct a mini-trial, (ii) that it must take account not only of the evidence actually placed before it, but also of the evidence that could reasonably be expected to be available at trial and (iii) that it should consider whether fuller investigation of the facts might add to or alter the evidence available to the trial judge. Given, however, that the original Particulars of Claim had already been amended once, the judge regarded himself as entitled to assume that the amended pleading set out the best case which could properly be advanced on behalf of the Fibula. He accordingly proceeded by reference to the pleaded case, having expressly recorded that no application had been made for permission to amend, nor an adjournment sought for that purpose.

The application for permission to appeal and to adduce new evidence

15. On 20 April 2022, Fibula applied for permission to appeal against HHJ Pelling's judgment arguing that the judge had erred in law in concluding that Fibula had no real prospect of successfully arguing that:

    (a) the lease was terminated on 17 March 2020 (alternatively 26 March 2020) under the *force majeure* provision;

    (b) the lease was frustrated by no later than 17 March 2020, or a later date;

    (c) no obligation to pay under the lease had arisen because either the Audit Condition and/or the Approvals Condition had not been satisfied.

16. On 16 June 2022, Fibula applied to rely on fresh evidence consisting of evidence which is now relied upon in support of the amendment application.

17. On 15 August 2022, Males LJ dismissed both applications in the following terms:

    "1. Generally, it is apparent that the judge decided the case by reference to the way in which it was argued before him, as he was bound to so.

    2. Ground 1: *The judge was clearly right to say that it was the applicant's responsibility as lessee to obtain the relevant approval/authorisations…*

    3. Ground 2: *The judge was clearly right to say that force majeure must have existed for 10 days before a notice to terminate could be given. No case was advanced that it had done so by the date when notice was purportedly given, i.e. 17th March.*

    4. Ground 3: *If the purported force majeure notice was ineffective to terminate the agreement, the consequence was that it continued in being, in which case the applicant was obliged to make the payment which was about to fall due. It is apparent that it was for this reason that the applicant concentrated on 17 March as the date of termination. It is not arguable that the contract had been frustrated by this date. It might, perhaps, have been arguable that it was frustrated at some later point once it became clear that flights between Romania, Turkey and Egypt would not be possible and that international tourism generally*

was severely curtailed, but this would have represented a very different case from that which was advanced and was not one which the judge was obliged to consider.

5. Ground 4: *There was no pleaded case that the audit had not been successfully completed. Nor was there any application to amend. It was not for the judge to require the claimant to amend its pleadings.*

6. Application to adduce new evidence: *The criteria for the admission of new evidence on appeal are not satisfied. In particular, it is not shown that the proposed new evidence could not have been obtained for the hearing below.*

7. For these reasons an appeal would have no real prospect of success."

Applicable principles

Amendment

18. It is not in dispute that Fibula requires permission to amend pursuant to CPR Part 17.1(2). Under this provision, the court has a broad discretion which requires it to take into account all relevant circumstances, including:

    (a) Whether the amendments have some prospects of success (the test in this regard being the same as for summary judgment);

    (b) The overriding objective that cases should be dealt with justly and at proportionate cost;

    (c) The balance of prejudice;

    (d) (Where the amendment is made late), the reasons for the delay and the impact of allowing a late amendment.

Issue Estoppel and Henderson *abuse*

19. I was referred to numerous authorities on issue estoppel and *Henderson* abuse, including *Arnold v National Westminster Bank plc (No.1),* [1991] 2 AC 93; *Johnson v Gore Wood & Co.,* [2002] 2 AC 1; *P&O Nedlloyd BV v Arab Metals Co.*, [2006] EWCA Civ. 1717; *Seele Austria GmbH Co. v Tokio Marine Europe Insurance Ltd,* [2009] EWHC 255 (TCC); *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd,* [2013] UKSC 46; [2014] AC 160; *Gruber v AIG Managements France SA,* [2019] EWHC 1676 (Comm); *Kensell v Khoury,* [2020] EWHC 567 (Ch.), from which I derive the following principles in so far as relevant to the present application:

    (a) Once a cause of action has been held either to exist or not to exist, this gives rise to a cause of action estoppel whereby neither party can challenge the outcome in subsequent proceedings. For a cause of action estoppel to arise, the cause of action in the later proceedings must be identical to that asserted in the earlier proceedings: *Arnold (supra)* at 104D.

    (b) Even where the subsequent proceedings involve a different cause of action, a decision on a particular issue which formed a necessary ingredient of the earlier cause of action

and is also relevant to the subsequent cause of action is binding on the parties and cannot be reopened: *Arnold (supra)* at 105E.

(i) The relevant question in this respect is whether resolution of the issue was a "necessary step" to the decision or a "matter which it was necessary to decide and which was actually decided, as the groundwork of the decision": see *Seele Austria (supra)* at [18] quoting Lord Wilberforce in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No. 2)*, [1967] AC 853. A mere dispute about facts divorced from their legal consequences is not an "issue" for these purposes: *Fidelitas Shipping Co. Ltd v V/O Exportchleb*, [1966] 1 QB 630, 641. The test is whether the determination was so fundamental to the substantive decision that the latter cannot stand without the former: *P&O Nedlloyd (supra)* at [23]-[24] quoting with approval from *Spencer Bower, Turner and Handley, the Doctrine of Res Judicata* (3rd ed.);

(ii) For this purpose, it is permissible to look not only at the judgment but also at the pleadings, evidence and, if necessary, other material in order to show what issue was actually decided: see *Seele Austria (supra)* at [18] quoting *Carl Zeiss (supra)*.

(c) The principle articulated in *Henderson v Henderson* is that:

"… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

(d) The *Henderson* principle is not solely confined to abuse of process but overlaps with and qualifies the doctrine of *res judicata* by providing a degree of flexibility in the application of the latter: see *Arnold (supra)* at 104-107; *Virgin Atlantic (supra)* at [17]-[26].

(e) The flexibility permitted in cases of issue estoppel is greater than in cases of cause of action estoppel: see *Arnold (supra)* at 109; *Virgin Atlantic (supra)* at [21]-[22]. Thus:

(i) In cause of action estoppel, absent fraud or collusion, the bar is absolute in relation to all points which had to be and were decided in the earlier proceedings. The judgment cannot be reopened even where new factual material is discovered which could not with reasonable diligence have been deployed in the earlier proceedings. Cause of action estoppel *also* bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided in the earlier proceedings because they were not raised but which could and should in all the circumstances have been raised;

(ii) By contrast, the availability of further material which could not by reasonable diligence have been adduced in the earlier proceedings can amount to special

circumstances justifying an exception to the operation of issue estoppel, whether or not the relevant point was specifically raised and decided in the earlier proceedings. However, the bar will usually be absolute if the relevant point could with reasonable diligence and should in all the circumstances have been raised.

(f) The principles of issue estoppel and *Henderson* abuse can apply not only in the context of separate sets of proceedings, but also where the relevant issue arises at a subsequent stage of the same litigation, for example after a trial of preliminary issues or a summary judgment: *Seele Austria (supra)* at [19] quoting from *Fidelitas Shipping (supra).* However, a finding of *Henderson* abuse within a single set of proceedings, whilst conceptually possible, will be unusual, particularly where the earlier decision was arrived at on a summary basis: *Gruber v AIG (supra)* at [11]; *Kensell v Khoury, (supra)* at [27]-[53].

(g) Abuse usually involves unjust harassment but the fact that a point could have been raised in earlier proceedings does not necessarily mean that it should have been so as to make it abusive to do so at a later date. The court should adopt a broad, merits-based approach and ask whether in all the circumstances the party raising the issue is misusing or abusing the process of the court: *Johnson v Gore Wood (supra)*at 31; *Tannu v Moosajee,* [2003] EWCA Civ. 815 at [33]-[34].

20. Against this background, I turn to consider each of the proposed amendments. It is not disputed that Fibula is prevented by cause of action estoppel from now relying on the proposed amendments to argue that it is entitled after all to recover its deposit, even though that would be the logical consequence were the arguments to succeed. As made clear in *Arnold (supra),* even the emergence of new evidence which could not with reasonable diligence have been adduced earlier does not permit a cause of action estoppel to be evaded. The question raised by this application, however, is whether Fibula can nonetheless rely on these matters by way of defence to Just-Us' counterclaim.

The New Defences

21. The main amendments on which Fibula seeks to rely are threefold:

(a) The Audit Defence, namely an averment that Fibula's payment obligations under the lease never arose because of Just-Us' failure to complete a successful audit;

(b) The Approvals Defence, namely an averment that the lease itself never came into force because the authorisations required by the Approvals Condition had not been obtained from the civil aviation authorities of Romania and Turkey;

(c) The Frustration Defence, namely an allegation that the lease was frustrated, whether or not by supervening illegality, on 27 March 2020, alternatively 4 April 2020, when flights between Romania and Turkey were suspended as a result of the global pandemic.

22. Fibula also seeks to advance a fourth defence but this falls into a different category and I shall return to it at the end.

The Audit Defence

23. The argument here is that there never was a successful audit and that accordingly no obligation to pay the sums demanded in the Counterclaim ever arose. Fibula submits that an audit was carried out but that the audit report revealed various deficiencies. Specifically:

    (a) A non-compliance was noted regarding DGR labelling and marking;

    (b) Just-Us did not have approval from the Romanian Civil Aviation Authority at the date of the audit to perform line maintenance activity;

    (c) Although Just-Us planned to enter into a line maintenance agreement with MyTECHNIC, the contracts had not yet been approved;

    (d) Just-Us' application for approval for its Aircraft Reliability Monitoring Programme had not yet been granted by the Romanian CAA.

24. Further enquiries carried out by Fibula's current solicitors suggest that none of these matters has since been rectified or completed.

25. For its part Just-Us does not dispute that the successful completion of the audit was a pre-condition to Fibula's obligation to make any payments under the lease. It does not challenge the authenticity or substance of the material now relied on by Fibula. Nor has it adduced any substantive evidence that the matters identified in the audit report were ever addressed. Before HHJ Pelling it relied solely on a witness statement of its legal representative, Mr Iordache, dated 28 October 2020 which exhibited the Audit Report and stated simply that *"On 26 and 27 February 2020, the Aircraft passed the Lessee's audit. The Applicant then had an unconditional obligation to make the wet lease payments to the Respondent."* It seems clear that this was the *"material available"* which the judge accepted in paragraph 16b. of his judgment.

26. In these circumstances, the argument of Mr Jonathan Dawid on behalf of Just-Us was that the Audit Defence had no realistic prospect of success because Fibula was issue estopped or precluded by the *Henderson* principle from raising it.

27. In my judgment, no issue estoppel arises in this case. The point was not pleaded and the learned judge made it clear that he was approaching the application on the basis that it formed no part of the case which he had to consider. Accordingly, the issue simply did not arise for decision. Moreover, Fibula did not need to show that the Audit Condition was satisfied in order to succeed in its claim to recover the deposit. It cannot therefore be said that resolution of the issue was fundamental to the judge's decision.

28. The judge's acceptance on the *"material available"* that the audit had been passed and that the payment obligation had arisen was not a finding on a contested point and does not in my view affect the position. Mr Dawid argued, however, that the judge's findings that Just-Us was not in repudiatory breach and that the contract had not been frustrated necessarily assumed that the payment obligation had arisen and that the audit must therefore have been successfully passed. He submitted that this was sufficient to create an issue estoppel and argued that the situation was analogous to a decision that a contract had been breached which was necessarily predicated on there being consideration for the agreement.

29. The point was persuasively argued by Mr Dawid but I am not convinced that the analogy is exact since, in the scenario he posited, there would be a cause of action estoppel in any

event and the question of issue estoppel would not arise. But in any event, I am satisfied, looking at the judgment in the context of the pleadings, the evidence and the argument, that this was not a decision on an "issue" in the sense required for issue estoppel. In reality it was no more than an assumption as to a background fact in relation to which no pleaded issue arose, which the judge made for the purpose of considering the case which was pleaded. The judge was expressly not resolving a specific dispute as to whether the audit had been passed (which, as already noted, was not a necessary part of Fibula's case). At most, therefore, this was a decision on the facts divorced from their legal consequences which is not an "issue" for the purposes of issue estoppel: see paragraph 19(b)(i) above.

30. As regards *Henderson* abuse, I do not consider that it would be abusive to permit Fibula to rely on the Audit Defence as a defence to the counterclaim in the circumstances of this case:

(a) It is not enough for Just-Us to say that the point could have been raised in support of Fibula's claim before HHJ Pelling. The claim is no longer in issue and Fibula does not seek to resurrect it.

(b) We are here concerned solely with the counterclaim which was not before the court on the summary judgment application. The subject matter of the litigation before HHJ Pelling was accordingly the summary determination of the claim, not the counterclaim.

(c) Having chosen not to include the counterclaim in its summary judgment application, Just-Us can hardly complain if it is now treated as a separate cause of action with a separate life of its own. Realistically there was never going to be finality in respect of the dispute between the parties while the counterclaim remained alive and if Just-Us had wanted such finality, it could have applied for summary judgment at the same time as seeking to dismiss the claim. The position would undoubtedly have been very different if it had.

(d) I also regard it as highly relevant that this is not a case where Fibula is seeking to harass or vex Just-Us. On the contrary, it is seeking to defend itself against a claim instigated by Just-Us. Reliance on the Audit Defence does not therefore involve any collateral attack on the judgment of HHJ Pelling, since all parties accept that Fibula's claim to recover the deposit is dead and buried.

(e) Balancing the prejudice to Fibula in being denied the right to defend itself against a €5 million claim against Just-Us' right not to be harassed or vexed by multiple proceedings, I have formed the view that the balance comes down clearly in Fibula's favour. I accept that Fibula had every opportunity to run the point at the summary judgment application and that the additional material on which it now seeks to rely could have been procured earlier. I also accept that Fibula must bear responsibility for any failings on the part of its former solicitors in this respect. However, it has already paid the penalty for this by losing irrevocably any right to recover its deposit and I see nothing unjust in allowing it to deploy the argument as a defence to a counterclaim which has progressed no further than the pleading stage.

(f) Mr Dawid does not rely on delay *simpliciter* as a reason for disallowing the amendment (rightly in my view). As submitted by Mr Bradley, the defence falls within a narrow compass and should not give rise to protracted evidence or legal submission. Either the audit was successfully passed or it was not. There may well be argument in due course

as to whether the matters noted in the audit report fell to be ignored as *de minimis* or as to whether Fibula in fact terminated the lease for other reasons. Such arguments go to the substance of the defence and are only relevant if it can clearly be said that it is bound to fail. That is not this case.

31. For these reasons, the Audit Defence should be permitted to proceed.

The Approvals Defence

32. For substantially the same reasons, it is my view that the Approvals Defence should likewise be permitted to proceed.

33. Again, there is no challenge by Just-Us to the authenticity or substance of the material on which Fibula seeks to rely. I accept that all of this material was either already in evidence on the summary judgment application or could with reasonable diligence have been adduced at that stage. However, it was not pleaded or argued that the lease never came into effect at all because the requisite approvals had not been obtained. Rather Fibula's argument was that Just-Us was in repudiatory breach in ceasing to having the necessary approvals after 16 March 2020. In dismissing this argument, HHJ Pelling held that the obligation to obtain approvals and authorisations was on Fibula pursuant to the recitals in the lease. The Approvals Condition itself was not referred to or discussed.

34. In these circumstances, I am satisfied that no issue estoppel arises for reasons similar to set out in paragraphs 28 and 29 above. Indeed, Fibula's case is stronger in relation to this defence since the judge did not even arguably make any specific finding as to whether the Approvals Condition had been satisfied.

35. My conclusion that it would not be an abuse of process to permit Fibula to rely on the Audit Defence applies equally to the Approvals Defence.

Frustration

36. The position in relation to frustration, however, is different. The claim advanced before HHJ Pelling was that the lease had been frustrated by 17 March 2020, alternatively by virtue of supervening illegality under the laws of Egypt, Turkey and Romania. The relevant events relied upon were those set out at paragraph 10 above which spanned the period to 4 April 2020.

37. It is therefore clear that Fibula's argument at the summary judgment application was not only that the lease was frustrated by 17 March 2020, but also that it was alternatively frustrated at some later date up to 4 April 2020. The argument was dismissed by the judge essentially on the basis that there was no joint assumption as to the foundation of the lease or common assumption as to the countries to which the aircraft would fly. There was therefore no geographical or other limitation imposed contractually as to where the aircraft could be operated commercially and it followed that the Egyptian and Romanian governmental restrictions relied upon were incapable of constituting frustrating events. He also held that none of the decrees relied upon made operation of the aircraft illegal.

38. Fibula now seeks to rely on precisely the same events in support of an argument that the lease was frustrated on or about 27 March 2020 and to adduce new evidence in support of that argument. I am, however, quite satisfied that an issue estoppel arises in relation to the

argument that the lease was frustrated prior to 4 April 2020. The point regarding supervening illegality (which is but a sub-species of frustration) was clearly pleaded and argued and was equally clearly dismissed by the judge.

39. The fact that Fibula has now obtained additional evidence in support of its case is irrelevant. This evidence could clearly have been obtained earlier with the exercise of reasonable diligence and, as already noted, it is irrelevant that there may have been failings on the part of Fibula's previous solicitors in this regard. In these circumstances, the law is clear that there is no basis for circumventing the issue estoppel and I can see no other special circumstances which would justify an exception to its operation. Whilst it might not have been abusive to allow the Frustration Defence to be raised, the judge's reasoning on the summary judgment application seems to me to be unquestionably right and I would have concluded that the argument had no reasonable prospect of success in any event.

40. For these reasons, permission to amend in relation to the Frustration Defence is refused.

The Furlough Defence

41. Finally, I must deal with the fourth defence addressed by the amendments. This is an argument that Just-Us should give credit for furlough payments received by Just-Us in respect of its workforce.

42. I can deal with this very shortly indeed, not least because Mr Bradley did not consider it worthy of even honourable mention in either his skeleton argument or his oral submissions. Suffice it to say that I accept it has no realistic prospect of success for the reasons given by Mr Dawid, namely that Fibula has not demonstrated any link between the furlough payments and its own contractual obligations under the lease which would justify the alleged credit.

Conclusion

43. Permission is accordingly granted to amend the Reply and Defence to Counterclaim so as to raise the Audit Defence and the Approvals Defence. Permission to raise the Frustration Defence and the Furlough Defence is refused. Mr Dawid also helpfully indicated that Just-Us did not object to certain other amendments which Fibula wished to make (subject in two cases to minor adjustments to the wording). I will therefore invite the parties to agree a draft amendment reflecting the terms of this judgment and to submit it together with a draft order, agreed so far as possible.